

Chapter 6

The Politics of (and Behind) the UNFCCC's Loss and Damage Mechanism



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Abstract Despite being one of the most controversial issues to be recently treated within climate negotiations, Loss and Damage (L&D) has attracted little attention among scholars of International Relations (IR). In this chapter we take the “structuralist paradox” in L&D negotiations as our starting point, considering how IR theories can help to explain the somewhat surprising capacity of weak parties to achieve results while negotiating with stronger parties. We adopt a multi-faceted notion of power, drawing from the neorealist, liberal and constructivist schools of thought, in order to explain how L&D milestones were reached. Our analysis shows that the IR discipline can greatly contribute to the debate, not only by enhancing understanding of the negotiation process and related outcomes but also by offering insights on how the issue could be fruitfully moved forward. In particular, we note the key importance that discursive power had in the attainment of L&D milestones: Framing L&D in ethical and legal terms appealed to standards relevant beyond the UNFCCC context, including basic moral norms linked to island states’ narratives of survival and the reference to international customary law. These broader standards are in principle recognised by both contending parties and this broader framing of L&D has helped to prove the need for action on L&D. However, we find that a change of narrative may be needed to avoid turning the issue into a win-lose negotiation game. Instead, a stronger emphasis on mutual gains through adaptation and action on L&D for both developed and developing countries is needed as well as clarity on the limits of these strategies. Examples of such mutual gains are more resilient global supply chains, reduction of climate-induced migration and enhanced security. As a result, acting on

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L&D would not feel as a unilateral concession developed countries make to vulnerable ones: it would rather be about elaborating patterns of collective action on an issue of common concern.

Keywords Loss and Damage · AOSIS · UNFCCC · International relations
Neorealism · Liberalism · Constructivism

6.1 Foundations for an International Relations' Contribution to the Debate

In recent years, the academic community has made important contributions to the Loss & Damage (L&D) debate, especially by (i) framing it through a disaster and climate risk management perspective (Mechler et al. 2014; Fekete and Sakdapolrak 2014; Birkmann and Welle 2015; Mechler and Schinko 2016); (ii) looking at the connection between L&D and the limits to adaptation (Warner and van der Geest 2013, 2015); (iii) outlining how attribution studies could support the assessment of L&D (Huggel et al. 2013; James et al. 2014); and (iv) discussing L&D's connection with the concept of state responsibility in international law (Tol and Verheyen 2004; Verheyen 2012, 2015; Mayer 2014; Mace and Verheyen 2016). Some authors have also provided historical overviews on the emergence of L&D in the international debate, analysed the role of the UNFCCC in addressing it, and discussed the possible implications of the Warsaw International Mechanism (WIM) (Huq et al. 2013; McNamara 2014; Mathew and Akter 2015; Roberts and Huq 2015; Stabinsky and Hoffmaister 2015). Against this background, contributions by political science and International Relations (IR) scholars have been almost absent (recent exceptions are Johnson (2017), Vanhala and Hestbaek (2016) and Calliari (2016a)).

This is only partly surprising. Overall, limited attention has been devoted to climate change within the discipline, especially when considering adaptation-related issues (Crump and Downie 2015). While contributions on mitigation are somewhat more common, where the need for international cooperation is more evident, this is not the case for adaptation and its (possible) failures and limits (i.e., L&D). Yet, there are a number of reasons why the current discourse on adaptation and its limits/constraints should be of interest to those exploring global policy and international power relations (Khan 2016): These include the self-interest of states and how in a globalised and interconnected world they are exposed to the effects of social, economic, political, environmental, and technological events, even when those occur in a different corner of the world. In addition, norms, values and justice imperatives also feature as a base for collective action on adaptation (Brown and Weiskel 2002) and play an even more important role when considering L&D.

Moreover L&D provides a very interesting case to be studied by IR scholars given the relevance of power dynamics in the climate change negotiations setting and its complex, asymmetrical and multilateral characteristics. Decision-making under the

UNFCCC relies on consensus: disagreement around the voting majority required for certain decisions has until now prevented the adoption of the rules of procedure (draft art. 42). This implies that, differently from other multilateral fora where each Party is bestowed a single vote and thus given equal weight, final outcomes in the UNFCCC will likely mirror Parties' capacity to shape and influence the decision-making process. In this context, it is important to point out that, on their initiative, developing countries managed to establish the WIM in 2013 and obtain a dedicated article on L&D in the Paris Agreement in 2015. A leading role in the process was assumed by the Alliance of Small Island States (AOSIS), a coalition of small island and low-lying coastal countries sharing similar development challenges and vulnerabilities to climate change impacts, and regarded among the most vocal groups in climate talks. Generally considered as the parties with less negotiation power, at least in terms of sheer delegation sizes, these achievements appear particularly remarkable.

The case of AOSIS has been characterised as an example of the so-called “structuralist paradox” in negotiations (Betzold 2010), i.e., the case that weaker parties are often able to effectively negotiate with stronger parties and get something out of the process (Zartman and Rubin 2002). More specifically, AOSIS' capacity to influence the UNFCCC has been explained in terms of moral leadership (de Águeda Corneloup and Mol 2014), capacity to “borrow power” (Betzold 2010), promotion of collaborative approaches to knowledge building and cooperative institutional mechanisms (Larson 2003). While importantly shedding light on a relatively overlooked topic, these contributions only explore limited timeframes¹ and, by design, are not able to capture evolutions and diversifications in the use of power sources. Moreover, none of them specifically addresses L&D negotiations, instead applying a broader adaptation lense.

In this chapter we specifically focus on the L&D process over time in order to consider its emergence and evolution from the negotiation of the UNFCCC (1991) to the entry into force of the Paris Agreement (2016). Taking the “structuralist paradox” in L&D negotiations as our starting point, we look beyond aggregate measures of power (like GDP, population size or military forces) and consider different sources of influence that AOSIS might have activated to shape L&D outcomes. We analyse L&D negotiations through the lenses of the main schools of thought in IR—the neorealist, liberal and constructivist (Snyder 2004)—to better understand the complexities of finding international agreement on L&D issues. This approach might look unorthodox, given that these schools of thought are based on hardly reconcilable premises. Nevertheless, conceptual pluralism around the notion of power is much needed to understand how global outcomes are produced (Barnett and Duvall 2005), as different forms of power might capture different and interrelated ways through which actors are enabled or constrained in pursuing their objectives.

¹Betzold (2010) focuses on AOSIS's negotiating strategies in the climate change regime from 1990 to 1997; de Águeda Corneloup and Mol (2014) consider the period 2007–2009; while Larson (2003) analyses AOSIS' 1994 position paper: “Draft Protocol to the United Nations Framework Convention on Climate Change on Greenhouse Gas Emissions Reduction”.

The chapter is organised as follows. We first provide an overview of the L&D process within the UNFCCC from AOSIS's first proposals to the PA, looking at the historic developments and actions by different actors that led to the emergence of L&D as a pillar of the UNFCCC architecture. We then consider the negotiating process through the lenses of IR theories to understand how L&D outcomes have been produced. By analysing the actors involved, their positions, the negotiation process and related outcomes, we finally identify opportunities, both for research and policy, to move this contested discourse forward.

6.2 Positioning of L&D in the UNFCCC Negotiations

As discussed in the introductory chapter (Mechler et al. 2018), the debate on L&D has been spearheaded by AOSIS since the early 1990s, by calling for an insurance pool to compensate vulnerable small island and low-lying developing countries for the impacts of sea level rise (INC 1991) (Fig. 6.1).

It took more than 20 years to institutionalise the debate within the UNFCCC architecture through the creation of the WIM in 2013 and eventually the stipulation of the stand-alone article 8 in the Paris Agreement. Figure 6.2 shows the positioning of the Executive Committee of the WIM (ExCom), which the COP established to guide the implementation of functions of the WIM through an initial 2-year work plan, in the UNFCCC architecture. ExCom is a body constituted under the Convention, and is guided by and accountable to the COP.

COP 20 finalised the governance of the ExCom by bestowing 10 members each to Annex I and non-Annex I Parties.² However, disagreement around regional representation within Annex I parties caused substantial delays in nominating ExCom members, convening of the ExCom first meeting (September 2015), and implementing the activities of the WIM. The balanced representation among Parties is also reflected in the Chairmanship, with the two Co-chairs being elected from Annex 1 and non-Annex 1 respectively to serve for 1 year.³ The ExCom may establish expert groups, subcommittees, panels, thematic advisory groups or task-focused ad hoc working groups to help execute its advisory role.

The initial 2-year work plan of the WIM comprises 9 action areas focusing on: (1) Particularly vulnerable developing countries, population, ecosystems; (2) Comprehensive risk management approaches; (3) Slow onset events; (4) Non-economic losses; (5) Resilience, recovery and rehabilitation; (6) Migration, displacement and human mobility; (7) Financial instruments and tools; (8) complementing and drawing upon the work of and involvement other bodies; and (9) development of a 5-

²Members from non-Annex I Parties include 2 members from each of the African, the Asia-Pacific, and the Latin American and Caribbean States, 1 member from SIDS, 1 member from the LDC Parties, and 2 additional members from non-Annex I Parties.

³During the first meeting of the ExCom in 2017, co-chairmanship went from Tuvalu and USA to Jamaica and European Union.



Fig. 6.1 Timeline of L&D milestones. Source UNFCCC (2018)

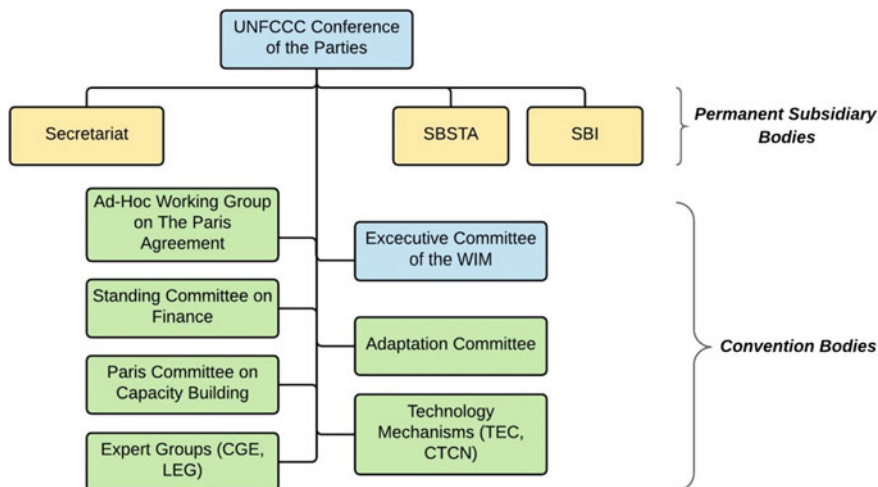


Fig. 6.2 The WIM in the UNFCCC architecture. According to Decision 2/CP.19, the WIM reports annually to the COP. *Source* Adapted from own elaboration

year rolling work plan. As for the latter, its strategic workstreams were approved at COP23 and call for enhanced cooperation on: (1) Slow onset events; (2) Non-economic losses; (3) Comprehensive risk management approaches; (4) Migration, displacement and human mobility; and (5) action and support, including finance, technology and capacity-building.

The “structure, mandate and effectiveness” of the WIM is to be periodically reviewed, with the first review to be held in 2019 and subsequent ones to take place no more than 5 years apart (UNFCCC 2017). Reviews should consider progress on the implementation of the ExCom’s work plan but also adopt a long-term vision to reflect on how the WIM may be enhanced and strengthened. As an input to the 2019 review, decision 4/CP.22 called for a “technical paper (to) be prepared by the secretariat elaborating the sources of financial support”. At COP 23 it was agreed that the latter should be informed by an expert dialogue (baptised as “Suva Expert Dialogue”) that took place in May 2018, in order “to explore a wide range of information, inputs and views on ways for facilitating the mobilisation and securing of expertise, and enhancement of support, including finance, technology and capacity-building, for averting, minimising and addressing loss and damage” (SBI and SBSTA 2017).

Besides the WIM, a major institutional milestone on L&D was reached with the adoption of the Paris Agreement. A stand-alone article 8 recognises L&D as distinct from adaptation, elevating it almost as a third pillar of climate action. Through the article “Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events” (UNFCCC 2015). The article sanctions the permanence of the WIM, whilst leaving the door open for it to be “enhanced and strengthened” through future COP decisions. It also calls Parties to work “on a cooperative and

facilitative basis” to “enhance understanding, action and support” in areas including early warning systems, comprehensive risk assessment and management, risk insurance facilities, climate risk pooling, and non-economic losses (UNFCCC 2015).

6.3 Actors and Positions in the L&D Debate

The inclusion of L&D as a distinct concept from adaptation in the Paris Agreement was the result of a series of politically charged negotiations, fuelled by a range of actors with a variety of viewpoints. The role played by each of these actors, including their negotiation positions, is briefly discussed in this section.

6.3.1 *Developing Countries and Their Representative Groups*

As recognised above, developing countries and their representative groups have provided much of the impetus for the recognition of L&D within the UNFCCC. AOSIS has been particularly important, having first campaigned for the inclusion of L&D in climate change negotiations in the early 1990s and continuing to do so in conjunction with other representative groups. Other key events have included:

- In 2005 at COP11, Bangladesh on behalf of the LDC Group called for the compensation of climate change damages (Vanhala and Hestbaek 2016);
- In 2013, G77 with support from AOSIS and LDCs pushed for (and achieved) the adoption of the WIM (Calliari 2016a); and
- Prior to the commencement of COP21, members of the G77, China bloc, the Climate Vulnerable Forum, LDCs, AOSIS and the Africa Group all emphasised the importance of L&D to the Paris negotiations (Hoffmeister and Huq 2015).

The negotiating position of developing countries in general has been to (i) consider L&D as distinct from adaptation; (ii) treat climate change negotiations as an appropriate forum to discuss L&D; (iii) hold developed countries liable for L&D; and (iv) call for compensation (Huq and De Souza 2016). At the same time, they have raised concerns that the emphasis of L&D discourse on financial compensation could have a trivialising effect on addressing the underlying needs of developing countries (Hoffmaister et al. 2014).

6.3.2 *Developed Countries*

Developed countries have generally been critical and provided the opposite stance to developing countries on negotiations around L&D. Particular resistance was made in recognising L&D as distinct from adaptation. This is reflected, for instance, in

developed countries' attempts to have L&D treated outside the Paris Agreement through a COP decision, or inside the text of the agreement but under the same article as adaptation. As for compensation, any references to such a concept have mostly been avoided, with developed countries shifting instead the attention to non-economic L&D, such as “losses of lives and negative impacts for health”, and “loss of biodiversity and ecosystem services necessary to sustain livelihoods” (Norway 2013). The US also raised ethical concerns, by claiming that considering compensation would have meant “put[ting] a monetary value on the lives, livelihoods and assets of the most vulnerable countries and populations” (UNFCCC 2012a).

Not surprisingly, in Paris they rejected compensatory language (e.g. “rehabilitation”, “compensation” and “liability”) for fear of creating a legal liability for L&D suffered by developing countries (Huq and De Souza 2016). Former U.S. Secretary of State John Kerry explained the US' reluctance in relation to this as follows: “We're not against [loss and damage]. We're in favour of framing it in a way that doesn't create a legal remedy because Congress will never buy into an agreement that has something like that...the impact of it would be to kill the deal” (Goodell 2015).

Ultimately, Article 8 can be viewed as a compromise for developed countries; although they conceded the treatment of L&D as a separate pillar for climate action, they made it clear that they continue rejecting any liability for L&D, and emphasised a strong role for climate risk management. This attempt to move the L&D discourse under the less contested and binding disaster risk reduction framework or under the wider humanitarian arena is not new and has characterised developed countries' position since the inception of the L&D work programme. A central argument for it has been the extreme difficulty in attributing “the incidence of loss and damage to climate change, as opposed to natural climate variability and/or vulnerabilities stemming from non-climatic stresses and trends like deforestation and development patterns”, as put by the US (UNFCCC 2012a).

6.3.3 NGOs

Generally speaking, NGOs have been highly supportive of the efforts of developing countries to create a liability and compensation mechanism for L&D. Such support has its roots in climate justice considerations; for example, ECO noted at the time of COP19 that L&D is a matter of “climate justice...It is time for those who are mainly responsible for climate change to act here in Warsaw” (Vanhalala and Hestbaek 2016). In particular, NGOs:

- *Have advocated for the development of an L&D mechanism.* For example, Germanwatch, supported by the Munich Climate Insurance Initiative (MCII) (together with other partner institutions), launched the Loss and Damage in Vulnerable Countries Initiative in 2012 (CDKN et al. 2012). Similarly, the ACT Alliance, a network consisting of 140 humanitarian and development organisations, advocated for L&D during COP19: “Governments should recognise that we cannot choose between

mitigation, adaptation and loss and damage. ... The lower the mitigation ambition, the higher the adaptation need. The lower the adaptation support available to help poor communities and countries, the more serious the limits to adaptation become from climatic changes, the more loss and damage ensues” (Vulturius and Davis 2016)

- *Have helped to stimulate interest in L&D in developing countries.* For example, LDCs participating in a MCII workshop developed much greater interest in the development of an L&D mechanism than they held prior to participation (Vanhala and Hestbaek 2016);
- *Have acted as enablers for change.* For example, the pro bono Legal Response Initiative (LRI)⁴ operated by WWF-UK and Oxfam-GB has provided legal support to LDCs during climate change negotiations. A similar role was played by the Foundation for International Environmental Law and Development (FIELD), a non-governmental research institute based at the Law Department at SOAS, University of London (see for instance Hyvarinen (2012)). A recent advisory group employed by the Republic of Marshall Islands and AOSIS is the New York based Independent Diplomat (Carter 2015);
- *Have sought public support on L&D.* For example, through reports produced by ActionAid, Care, and WWF (ActionAid 2010; ActionAid et al. 2012, 2013);
- *Have continued to pursue options for compensation outside of climate change negotiations.* For example, Greenpeace has used the Philippines Human Rights Commission to accuse a number of major companies of human rights abuses for carbon emissions. The Commission on Human Rights of the Philippines contacted those companies in 2016 to give them an opportunity to respond to Greenpeace's allegations (Vidal 2016).

6.3.4 *The Private Sector and the Insurance Industry*

There is limited evidence of private sector actors playing a role in the development of L&D as a concept and mechanism, with the exception of some insurance companies. Indeed, from a private sector point of view, the conceptual separation of L&D, adaptation, and disaster risk reduction might appear a highly theoretical and academic exercise, with limited relevance (Surminski and Eldridge 2015). However, back in 2011, when the UNFCCC consulted on an L&D mechanism, a number of responses to the UNFCCC called for greater engagement with the private sector in climate risk management. For example:

- Norway noted that ‘broad participation from stakeholders [including the private sector] would be crucial to a good outcome of the work programme’ (Norway 2011);
- Gambia asked ‘to seek (private sector) contribution for a successful mechanism to address L&D in LDCs’ (Gambia 2011)—but explicit detail of what this ‘con-

⁴<http://legalresponseinitiative.org/>.

tribution' means remains lacking. Gambia also referenced the need to provide the private sector in LDCs with tools and information to help them respond to the risk of L&D. The submission specifically mentions 'climate services for users in both the public and private sector in LDCs and other vulnerable countries, (... including the) strengthening of meteorological services in developing countries to facilitate free sharing of data and information' (Gambia 2011).

The World Health Organization, International Labour Organization, and UNISDR have all made similar calls. However, while these submissions point to a clear deficit in integrating the private sector, they do not provide much detail on the expectations that come with it. The US has been more specific in explaining the aim of this private sector engagement: 'increase collaboration with the private sector (...) to achieve effective and comprehensive risk management. (...) We should also prioritise the development of strategies that leverage private sector resources and create market-based mechanisms that are not overly reliant on public sector budgets, and that are sustainable in the long term' (USA 2011).

ExCom's 2016 report makes several references to the private sector. In particular the ExCom (SBSTA and SBI 2016):

- has recommended to the COP that the private sector be invited to cooperate and collaborate on issues relating to L&D where relevant.
- has initiated engagement with the private sector to identify how to enhance the implementation of comprehensive risk management approaches relating to L&D.
- has reached out to private investors to encourage them to incorporate climate risk and resilience into development projects.

The only sector that has been engaged in the L&D discussions under the UNFCCC is the insurance industry. In fact, the dominant focus on insurance-related instruments within the WIM is likely to have been influenced by the presence and engagement of these insurance companies.

A particularly prominent role has been played by MCII. MCII was initiated as a charitable organisation by representatives of insurers, research institutes and NGOs in 2005 in response to the rising interest in insurance-related solutions for climate adaptation. It brings together a broad range of insurers, policy researchers, NGOs and other climate change experts in a single forum. The UNFCCC is recognised as an 'observer' and 'friend' of MCII. Between 2008 and 2011, MCII's submissions to the UNFCCC focused on the role of insurance for weather-related risks in the context of adaptation (MCII 2012). Notably, some elements of a 2008 MCII proposal for a climate risk management module, comprising prevention and insurance pillars to facilitate adaptation (MCII 2008), were eventually included in the Cancun Adaptation Framework and the SBI Work Program on L&D.

Other parts of the insurance industry are also showing an emerging interest in L&D. This has been highlighted by the Philippines, which hosted a UNFCCC Standing Committee on Finance forum in early September 2016. The forum was designed to support the work of the WIM and ExCom. The programme for the forum was designed by the UNEP FI Principles for Sustainable Insurance (PSI) Initiative, and

members of the Philippines insurance industry participated in the forum by providing technical expertise. A separate event was also hosted by the PSI together with the Philippines Insurers and Reinsurers Association the day following the forum (UNEPFI 2016). This event involved discussion of the L&D, and involved members of ExCom. Chapters 13 (Schäfer et al.) and 21 (Linnerooth-Bayer et al.) of this book look at the role of insurance for L&D in greater detail.

6.4 The L&D Negotiation Process Through the Lenses of IR Theories

In the previous section attention was drawn to the different actors involved in L&D negotiations, describing their positions and contributions. In particular, we emphasised that developing countries' negotiators, including AOSIS, after long negotiations managed to reach at least a partial victory in terms of the WIM and Art. 8 of the Paris Agreement. We now investigate this somewhat surprising victory from different IR perspectives to better understand the complexities of finding international agreement on L&D solutions. More specifically, we look at L&D negotiations through the lenses of the main school of thoughts in IR, namely neorealism, liberalism and constructivism (Snyder 2004). We believe that a pluralistic approach is necessary to understand how global outcomes are produced (Barnett and Duvall 2005).

In general terms, a neorealist viewpoint is useful to highlight resource-endowment asymmetries and highlight strategies to overcome them. Neorealism is a very influential strand in IR and sees states as pursuing their self-interest (which is ultimately security or wealth) in an international system defined by anarchy. States possess varying capabilities, or power, that they use to turn deals in their favour. The power States possess depends on their resource endowment, including the economy, population, and military forces. Nevertheless, aggregate measures of power might explain little about power positions when considering a specific bargaining circumstance (climate talks, in this case). What becomes relevant, instead, is "issue-specific power"; that is, the amount of relevant resources a Party can use for a specific conflict or concern (Habeeb 1988). In a multilateral setting such as the UNFCCC, two main resources acquire particular relevance and are considered for our analysis: delegation size and capacity.

Liberalism shares some assumptions with realism (anarchy of the international system and rationality of actors), but rejects power as the sole explaining factor and stresses the role of international cooperation and mutual benefits in shaping international outcomes. In particular, liberalism postulates that (i) it is the interdependence among state preferences to influence world politics [that promotes international cooperation,] and that (ii) states' preferences mirror the views of some subset of (domestic) social groups (Moravcsik 2008). The first assumption derives from the special emphasis liberals place on globalisation as a characteristic of the international political-economic system. In an interconnected world, characterised

by high degrees of complexity and feed-back effects, state interactions are daily occurrences in a number of realms, including society, economy, politics and technology. These interactions are fuelled by specific state preferences (as determined by domestic actors), without which a state would not have any incentive to engage in the international context. Liberalist lenses are thus useful to investigate how asymmetry between states' preferences affect L&D outcomes.

Finally, constructivism is a relatively recent theoretical paradigm, challenging in many aspects both realist and liberal theories in explaining international negotiations and power relations. What fundamentally distinguishes constructivism from the former schools of thought is its ontological assumption of the world as being socially constructed. This means, as Hurd (2008) puts it, that “*how people and states think and behave in world politics is premised on their understanding of the world around them, which includes their own beliefs about the world, the identities they hold about themselves and others, and the shared understandings and practices in which they participate*”. One of the most important contributions of constructivism is showing that norms matter (Price 2008) and thus ethical and legal standards are important in guiding world politics (Snyder 2004).

We suggest all these viewpoints are necessary to understand L&D negotiations. In the following sections we apply such competing theories to the L&D case by assuming the particular perspective of small island states, AOSIS being their most proactive proponent on the L&D issue.

6.4.1 Neorealism

In terms of aggregate power, AOSIS—a coalition of socially, economically and environmentally vulnerable small island nations—would be defined as a low-power actor in international negotiations. Its members are home to less than 1% of the world population; the sum of their 39 GDPs equals the annual economy of the city of London⁵; and almost half of the states have no or limited armed forces (Barbey 2015). Yet, such traditional indicators of power might explain little in a specific bargaining situation like climate negotiations. In this setting, two “issue-specific power” resources acquire particular relevance: delegation size and capacity. Both are reflections of a country's GDP. The size of national budgets influences the number of personnel and experts in the government and the ministries back home that can develop national negotiation positions, as well as the size of the delegations (Panke 2012). Developing countries often cannot afford to send big negotiating teams to COPs, and some initiatives have been put in place in response to that. One of them is the *Trust Fund for Participation in the UNFCCC* established under the Convention, which is nevertheless based on limited and decreasing voluntary contributions and can only support around two additional delegates per eligible developing Party (UNFCCC 2016). These circumstances inevitably hamper developing countries' full participation in the negotiation process.

⁵Own calculations based on the World Development Indicators by the World Bank (2015).

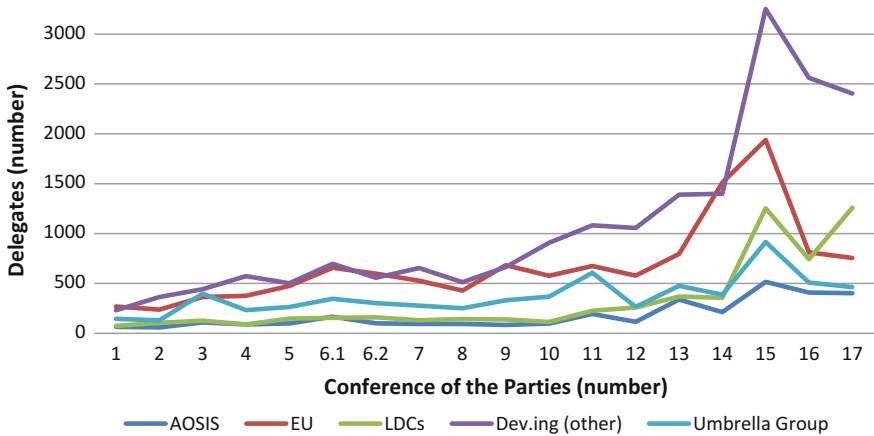


Fig. 6.3 Evolution of Party groupings/coalitions. *Note* Dev.ing (other) refers to G77 & China minus AOSIS. *Source* Own elaboration based on Böhmelt (2013)

Delegations composed of a small number of people only are unlikely to possess the range of technical expertise needed to follow different negotiation streams and are physically unable to cover simultaneous or exhaustingly long sessions (Chasek 2005; Michaelowa and Michaelowa 2012). The smaller the delegation, the less it will also be able to participate in the informal side of UNFCCC negotiations (where the most contentious issues are likely to be solved) and to exploit the networking opportunities offered by COPs.

AOSIS’ “issue-specific power” is evident when considering the evolution of the group’s delegations at COPs. A comparison among the sizes of UNFCCC Party-groupings between 1995 and 2011 (own elaboration based on Böhmelt (2013)⁶ confirms AOSIS as the smallest one, with its size increasing at a slower pace compared to other non-Annex 1 Parties (Fig. 6.3).⁷

Although some authors consider size as an indicator of bargaining skills (Weiler 2012), other non-material resources like knowledge and expertise influence Parties’ capacity at the negotiating table. Developing countries are typically ascribed a “capacity gap”, only partially alleviated by the support offered by non-state actors (Schroeder et al. 2012). The case of AOSIS is somewhat different as the personal leadership of its negotiators and the early engagement of NGOs as knowledge brokers turned the group into one of the most vocal and proactive in climate talks. This is at least true when considering some key issues like the 1.5 °C target, adaptation and L&D, on which the group has been more cohesive. On topics of specific concern, members have started to increasingly negotiate out of the group, for instance on

⁶Latest available data.

⁷We are aware that a more accurate consideration of AOSIS’ resource-endowment in L&D negotiations would require disaggregated data on the number of delegates effectively working on the issue, to be compared with their counterparts in other groups. Unfortunately this information does not yet exist.

the issue of reducing emissions from deforestation and forest degradation (REDD) (Betzold et al. 2012).

Yet, it is not just about resources. “Issue-specific power” can be increased using “behavioural power”, i.e. tactics to alter perceived or real power structures (Habeeb 1988). Teaming up with NGOs was one of the strategies employed by AOSIS to rectify power asymmetries on L&D. The other was to pull resources and gain influence through coalition-building with other non-Annex I groupings. The alignment with LDCs, the African Group and the G77+ China was arguably a result of a conceptual “reshaping” of the L&D concept in the 2000s. While originally AOSIS’ claims only focused on losses resulting from sea level rise (as in its 1991 proposal), consideration for the residual impacts from slow onset events as a whole and the financial risk associated with extremes (e.g. AOSIS 2008) made a stronger case for other developing countries to support the cause. This is not to say that all these groupings had the same position on L&D and, even less, the same idea about what L&D is. If AOSIS stressed the life-threatening dimension of L&D, the LDCs focused more on the connection with development and how L&D could affect the quality of life, livelihoods, food security, and social fabric at the community/household level. At the same time, Bolivia defined L&D as lost development opportunities and pointed at the deferral of payments to international institutions, debt relief and similar measures as a way to address them (UNFCCC 2012a). However, common denominators laid in the request for L&D to be a stand-alone pillar in UNFCCC architecture and in the need for supporting developing countries’ limited capacity to address climate change impacts. The G77+ China is worthy of separate consideration. While its position was decisive for the establishment of the WIM and the creation of a separate article on L&D in the Paris Agreement (see, for instance, the work done within the Ad Hoc Working Group on the Durban Platform for Enhanced Action—ADP), future alignment with AOSIS’ positions cannot be taken for granted. This is mainly because of the heterogeneity of the group which makes synthesis among its members’ positions challenging to reach. Recent examples of difficulties in finding common ground include the review of the WIM at COP22 (Calliari 2016b) and the quarrels between China and AOSIS on the need (supported by the former) to erase the reference to “particularly” vulnerable developing countries in defining beneficiaries of L&D support.⁸

While AOSIS has surely benefitted from liaising with other developing countries in bringing L&D high on the UNFCCC Agenda, this cannot deterministically explain why outcomes on L&D were obtained. Coalition-building in itself is not a sure means for any grouping to impact substantively on negotiations (Cooper and Shaw 2009) and even less in a consensus-based setting such as the UNFCCC (Deitelhoff and Wallbott 2012). As the institutional context does not level power asymmetries—for instance through a one state-one vote system—weaker Parties will be unable to succeed by relying on their resource-endowment only. Thus, trying to explain L&D negotiations through “realist eyes” does not allow for going beyond the “structuralist paradox”. It is therefore worth investigating other sources of power beyond the neorealist perspective to get more insight on how AOSIS’ outcomes on L&D were obtained.

⁸Personal observations at COP 22.

6.4.2 *Liberalism*

By stressing the role played by preferences, *liberals* point to their interdependence as a determinant of bargaining outcomes. Some liberals ascribe particular importance to economic preferences in determining state behaviour. In the L&D case, developed countries would be incentivised to support their vulnerable developing counterparts so as to guarantee their viability as commercial partners or to safeguard their delocalised supply-chains. Global trade systems can indeed transmit a variety of negative impacts, as exemplified by the billion dollar losses incurred by the American corporation Intel that resulted from the collapse of the Thai electronic industry following flooding in 2011 (Struck 2011). Actually, this liberal argument was also employed by AOSIS when it called on the international community to consider the “increased interdependence of global economy and society” and to address “the cascading effects that climate change impacts in poor and vulnerable regions can globally have” as it would be “cost-effective” (AOSIS 2008). It is worth noting, however, that this argument was incidentally used by developing countries and that they largely approached the debate in ethical and legal terms.

While making the case for increased international cooperation on L&D, liberal theory also allows for highlighting some of the “hampering factors” that have affected developing countries in L&D negotiations. These are related to the liberal conceptualisation of power, which differs significantly from realist theory. According to Kehoane and Nye (1977), one form of international influence derives from the “asymmetric interdependence” of preferences among states. The more interdependent a state is and the more intense its preference for a given outcome, the more power others potentially have over it (Moravcsik 2008). In other words, the salience an actor attaches to an issue is inversely linked to its success at the negotiating table as the actor will be more willing to make concessions to get the result (Schneider 2005). Moreover, salience is linked to the existence of an outside option: if a state has alternatives to the negotiated agreement it will exploit the circumstance to ask for a higher “price” to take part in it. Translating this reasoning to L&D negotiations, it is easy to see how AOSIS has negotiated since the beginning from a disadvantageous position. By virtue of their extreme vulnerability and the existential threat posed by climate change, small island states can only rely on ambitious mitigation efforts and support for adaptation and rehabilitation by developed countries to address L&D. This has two intertwined implications: (i) as they do not have control over the issue at stake (mostly in terms of mitigation), small island states can do nothing but wait for developed countries to act; and (ii) not having bargaining power, small island states are forced to accept a sub-optimal solution compared to what they would prefer.

Beyond salience, liberals stress the importance that domestic actors have in shaping negotiating outcomes. Governments facing a strong opposition back home—and thus looking less powerful—can convince counterparts that only a minimum commitment is possible (Schneider 2005). While not really applying to AOSIS’ member states (as domestic actors should agree with the survival of their country), this can be observed in a relevant counterpart of the L&D debate: the US. One of the leit-

motifs of the US delegation at COP21 was that any reference to legal remedies in the Paris Agreement would have encountered the opposition of the Congress and had the effect “to kill the deal”. The US ratification constraint (Putnam 1988) forced AOSIS to put aside their responsibility claims and go for a compromise solution. Talks between the US and small island states, labelled a “meeting of the minds” by Secretary Kerry (Friedman 2015), were held at the onset of the second negotiation week, with Saint Lucia minister Fletcher describing their objective as “ensur[ing] that everybody was comfortable with the agreement” (CarbonBrief 2015). Yet, the compromise solution (paragraph 52 of the accompanying decision to the Agreement excluding basis for any liability or compensation claims) did not make everybody comfortable. The Philippines expressed deep concern and Bolivia stated that “no clause can deny people and countries’ rights to ask for compensation” and that “all the necessary institutional means will be used so that [climate] justice can be made” (Bolivia 2015).

As made evident by this discussion, a liberalist view of L&D negotiations does not really help to explain the structuralist-paradox. In fact, it reinforces it. This is the result of considering, as in realism, negotiation outcomes a function of the (static) characteristics—being Parties’ features or capabilities—of a particular negotiation. In other words, for liberals and neorealists it is material power (military hardware, strategic resources, and money) that ultimately matters (Hurd 2008). On the contrary, constructivists argue that both material and discursive power are necessary for understanding world politics (Hopf 1998). We therefore turn our attention to the constructivist approach and the role that ethical and legal discourses have had in shaping L&D negotiations.

6.4.3 *Constructivism*

Along the constructivism line, L&D negotiations would have been shaped not only by material power or state interest but also by a competition between states around different understandings and framings (i.e. discourses) of L&D. Developing countries have largely framed L&D in ethical and legal terms and made a case for this conceptualisation since the beginning of climate talks. They have pointed to the unfairness of climate change (affecting first those least responsible for the problem) and to the threats for survival it poses for the most exposed societies. By analysing developing countries’ submissions to the SBI and ADP (2011–2015) and High Level Segment statements from COP 16 to COP 21 (see Calliari (2016a) for the material employed), it is possible to find references to the concepts of fairness, international solidarity; equity and intergenerational equity. The legal counterpart of these ethical arguments is the concept of state responsibility–compensation (see Chap. 7 on legal issues: Simlinger and Mayer 2018), which seeks reparation for wrongful acts attributable to states. In terms of citation frequency, this is the most-cited principle in the (wide) sample of submissions we analysed, and it is often accompanied by the Polluter Pays Principle; Common but differentiated responsibility and respective

capabilities (CBDR-RC) and references to precautionary measures. On the contrary, as explained above, developed countries have mostly avoided any references to compensation, and have tried instead to shift the attention to non-economic L&D. This is interesting if we consider that, up to the establishment of the WIM, developing countries tended to associate L&D to (in principle) the quantifiable and monetisable effects of climate change, like physical impacts—e.g. loss of land because of sea level rise—and economic impacts, such as the loss of development opportunities advanced by Bolivia (UNFCCC 2012a). As a whole, developed countries have tried to shift L&D to the less contested DRR and humanitarian frameworks; used scientific knowledge (issues of attribution) to neutralise the developing Parties' compensation claims; and employed ethical claims to avoid the 'monetisation' of the discourse, by hinting at the inappropriateness of placing price tags on the lives, livelihoods and assets of the most vulnerable societies (Calliari 2016a).

If power, in a simplified constructivist view, is about "convince[ing] others to adopt [ones] ideas" (Snyder 2004), can AOSIS be deemed successful on the L&D issue? Can the WIM and Article 8 be seen as a result of AOSIS' discursive power? Undoubtedly, the developing countries managed to institutionalise the idea of L&D as something beyond adaptation both in the text of Decision 2/CP.19 establishing the WIM and with a stand-alone article for L&D in the Paris Agreement. Thus, they were able to "convince" developed countries on this point. The result was obtained by framing the L&D debate in such a way that Parties' resources and interests became irrelevant as the playground was moved into the legal and moral fields. While narratives of survival (and thus moral issues) have also been employed by AOSIS in other UNFCCC negotiation streams (for instance, in asking for ambitious mitigation actions), the massive recourse to state Responsibility-compensation claims was the main factor in determining AOSIS' outcomes. It can be argued that, rather than being an objective per se, calls for compensation were used strategically to get concessions from Annex 1 Parties. This idea is somehow reinforced when looking at the timing of compensation claims (Table 6.1).

Most of them concentrated before 2013, at the time of the discussion for an institutional mechanism to address L&D (what was going to be the WIM). After that, reference was made episodically by AOSIS and the G77+China in the proposal for a Climate Change Displacement Coordination Facility. Among the performed functions, the facility was to provide "compensation measures for people displaced by climate change"—a provision that was dropped without excessive clamour on the road to Paris. And while at COP 21 requests for compensation were "traded" for a dedicated L&D article, they reappeared in a number of interpretative declarations to the instruments of ratification of the Paris Agreement (see Bolivia, the Philippines, Nauru, Marshall Islands, Cook Islands, Solomon Islands and Tuvalu). This is not to imply that such calls for retributive justice were not genuine: they are consistent with the unfairness that developing countries ascribe to the climate change problem. However, some tactical considerations are discernible behind their use in climate talks.

In terms of the "status" that L&D has in the UNFCCC architecture, AOSIS and other developing countries were less successful in "convincing" their counterparts

Table 6.1 Party/Grouping calling for compensation in the period 1991–2016

Year	Party/grouping
1991	AOSIS
2008	AOSIS; Sri Lanka
2009	Brazil; Colombia; India; Nicaragua on behalf of Guatemala, Dominican Republic, Honduras, Panama and Nicaragua; Turkey; Tuvalu; Cook Island; Algeria on behalf of the African group; AOSIS; Bolivia;
2010	Bolivia; Ghana; AOSIS; Maldives; The Bolivarian Republic of Venezuela on behalf of Cuba, Bolivia, Ecuador and Nicaragua; Alba;
2011	Mexico ^a , Sri Lanka
2012	AOSIS; Gambia for the LDCs; Swaziland for the African Group; Ghana; Bolivia with Ecuador, China, El Salvador, Guatemala, Thailand, Philippines, Nicaragua;
2013	AOSIS
2014	Central American Integration System (SICA, in Spanish)
2015 (pre-PA)	AOSIS, G 77
2015–2016 (post-PA)	Bolivia, Nicaragua, Cook Islands; Micronesia (Federated States of); Nauru; Niue; Solomon Islands; Tuvalu

^aMexico does not properly call for compensation, but rather highlights it among the mechanisms that could be “identified, prioritised and developed”

in placing L&D as a truly third pillar of climate action. In particular, L&D does not seem to be placed on an equal footing with mitigation and adaptation in the climate regime designed by the Paris Agreement as no reference is made to Article 8 by other treaty provisions. It is not mentioned in the purpose of the Agreement (Article 2), in the context of the “ambitious efforts” required to achieve it (Article 3), in the related transparency framework (Article 13), or in the global stocktake process (Article 14). This signals not only the “last minute” nature of the agreement reached at COP 21, but also—and most importantly—the contested status that L&D continues to have under the UNFCCC. Besides the symbolic meaning of keeping L&D separate from adaptation, Article 8 contains nothing more than tentative and cautious language.

6.5 From Theory to Practice: Next Steps and Key Questions for Moving the L&D Discourse Forward

Despite being one of the most controversial issues to be recently treated within climate negotiations, L&D has attracted little attention among IR scholars. Yet, the discipline can greatly contribute to the debate, not only by enhancing understanding of the negotiation process and related outcomes but also by offering insights on how the issue could be fruitfully moved forward. This chapter specifically adopted a multi-faceted notion of power, drawing from the neorealist, liberal and constructivist

schools of thought, in order to explain how L&D milestones were reached. This allowed for overcoming the “structuralist paradox” in negotiations, i.e. the apparently surprising capacity of weak parties to take home results while negotiating with stronger parties.

Developing countries' achievements on L&D (WIM and Article 8) are only surprising when considering power in its purely materialistic form. If discursive power is added to the picture, then achievements can be ascribed to developing countries' capacity to shape their fate rather than to fortunate circumstances. This is not to say that material power does not play any role. Developing countries are faced with resource and capacity constraints which make it harder for their needs to be fully addressed within the UNFCCC. Consistently, NGO support will continue to play a crucial role in levelling current asymmetries in terms of capabilities, together with other initiatives to fund developing countries' participation in the process.

Yet, other sources of power besides the realist and liberal ones can be decisive for obtaining desired international outcomes. Our analysis has shown the key importance that discursive power, by framing L&D in ethical and legal terms, had in the attainment of L&D milestones. First, it moved the debate to a playground where resources and interests became irrelevant, therefore putting developed and developing countries on an equal foot. Second, it appealed to standards somehow shared or agreed beyond the UNFCCC context, including the basic moral norms linked to island states' narratives of survival and the reference to international customary law (state responsibility-compensation principles). This was useful to prove the need for action on L&D recurring to standards in principle recognised by both contending parties in other international arenas. Although this was not enough to impose developing countries' view on what L&D is and how it should be addressed, it at least moved developed countries' position towards the direction paved by the former.

At the same time, however, this strategy prevented Parties from starting a process towards the creation of shared meaning and understanding around L&D. Indeed, definitional issues have been carefully avoided in order not to stumble into the taboo reference of ‘compensation’. As a result, no official definition of L&D has been agreed at the UNFCCC level yet and Parties rely on a working one formulated under the SBI (UNFCCC 2012b). This is not just a matter of form, but a more important matter of substance. Without clarity around L&D conceptual boundaries, it will ultimately be difficult to go beyond the explorative mandate the WIM was given. In particular, concrete guidance is needed in order to implement the WIM's third function on enhancing “action and support to address loss and damage”, which also includes finance. For example, there is a need for establishing relevant criteria to identify L&D projects on the ground, as well as defining the level of adaptation beyond which L&D materialises. Does L&D arise when social, technical and physical limits are surpassed, or should also economic and institutional constraints be considered? The answers cannot but be political.

Yet, we are not claiming that agreeing on a definition is the only way to have meaningful action on L&D. We are aware that the discussion still causes discomfort and may lead to political deadlock. We thus believe that a more fruitful way forward entails adopting a different perspective and agreeing on shared principles

against which action could be tested (see chapter on justice by Wallimann-Helmer et al. 2018). Such shared principles would support an L&D working space where solutions can be developed (see chapter by Schinko et al. 2018), including tools to address irreversible losses, which are mostly associated with slow-onset events. While there is general accord around the use of comprehensive risk management approaches (including risk assessment, reduction, transfer, retention), how to deal with impacts from slow onset events remains an open question. Discourse about those impacts and efforts to develop creative or transformative instruments in response has been somewhat limited, often hampered by the taboo of compensation. A change of narrative is therefore needed. Framing L&D exclusively in terms of justice might have turned the issue into a win-lose negotiation game. Instead, a bigger emphasis on mutual gains through adaptation and action on L&D for both developed and developing countries is needed, as well as more clarity on the limits of those strategies. Examples of such mutual gains are more resilient global supply chains, reduction of climate refugees and enhanced security. As a result, acting on L&D would not feel as a unilateral concession developed countries make to vulnerable ones: it would rather be about elaborating patterns of collective action on an issue of common concern.

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