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**Loss & Damage: a Critical
Discourse Analysis**

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Mattei (FEEM) and Euro-Mediterranean
Center on Climate Change (CMCC)

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Summary

The years-long negotiations on an international mechanism for loss and damage (L&D) associated with climate change impacts got to a milestone during the nineteenth session of the UNFCCC Conference of the Parties (COP-19), held in Warsaw in November 2013. The COP established the Warsaw international mechanism, aiming to address L&D associated with the adverse effects of climate change, including extreme events and slow onset events, in vulnerable developing countries (Decision 2/CP.19). The paper performs a Critical Discourse Analysis (CDA) of COP decision 2/CP.19 in order to reconstruct developing and developed countries' positions on L&D and reflect on how the Warsaw mechanism could be implemented. The analysis builds on Fairclough's (1992) three-dimensional model for CDA, and makes use of a wide range of materials including previous COP decisions, High Level Segment statements and Parties submissions to COP 19, press releases and other relevant documents. The analysis highlights the lack of a common understanding and representation of L&D by developed and developing countries, with this fact ultimately hampering the possibility to define specific tools to address the issue within the mechanism. The difficulty to come to a shared meaning on L&D is due to its connection to other controversial discourses under the UNFCCC, including that of compensation for climate change impacts. As the concept of compensation pertains to the field of international law, the paper explores the appropriateness of the notions of State Responsibility for wrongful acts and State liability for acts not prohibited by international law to effectively deal with L&D. The paper concludes by discussing some strategic options for developing countries to advance the L&D discourse within international talks.

Keywords: Loss and Damage, Climate Change Negotiations, State Responsibility, State Liability, Attribution, Critical Discourse Analysis

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Introduction

The years-long negotiations on an international mechanism for loss and damage (L&D) associated with climate change impacts got to a milestone during the nineteenth session of the UNFCCC Conference of the Parties (COP-19), held in Warsaw in November 2013. The COP established the so-called Warsaw international mechanism (WIM) (UNFCCC Secretariat 2012), aiming to address L&D associated with the adverse effects of climate change, including extreme events and slow onset events, in particularly vulnerable developing countries. Discussion on L&D, formally initiated with the 2007 *Bali Action Plan* (UNFCCC COP 2008) and later embedded in the *Cancun Adaptation Framework* (2010) (UNFCCC COP 2010), has been campaigned by the Alliance of Small Island States (AOSIS) since the early 1990s. AOSIS' claims have mainly focused on the establishment of a compensation mechanism, able to refund developing countries for those unavoidable impacts materializing when both mitigation and adaptation efforts fall short. However, the WIM does not recognize any accountability of the most advanced economies for past and ongoing human induced climate change, nor makes any tangible commitment for helping low income and small developing island states to cope with L&D. Rather, it outlines a partnership for a better knowledge gathering, coordination and support, 'including finance, technology and capacity building'.

Up to date, L&D attracted little academic research (Warner, van der Geest and Kreft 2013) (Warner al. 2012). The existing body of literature is primarily composed by advocacy groups (Actionaid, Care International, WWF 2013, 2012; ActionAid 2010) and has mainly been produced in preparation of international meetings and with the aim of supporting developing countries' negotiating position. Interestingly, a recent branch of literature has been concentrating on a topic which is directly linked to that of L&D, i.e. the limits to adaptation (Dow and Berkhout 2014, 2013; Adger, et al. 2009; Morgan 2011). The IPCC AR5 has also devoted attention to the concept of 'constraints and limits to adaptation' (Working Group II, Chapters 16 and 17) (IPCC 2014), where the first are those factors which make it difficult to implement adaptation actions, while the latter are insurmountable barriers to adaptation (Dow and Berkhout, 2013; Pedersen 2009). Nevertheless, the connection between L&D and the constraints/limits to adaptation is not always made explicit, leaving the integration of the two branch of literature at an embryonic stage.

As a result, no commonly agreed definition is available for the concept yet. In the literature review prepared by the Work programme on L&D under the Subsidiary Body for Implementation (SBI) to the UNFCCC, L&D is very broadly referred to as ‘the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems’ (SBI 2012). Such definition, however, does not clarify why L&D should be regarded as a different category within climate change impacts and should be therefore addressed with an *ad hoc* instrument. Other definitions make a step ahead, explicitly linking L&D with the inability to cope and adapt to climate change impacts (Warner, van der Geest and Kreft 2013). However, this does not allow for precisely setting the boundaries of the concept: is such inability to adapt stemming from institutional barriers, prohibitive costs or technical impossibility? All these cases holding true, what the difference with the concept of residual impact would be then?

The fluidity in the way L&D is conceptualized, also shows up at the negotiations level. While consensus around core concepts like mitigation and adaptation has been reached, this does not hold true for L&D. Discourses around the concept are still characterized by a strong juxtaposition between developing and developed countries, with the former claiming L&D to be something beyond adaptation and thus requiring additional instruments besides mitigation and adaptation, and the latter including L&D within the scope of adaptation.

The paper employs a Critical Discourse Analysis (CDA) to investigate how different discourses, i.e. way of understanding and representing the issue of L&D, have been endorsed by developed and developing countries and the possible reasons for their divergence. It also reflects on the consequences this had on the definition of appropriate and concrete actions to address L&D through the WIM. The first section provides an overview of the theory and method of discourse analysis: particular attention is drawn on the CDA approach and its theorization by Norman Fairclough. Making use of Fairclough’s three-dimensional model for CDA, the analysis carried out in section 3 highlights the lack of a common understanding and representation of L&D by developed and developing countries, with this fact ultimately hampering the definition of specific tools to address the issue within the mechanism. The difficulty to come to a shared meaning on L&D is due to its connection to other controversial discourses under the UNFCCC, including that of compensation for climate change impacts. As the

concept of compensation pertains to the field of international law, the paper explores the appropriateness of the notions of ‘State Responsibility for wrongful acts’ and ‘State liability for acts not prohibited by international law’ to effectively deal with L&D. In the text I shortly refer to such concepts as ‘responsibility’ and ‘liability’, adopting the language employed by the United Nations and among international jurists (Barboza 2011). The paper concludes discussing some strategic options for developing countries to advance the L&D discourse within international talks.

Theory and method: Critical Discourse Analysis

Being aware that there is no generally accepted definition of *discourse* in social science (Pedersen 2009), I adhere to its interpretation as a particular way of talking about and understanding the world, or an aspect of the world (Jørgensen and Phillips 2002). Therefore, discourse analysis becomes a strategy to reveal how the understanding of the world is built through language and how, conversely, the latter contributes to change social reality. It draws attention on the way discourse is produced, what it excludes, how some knowledge becomes significant and some other does not, and how power relations are reflected in language (Hesse-Biber and Leavy 2006; Friman 2013).

Discourse analysis is rooted in a social constructionist approach within social sciences and humanities (Pedersen 2009). Despite the common epistemological premises, approaches to discourse analysis vary, differing *inter alia* with respect to the role of discourse in the construction of the world and the analytical focus (van Dijk 2001). In this paper, I employ a CDA as mainly concerned with social problems and political issues and for its attempt not only to interpret but also to explain discourse structures (Fairclough and Wodak 1997). In particular, CDA focuses on the ways discourse structures enact, confirm, legitimate, reproduce, or challenge relations of power and dominance in society (van Dijk 2001). As negotiations under the UNFCCC are characterized by pronounced power asymmetries, CDA turns out to be useful in detecting whether the latter are reflected in the discussion on L&D.

Within the CDA approaches, I focus on Norman Fairclough’s work and adopt his three-dimensional model for CDA (Fairclough 1992). According to it, the starting point of any analysis should be the consideration of two important elements of the discourse: (1) the *communicative event* (for example, a newspaper article or any other

text or speech); (2) the *order of discourse*, i.e. the configuration of all discourse types used in a specific field. The communicative event has three dimensions, each of which should be covered by a specific analysis:

- (1) it is a *text*, and should be subject to a linguistic analysis (vocabulary, grammar, syntax);
- (2) it is a *discursive practice*: attention should be drawn on how the text is produced and consumed, focusing on the way power relations are enacted. The underlying hegemonic processes, through which consensus around meanings emerges, should be explored;
- (3) it is a *social practice*, with this implying considering how the discursive practices reproduces or restructures the existing order of discourse and how this translates into social change.

Hence, Fairclough proposes three levels of analysis: at *micro*, *meso* and *macro* scales. Accordingly, the analysis of COP Decision 2/CP.19 (*communicative event*) in section 3 is carried out considering these three dimensions. Although the text of 2/CP.19 constitutes the core of the analysis, it is worth noting that it is examined in connection with other relevant documents, including previous COP decisions (1/CP 16, 7/CP 17, 3/CP 18), High Level Segment statements made by Heads of States and Governments at COP 19/CMP 9, Parties submissions in preparation of COP 19, press releases and other relevant documents available on the UNFCCC website. This is functional to reconstruct in an organic way the different discourses adopted by developed and developing countries on L&D.

Analysis of the decision (2/CP.19) and discussion

I start from the analysis of the discursive practice (*meso scale* in Fairclough's model) as crucial to understand how the authors of Decision 2/CP.19 draw on existing discourses when producing the text. It entails eliciting the particular ways in which authors understand and represent the issue, and detecting how such views interact, eventually reproducing or transforming the order of discourse. To this aim, I analysed a wide range of material, including official documents available on the UNFCCC website, including High Level Segment statements at COP 19/CMP 9, Parties submissions in preparation

of COP 19, as well as press releases and reports prepared by advocacy groups in view of international talks.

I have already recalled in the introduction how developing and developed countries frame L&D in two conflicting way, the former claiming L&D to be something *beyond* adaptation and thus requiring additional instruments besides mitigation and adaptation, and the latter including L&D *within* the scope of adaptation. The reasons behind such juxtaposition mainly lie in the reference made by developing countries to the concept of compensation: in their view, developed countries should refund them for the unavoidable impacts already materializing as a consequence of past and ongoing greenhouse gases (GHG) emissions.

The element of financial compensation represents a cornerstone in the way AOSIS has framed L&D since the early 1990s. During the same negotiations of the UNFCCC, AOSIS proposed the establishment of an international scheme to be funded by industrialised parties and aiming at compensating small island and low-lying developing nations for loss and damage resulting from sea level rise (Linnerooth-Bayer J. 2003). Traces of this proposal can be found in article 4.8 of the 1991 Convention, when it call parties to consider appropriate actions ‘including (...) funding, *insurance* and the transfer of technology’. Although downplayed, calls for compensations have continued to be raised during negotiations. For instance, during the SBI plenary in Warsaw, Swaziland urged for the consideration of compensation, rehabilitation and insurance within the institutional arrangement on L&D (International Institute for Sustainable Development 2013). However, it would be simplistic to reduce developing countries’ position to mere financial requests. As recently stated by developing countries’ negotiators on L&D at COP 19, ‘financial compensation may represent a normative solution to the perils of vulnerable countries, but does not necessarily mean that the underlying needs are addressed’ (Hoffmaister, et al. 2014). Indeed, some important dimensions of L&D are impossible or particularly difficult to translate in monetary terms, including the loss of biodiversity, cultural heritage or statehood.

On the other hand, developed countries have generally avoided any references to compensation, given its connection with the controversial discourse of climate change responsibility. Countries like the United States have also questioned the appropriateness of addressing L&D within the UNFCCC, maintaining that it could be more

conveniently dealt with under the disaster risk reduction framework (Verheyen 2012). In general, they have opposed the establishment of a third pillar besides adaptation and mitigation, claiming that L&D and adaptation are inextricably linked and should be therefore addressed together. In their view, a third pillar would also just add complexity to the already intricate institutional structure of the UNFCCC.

Given this background, let us consider now how such different discourses and standpoints interacted during the Warsaw negotiations, eventually shaping the text of Decision 2/CP.19. The linguistic analysis of Decision 2/CP.19 (*micro scale* in Fairclough's model) clearly shows how parties were not able to reach an agreement around a common representation of the issue. Firstly, the relationship between L&D and adaptation is defined in two clashing ways. According to line 6 of the Decision L&D 'includes, and in some cases involves more than, that which can be reduced by adaptation', while at line 13 the WIM is placed 'under the Cancun Adaptation Framework'. The first statement recognizes L&D as something which, in some cases, can go beyond adaptation and thus recognizes developing countries' claims. On the contrary, the second statement –placing L&D under the *Cancun Adaptation Framework*- suggests a relation of subordination between the concepts, with L&D being a part of adaptation as argued by developed countries. From a rhetoric point of view, this is a case of 'constructive ambiguity', a tool often employed in diplomacy to get over situations of impasse (Berridge and James 2001). It is a strategy used when parties have strong and contradictory interests and views and/or the negotiations are running short of time (Pehar 2001). The incapacity to get to a shared definition of the concept is also shown by the provision requiring a review of the mechanism 'including its structure, mandate and effectiveness' at COP 22 in 2016 (§1 and §15 of the Decision).

Another interesting consideration can be done on the basis of the linguistic analysis and deals with the issue of climate change attribution. In Decision 2/CP.19 (as well as in the decisions adopted since the Cancun Agreements), L&D is referred to as being *associated* with climate change impacts, including extreme weather events and slow onset events. This might represent another case of constructive ambiguity in its lexical form. The verb 'associate' implies a connection between two things either because they occur together or because one produces the other (Angus Stevenson, editor 2010). Thus, the verb can entail different relationships linking the concepts: they can be on the same level, being simply connected, or one can be subordinated to the other, as

caused by the latter. More research should be done in understanding whether this expression has been used in the decisions as a compromise on the different negotiation positions on attribution of L&D to climate change, or simply because of the uncertainty that still lingers on the relationship between climate change and extreme events. Indeed, establishing a causal link between climate change and some extremes is particularly challenging for the current state of scientific knowledge. As highlighted by the 2012 ‘Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation’ (IPCC 2012) and more recently by the IPCC AR 5 (IPCC 2013), while the relation between some slow-onset events and large-scale warming has been robustly proved, extreme weather events (which are also associated with greater loss and damage) cannot still be fully attributed to climate change. Lacking the causal link of L&D with climate change, claims for compensations become ultimately difficult to rise. Moreover, it is difficult to distinguish the contribution and the sign of other factors, like exposure and vulnerability, to L&D. It is nevertheless interesting to note that developing countries, and AOSIS in particular, at the negotiation level seem to support the perspective of a causal link tying L&D and climate change. Taking Nauru’s submission to COP 19 (‘Views and information on elements of an international mechanism to address loss and damage from the adverse effects of climate change’ (Nauru on behalf of The Alliance of Small Island States 2013) as an example, the alleged causal link between L&D and climate change impacts is made explicit by the same title. Indeed, the preposition ‘from’ indicates the source or cause of something (Angus Stevenson, editor 2010).

Moving now to the *macro scale* of Fairclough’s model, we can ask ourselves whether the order of discourse on L&D has been transformed during COP 19 negotiations. As shown by the former two levels of analysis, power relations among developed and developing countries slightly changed, as the latter were able to introduce a ‘new’ discourse on L&D in the final text of Decision 2/CP.19 referring to it as something beyond adaptation. Developing countries are likely to employ this argument as a lever in 2016, so to move L&D away from the adaptation pillar when the mechanism will go through a revision. For the time being, however, it is still uncertain whether this actually corresponds to a new way of representing the issue and, most importantly, to a change in the way L&D has been addressed in the practice so far. In fact, as Fairclough notes (Fairclough 2003), a new discourse may come into an

institution without being enacted or inculcated, or it may be enacted but never fully inculcated. Inculcation means that people own the discourse. What could have happened in Warsaw is that developed countries have 'learnt' this new discourse for the purpose of closing the negotiation process, but at the same time they beware of internalizing it.

A legal perspective: responsibility and liability

Being 'compensation' one of the main Gordian knots to be cut within the L&D discourse, some scholars have explored the issue from an international law perspective. There are two concepts which acquire particular relevance in this case: that of State responsibility and that of State liability. Some authors (Tol and Verheyen 2004) believe it is possible to hold a state generally responsible for climate change damages for breaching the *no harm rule* under international customary law. As known, among the conditions to ascribe responsibility to a State, it is necessary to prove the causal link between the damage and the act/omission attributable to the state. However, caution should be employed in deeming sufficient to prove the causal link between GHG emissions and climate change in order to also establish a link between the latter and its adverse impacts. If the first connection is unequivocal, science warns that much uncertainty still characterizes the relationship between climate change and extremes, usually causing the greatest share of L&D. In the absence of a clear evidence on the attribution of extremes to climate change, envisaging State responsibility for climate change impacts become an arduous task.

Within international law, talking about state liability, i.e. responsibility for acts not prohibited by international law, would provide a better framework for the issue. Indeed, liability is a form of more sophisticated and solidaristic responsibility (Conforti 2002), aiming at regulating certain socially useful but hazardous activities so that to guarantee their economic viability while providing prompt reparation in case of transboundary damages to the environment or the society (Barboza 2011). No international obligations has to be breached and no fault has to be proved: only causation is relevant (Barboza 2011). However, given that the aim of liability is to safeguard victims, proving the causal link between act and damage is less stringent with respect to what is required for state responsibility. The complexity of the ecological system is fully taken into account (uncertainty, presence of multiple overlapping causes, temporal separation between act and damage), with the result of causality acquiring a

more flexible character.

Unfortunately, this type of accountability is still unripe within international law and it is disputed whether it can be evoked as a general principle of customary law. Indeed this kind of state liability has been envisaged so far by the *Convention on International Liability for Damage Caused by Space Objects* (1972) only. Yet, if we consider not only the juridical function of international law but also its political-diplomatic one, the concept of liability could nevertheless provide solid ground for developing countries claims. It is evident that if a party claims that what it pursues is in line with international law, it has a strong argument to make. Moreover, liability would be useful as a concept as it does not make any reference to fault, a discourse which is still controversial under the UNFCCC. Notwithstanding, talking about liability would always recall the concept of compensation, and that is why some perplexities around the real usefulness and political opportunity of using such concept arise.

Conclusions

One of the aim of discourse analysis is to investigate the relations of power and their possible changes through language. The insertion of the expression of L&D going beyond adaptation in the final text of Decision 2/CP.19 reflects a shift in the power relation balance between developed and developing countries, in favour of the latter. It is actually expected that this point will be used in 2016 as a lever to move the issue of L&D out of the adaptation pillar and position it as a new field in the battle against the adverse impacts of climate change, subsequent to the 'preventive' phase of mitigation and the 'managing' phase of adaptation (CDKN 2012). Negotiating power on the issue can be therefore deemed to have somewhat increased for developing countries. Yet, the use of constructive ambiguity in the text reminds us that developed and developing countries have failed to come to a shared meaning and representation of L&D and that many unresolved issues remain on the table, among which is that of compensation.

With this regard, we have noticed that pursuing a legal strategy to solve the controversy might not be really feasible, being the concept of liability still unripe within international law. An alternative option for developing countries could consist in employing the 'liability argument' from a political-diplomatic point of view, with the aim of strengthening their negotiating power. However, this could lead to considerable

political drawbacks, given that the concept of liability would always recall that of compensation. It might not be a case that recently developing countries have been downplaying any reference to liability during international talks.

A more reasonable option, then, would be to use the acquired negotiating power to fill the newly established WIM with meaningful activities, so to advance understanding on L&D. Indeed, the WIM offers a set of tools, mostly related to knowledge and expertise sharing, data distribution and collection, technological support and international dialogue enhancement, that have the potential to tackle the important dimensions of L&D which cannot be addressed financially. The establishment of the mechanism will therefore allow for further confrontation and advancement in the understanding of this complex and multifaceted issue.

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