

Legal Validity of Loss and Damage Fund for Global South - Post Cop28 Analysis

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Abstract

The climate-related degradation has increased to a level where the current international jurisprudence measures are already ineffective to provide responses against irrecoverable losses, especially in the Global South. One of the climate issues historically sidelined by climate diplomacy, i.e., Loss and Damage (L&D), again rose to the top of the agenda with the creation and operationalization of the Loss and Damage Fund through the Cop27 and Cop28, respectively. Although the Fund is heralded as a breakthrough, the issues that surround its effectiveness are questions about its legal enforceability, legitimacy of its governance as well as, evenness of access. The present paper casts a legal doubt on the international climate law nature of L&D in the aftermath of COP28, as well as analyses the feasibility of mechanisms developed so far. It applies to recent institutional reports, climate negotiations and legal scholarship to assess the ability of L&D framework to bring climate justice. This paper proposes that although the operationalization of the fund is a big step in the right direction, the fact that it is based on soft law, lacks the existence of a binding ethos, and is governed on an interim basis by the World Bank may compromise its legal viability and success in the long run.

Introduction

Climate change has become a legal challenge not merely a scientific and policy crisis to the world community. The developing countries, especially those with low adaptive capacity, remain disproportionately affected by climate-related calamities like floods, droughts and rise of sea level. These irreparable effects under the name of so-called Loss and Damage (L&D) have turned into one of the central pillars of climate justice. L&D has the harms that cannot be mitigated and adapted to such as to economic and non-economic losses.¹

History was made at COP27 in Sharm el-Sheikh where a new dedicated Loss and Damage Fund was created, a move that had been long anticipated by vulnerable nations which had been lobbying to have a formalized approach to repair historical and legacy losses. The fund was operationalized at COP28 in Dubai (2023) with funding pledges by countries including UAE, Germany, and the

¹ "The Loss and Damage Fund: A Solution to Interpretive Conflicts of Responsibility for Climate Change? | Netherlands International Law Review," accessed June 29, 2025, <https://link.springer.com/article/10.1007/s40802-024-00259-3>.

European Union. In addition, an interim agreement put the fund under the management of the World Bank instilling optimism and a feeling of disbelief among the legal and policy circles.² Although hailed as a historical event of transnational climate negotiations, on the one hand, the operationalization of the fund has brought back the poisoned arguments of state responsibility, financial justice, and the bindingness of climate duties. The question is open: Does the mechanism of Loss and Damage have any legal effect, or it is a purely symbolic process? Does the existing framework reflect Article 8 of the Paris Agreement or does it fail to provide legal responsibility of developed countries?³ Besides, what is the implication of the interim institutional arrangements on its legitimacy in particular concerning the controversial role of the World Bank as a neutral adjudicator?

These questions are discussed in this paper through the legal feasibility of the Loss and Damage framework following COP28. It starts by giving a historical background of the L&D concept as applied in the UNFCCC scenario. Then, it assesses the Paris Agreement under the legal basis of the Fund and criticizes the institutional design of the working structure. Finally, the paper provides an advisory on future matters concerning the possible amendments in the laws to institutionalize L&D as a lasting and fair presence in the international climate legislation.

Historical Evolution of Loss and Damage

The concept of Loss and Damage (L&D) in international climate law emerged from the persistent demands of vulnerable states, particularly the Alliance of Small Island States (AOSIS), which have historically borne the brunt of climate-induced catastrophes. The earliest formal proposal to address climate-related damage came in 1991 when AOSIS advocated for an international insurance pool to compensate small island nations for rising sea levels⁴. Although initially dismissed by larger powers, this proposal laid the foundation for a decades-long campaign to formalize the recognition of irreversible climate harm in global climate governance.

It wasn't until COP13 in Bali (2007) that the issue began gaining institutional traction, with the Bali Action Plan explicitly mentioning the need to address L&D associated with climate impacts. The major turning point came in 2013 at COP19 in Warsaw, which established the Warsaw International Mechanism (WIM) for Loss and Damage. The WIM served as the first coordinated global response to climate loss and damage, although it was largely procedural and lacked binding obligations or financial commitments⁵.

The Paris Agreement (2015) further integrated L&D into the climate regime through Article 8, which acknowledges the importance of addressing loss and damage. However, it was immediately undercut by Decision 1/CP.21, which explicitly stated that Article 8 “does not involve or provide a basis for liability or compensation.”⁶ This exclusion reflected resistance from developed countries, particularly the United States and members of the European Union, who were wary of being held financially or legally accountable for historical emissions.

² “Operationalization of the New Funding Arrangements for Responding to Loss and Damage and the Fund Established in Paragraph 3 of Decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee | UNFCCC,” accessed June 29, 2025, <https://unfccc.int/documents/632319>.

³ “Full Article: Loss and Damage, and Addressing Structural Injustice in the Climate Crisis,” accessed June 29, 2025, <https://www.tandfonline.com/doi/full/10.1080/21550085.2024.2387999>.

⁴ Reinhard Mechler and Teresa M Deubelli, “Finance for Loss and Damage: A Comprehensive Risk Analytical Approach,” *Current Opinion in Environmental Sustainability*, Slow Onset Events related to Climate Change, 50 (June 1, 2021): 185–96, <https://doi.org/10.1016/j.cosust.2021.03.012>.

⁵ “International Climate Change Law - Paperback - Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani - Oxford University Press,” accessed June 29, 2025, <https://global.oup.com/academic/product/international-climate-change-law-9780199664306?cc=pk&lang=en&>.

⁶ “Report of the Conference of the Parties on Its 21st Session, Held in Paris from 30 November to 13 December 2015 :,” accessed June 29, 2025, <https://digitallibrary.un.org/record/831052?ln=en&v=pdf>.

Nonetheless, developing countries persisted. COP25 in Madrid (2019) saw the establishment of the Santiago Network to facilitate technical assistance for addressing loss and damage. While symbolically important, it failed to mobilize actual finance or legally bind developed countries. It wasn't until COP27 in 2022 that the breakthrough occurred: parties agreed to establish a dedicated Loss and Damage Fund to provide financial assistance to the most affected countries.⁷

The operationalization of the fund at COP28 in Dubai (2023) represented the most significant advancement yet. Delegates agreed to a transitional framework that would guide the Fund's structure, governance, and financial pledges. Contributions were announced \$100 million from the UAE, \$100 million from Germany, and others from the EU and the UK. However, the fund was placed under the interim trusteeship of the World Bank, raising questions about governance, accessibility, and independence.⁸

This historical progression, from moral claims to partial legal recognition, illustrates both the persistent advocacy of vulnerable states and the reluctance of high-emitting nations to accept binding obligations. Despite institutional developments, the legal framework for loss and damage remains fragmented, characterized by soft commitments and cautious diplomacy rather than enforceable climate justice mechanisms.

Legal Status and Framework Post-COP28

The legal status of the Loss and Damage Fund established under the UNFCCC framework remains contested despite its formal operationalization at COP28. At the heart of the debate is whether the fund creates binding legal obligations for developed countries or merely represents a political gesture subject to voluntary compliance. The fund was endorsed by consensus at COP28, yet its governance structure, funding mechanisms, and accountability standards raise significant concerns about its enforceability and permanence in the international legal order.

The Paris Agreement, which represents the most comprehensive legal instrument under the UNFCCC, refers to Loss and Damage in Article 8, recognizing the need to address loss and damage associated with the adverse effects of climate change. However, Article 8(1) provides only that "Parties recognize the importance of averting, minimizing and addressing loss and damage."⁹

There is no language imposing affirmative duties, obligations to fund, or liability provisions.¹⁰ Moreover, Decision 1/CP.21, paragraph 51 expressly excludes the interpretation of Article 8 as creating a basis for liability or compensation, significantly weakening its legal force.

The COP28 transitional agreement further entrenched this "soft law" approach by emphasizing voluntary contributions to the Loss and Damage Fund. While parties like the UAE, Germany, and the European Union made financial pledges, there is no mandatory schedule of contributions, enforcement mechanism, or consequence for non-compliance. This reflects a continuity in the

⁷ "Can Loss and Damage Fund Strike a Responsive Chord in Global Climate Finance? - South - 2024 - Climate and Energy - Wiley Online Library," accessed June 29, 2025, <https://onlinelibrary.wiley.com/doi/abs/10.1002/gas.22417>.

⁸ "Operationalization of the New Funding Arrangements for Responding to Loss and Damage and the Fund Established in Paragraph 3 of Decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee | UNFCCC," accessed June 29, 2025, <https://unfccc.int/documents/632319>.

⁹ "The Paris Agreement | UNFCCC," accessed June 29, 2025, <https://unfccc.int/process-and-meetings/the-paris-agreement>.

¹⁰ "(PDF) International Climate Change Law. By Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani. Oxford: Oxford University Press, 2017. Pp. Xxxix, 400. Index. \$105, £80.00.," accessed June 29, 2025, https://www.researchgate.net/publication/323154310_International_Climate_Change_Law_By_Daniel_Bodansky_Jutta_Brunnee_and_Lavanya_Rajamani_Oxford_Oxford_University_Press_2017_Pp_xxxix_400_Index_105_8000.

reluctance of developed countries to accept legal responsibility for historical emissions and climate-related harm, despite their disproportionate contributions to global warming.¹¹

The choice of the World Bank as interim trustee also complicates the legal landscape. While the institution brings technical capacity and financial expertise, it is not a UN body and does not operate under the direct control of the Conference of the Parties (COP). The World Bank's governance structure, weighted by capital contributions, inherently privileges donor countries many of whom are the same actors resisting binding L&D obligations.¹² This arrangement undermines the normative principles of equity and climate justice, cornerstones of the UNFCCC and the broader climate regime.

Furthermore, the Transitional Committee Report of 2023, which guides the fund's structure, emphasizes a country-driven, accessible, and predictable funding mechanism. However, this language, although promising, lacks legal specificity and is framed in advisory, not mandatory, terms.¹³ Without formal treaty amendments or the creation of a protocol legally binding on contributing parties, the L&D framework remains vulnerable to shifts in political will and international financial trends.

Thus, while COP28 operationalized the Loss and Damage Fund, the current framework lacks the legal architecture required to ensure its enforceability. The fund's status under international law remains non-binding, its contributions are voluntary, and its governance raises legitimacy concerns. These limitations must be addressed if L&D is to transition from a political compromise to a meaningful legal instrument capable of redressing climate injustice.

Operationalization and Institutional Structure

The operationalization of the Loss and Damage Fund at COP28 marked a historic step in global climate finance, but its legal and institutional architecture reveals significant gaps in equity, governance, and enforceability. While the fund's creation was hailed as a success by many Global South negotiators, its institutional design especially its interim placement under the World Bank raises concerns about autonomy, accessibility, and long-term sustainability.

The Transitional Committee, established after COP27, was tasked with designing the fund's operational modalities. In its report adopted at COP28, the committee recommended that the World Bank act as the interim trustee for a four-year period. This decision was defended on grounds of administrative convenience and speed of deployment, given the World Bank's capacity to manage large-scale financial flows. However, it has been criticized for undermining developing countries' ownership over the mechanism and for privileging donor control¹⁴.

The governance structure of the fund includes a board composed of 26 members, equally divided between developed and developing countries. While this arrangement reflects a formal commitment to parity, the influence of developed countries is arguably reinforced through their dominance in the World Bank and their status as primary funders. The fund's interim host

¹¹ "A Call for Action: Insights from the pre-COP28 Scholarly Discourse and beyond the Operationalization of the Loss and Damage Fund - Shumba - 2024 - Climate Resilience and Sustainability - Wiley Online Library," accessed June 29, 2025, <https://rmetsonline.wiley.com/doi/full/10.1002/cli2.70001>.

¹² "Full Article: Loss and Damage Funding in the UN Climate Negotiations: From Dialogue to Reality," accessed June 29, 2025, <https://www.tandfonline.com/doi/full/10.1080/00139157.2023.2180268>.

¹³ "Operationalization of the New Funding Arrangements for Responding to Loss and Damage and the Fund Established in Paragraph 3 of Decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee | UNFCCC," accessed June 29, 2025, <https://unfccc.int/documents/632319>.

¹⁴ "Operationalization of the New Funding Arrangements for Responding to Loss and Damage and the Fund Established in Paragraph 3 of Decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee | UNFCCC."

institution is also not under the authority of the UNFCCC, potentially weakening the accountability mechanisms available under international climate law.¹⁵

In terms of funding criteria, the COP28 decision emphasized a “country-driven approach” to disbursement, with priority given to particularly vulnerable developing countries. It also called for simplified access procedures to ensure that the most affected states, often lacking administrative capacity, can still benefit from the mechanism. However, the absence of legally binding contribution obligations leaves the fund’s sustainability in question. The pledges made in Dubai, while symbolically important, remain voluntary and politically contingent¹⁶.

The Transitional Committee’s design also included provisions for monitoring, evaluation, and transparency, yet these are still in developmental stages. No independent oversight mechanism has been formally embedded in the current governance model. Civil society groups and legal scholars have warned that without clear accountability structures, the fund risks becoming another aspirational tool with limited tangible impact¹⁷.

Notably, the Santiago Network, established earlier at COP25 to facilitate technical assistance for loss and damage, is expected to complement the fund by providing institutional support. Yet, like the fund itself, it remains operationally underdeveloped and financially constrained, revealing a broader pattern of institutional under-resourcing in the UNFCCC framework¹⁸.

In conclusion, while the institutional structure of the Loss and Damage Fund provides a functional starting point, its reliance on interim arrangements and voluntary financing, combined with gaps in transparency and enforcement, undermines its potential to deliver meaningful climate justice. For the fund to evolve into a robust legal instrument, it must develop clearer accountability systems, binding obligations, and more inclusive governance anchored within the UN legal architecture.

Legal Viability and Enforcement Challenges

While the Loss and Damage Fund marks a historic milestone in climate negotiations, its legal structure remains notably fragile. The current regime is governed predominantly by soft law instruments such as COP decisions, declarations, and committee reports. Unlike treaty law, these instruments lack binding force under international legal standards, leaving the Loss and Damage framework vulnerable to political discretion rather than legal obligation¹⁹.

The fundamental legal challenge lies in the absence of codified state liability. The Paris Agreement’s Article 8 references L&D but explicitly avoids imposing liability or compensation obligations, as made clear in Decision 1/CP.21, para 51. This decision reflects developed countries’ longstanding resistance to acknowledging historical responsibility for climate change, a resistance grounded in fears of unlimited liability claims²⁰. As a result, the fund is not underpinned by state

¹⁵ “The Loss and Damage Fund: A Solution to Interpretive Conflicts of Responsibility for Climate Change? | Netherlands International Law Review,” accessed June 29, 2025, <https://link.springer.com/article/10.1007/s40802-024-00259-3>.

¹⁶ “POLITICAL AND LEGAL IMPLICATIONS OF DEFINING ‘PARTICULARLY VULNERABLE’ FOR THE LOSS AND DAMAGE FUND,” accessed June 29, 2025, <https://www.lossanddamagecollaboration.org/publication/political-and-legal-implications-of-defining-particularly-vulnerable-for-the-loss-and-damage-fund>.

¹⁷ Laura Kempa et al., “Financing Measures to Avert, Minimise and Address Loss and Damage: Options for the Green Climate Fund (GCF),” 2021, <https://www.fs-unep-centre.org/wp-content/uploads/2021/01/Financing-measures-to-avert-minimise-and-address-LD.pdf>.

¹⁸ Dorcas Stella Shumba, “A Call for Action: Insights from the Pre-COP28 Scholarly Discourse and beyond the Operationalization of the Loss and Damage Fund,” *Climate Resilience and Sustainability* 3, no. 4 (2024): e70001, <https://doi.org/10.1002/cli2.70001>.

¹⁹ Daniel Bodansky et al., *International Climate Change Law* (Oxford, New York: Oxford University Press, 2017).

²⁰ “COP 21 - Decisions | UNFCCC,” accessed June 29, 2025, <https://unfccc.int/process-and-meetings/conferences/past-conferences/paris-climate-change-conference-november-2015/cop-21/cop-21-decisions>.

responsibility doctrine as found in customary international law, such as the International Law Commission's Articles on State Responsibility.

Enforcement challenges are further compounded by the voluntary nature of contributions. Unlike the Green Climate Fund, which has mechanisms "albeit imperfect" for encouraging regular pledges, the Loss and Damage Fund lacks any compliance or review system to monitor donor obligations. There is no legal requirement for countries to meet their pledged amounts, nor any penalty for default or delay²¹. This undermines both predictability and credibility, critical features for any meaningful financial mechanism.

Moreover, the World Bank's interim role as host institution introduces governance complications. Though the institution offers technical expertise, it is structurally accountable to large donor countries and remains outside the legal and normative framework of the UNFCCC. Its policies prioritize fiscal prudence and conditionality, which may conflict with the equity-based principles of climate justice. This governance gap limits the fund's legal accountability to climate-affected states²².

Attempts to litigate climate-related harm under international law remain limited and largely symbolic. Cases such as those brought before national courts and human rights bodies, e.g., *Carvalho v. European Union* or climate complaints before the UN Human Rights Committee, have raised awareness but failed to impose binding L&D-related obligations on states²³. No international tribunal has yet recognized a justiciable right to compensation for climate-induced losses under customary or treaty law.

Given these limitations, scholars and Global South negotiators have proposed legal reforms. Suggestions include creating a protocol under the Paris Agreement specifically addressing L&D with binding obligations, or pursuing an advisory opinion from the International Court of Justice on the legal responsibilities of states for climate damage. While politically ambitious, such initiatives could enhance the normative weight of L&D and shift it from a political concession to a component of binding international law²⁴.

In conclusion, while the Loss and Damage Fund represents a moral and political victory, it remains legally precarious. Without formalized obligations, robust compliance systems, and legal mechanisms of redress, the current L&D regime lacks the enforcement muscle needed to hold high-emitting nations accountable. Future developments must close the gap between rhetoric and legal reality if the fund is to deliver lasting climate justice.

Comparative Perspectives

A comparative analysis of how different countries and regional blocs have approached Loss and Damage (L&D) reveals divergent legal strategies and political postures. These disparities reflect contrasting levels of vulnerability, historical emissions, and geopolitical leverage. A deeper understanding of these perspectives is critical to assessing the equity and enforceability of the international L&D framework.

²¹ Hojjat Salimi Turkamani, "The Loss and Damage Fund: A Solution to Interpretive Conflicts of Responsibility for Climate Change?," *Netherlands International Law Review* 71, no. 2 (September 1, 2024): 327–52, <https://doi.org/10.1007/s40802-024-00259-3>.

²² Bethany Tietjen and Tarun and Gopalakrishnan, "Loss and Damage Funding in the UN Climate Negotiations: From Dialogue to Reality," *Environment: Science and Policy for Sustainable Development* 65, no. 3 (May 4, 2023): 18–28, <https://doi.org/10.1080/00139157.2023.2180268>.

²³ Joana Setzer and Catherine Higham, "Global Trends in Climate Change Litigation: 2024 Snapshot," Monograph (London, UK: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, June 27, 2024), <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2024-snapshot/>.

²⁴ "Turning Climate Justice into Practice? Channeling Loss and Damage Funding through National Social Protection Systems in Climate-vulnerable Countries - Huber - 2024 - WIREs Climate Change - Wiley Online Library," accessed June 29, 2025, <https://wires.onlinelibrary.wiley.com/doi/full/10.1002/wcc.867>.

Small Island Developing States (SIDS): Legal Advocacy and Existential Risk

For Small Island Developing States (SIDS) such as Tuvalu, Vanuatu, and the Maldives, L&D is not an abstract legal principle but a matter of existential urgency. These countries have been the most consistent advocates for binding legal commitments on loss and damage. In 2023, the Pacific Islands Forum reaffirmed its demand for an international liability mechanism, citing rising sea levels, saltwater intrusion, and cultural dislocation²⁵.

Notably, Vanuatu spearheaded the campaign for an advisory opinion from the International Court of Justice (ICJ) on state responsibilities for climate change. This legal strategy aims to elevate the normative weight of L&D and provide jurisprudential guidance that could be used in future treaty negotiations or national litigation²⁶. SIDS have also proposed integrating L&D into climate risk insurance and sovereign debt relief frameworks, emphasizing the connection between climate harm and financial solvency.

The European Union: Political Support without Legal Liability

The European Union (EU) has positioned itself as a global leader in climate diplomacy and was among the first to pledge substantial sums to the Loss and Damage Fund. However, EU member states have consistently rejected proposals that would establish legal liability for historical emissions. The EU's support remains grounded in political solidarity rather than legal obligation²⁷. Moreover, the EU favors using existing development finance channels to disburse L&D funds, rather than creating new legal structures. This approach reflects a reluctance to entangle climate finance with debates about reparations or compensation, despite mounting pressure from Global South negotiators. Legal scholars have noted that this stance undermines the principle of common but differentiated responsibilities (CBDR), which lies at the heart of climate justice discourse²⁸.

United States: Legal Immunity and Political Resistance

The United States remains one of the most significant obstacles to establishing a binding L&D regime. While the Biden administration expressed support for the COP28 outcomes, it has not pledged a substantial contribution to the fund. U.S. negotiators have historically emphasized the non-liability clause in the Paris Agreement and have opposed any interpretation of L&D that could give rise to international legal responsibility²⁹.

Domestically, climate-related compensation is framed in terms of disaster response and humanitarian aid, not legal redress. This position is influenced by concerns over exposure to transnational climate litigation and the absence of a legal mandate from Congress to authorize reparations. Legal experts argue that U.S. intransigence weakens the legal credibility of the L&D regime and limits the scope for more equitable burden-sharing³⁰.

South Asia and Sub-Saharan Africa: High Vulnerability, Low Bargaining Power

²⁵ "Communique of the 2023 Pacific Islands Forum Special Leaders Retreat | Pacific Islands Forum Secretariat," accessed June 29, 2025, <https://forumsec.org/publications/communique-2023-pacific-islands-forum-special-leaders-retreat>.

²⁶ "Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change: Resolution" (New York: UN, 4), <https://digitallibrary.un.org/record/4008332>.

²⁷ "COP28," Consilium, accessed June 29, 2025, <https://www.consilium.europa.eu/en/policies/paris-agreement-climate/cop28/>.

²⁸ Alicja Sikora, "European Green Deal – Legal and Financial Challenges of the Climate Change," *ERA Forum* 21, no. 4 (January 1, 2021): 681–97, <https://doi.org/10.1007/s12027-020-00637-3>.

²⁹ "Full Article: Loss and Damage Funding in the UN Climate Negotiations: From Dialogue to Reality," accessed June 29, 2025, <https://www.tandfonline.com/doi/full/10.1080/00139157.2023.2180268>.

³⁰ Audrey R. Chapman and A. Karim Ahmed, "Climate Justice, Humans Rights, and the Case for Reparations," *Health and Human Rights* 23, no. 2 (December 2021): 81–94.

Countries in South Asia (e.g., Pakistan, Bangladesh, Nepal) and Sub-Saharan Africa (e.g., Mozambique, Ethiopia) are among the most climate-vulnerable but often lack the negotiating leverage of larger blocs. Their governments have framed L&D as a human rights and development issue, frequently invoking international humanitarian law and the Sustainable Development Goals (SDGs) in their legal arguments³¹.

The country has been vocal in promoting the operation of L&D Fund after the 2022 floods in Pakistan that left more than 33 million people displaced. However, even with the ethical and empirical force of these arguments it is still often the case that these countries cannot contribute financially or institutionally to the international climate finance, in the event it is subject to complicated conditions or other administrative barriers³².

Overall, the comparative analysis shows how the global discourse on Loss and Damage is affected by different levels of divergent political interests, the legal tradition, and the profile of the vulnerability. Until such structural asymmetries are addressed, the L&D regime will be characterized by geopolitical trade-off as opposed to binding climate justice.

The Way Forward – Reforming the Legal Architecture

While the operationalization of the Loss and Damage Fund represents progress, the absence of a binding legal framework, enforceable obligations, and robust institutional oversight leaves the regime politically fragile and legally underdeveloped. To evolve into a credible instrument of climate justice, the Loss and Damage architecture requires foundational reform. These reforms should aim to ensure legal certainty, financial predictability, equitable access, and accountability.

Codification through a New Protocol or Amendment

One of the most direct routes toward legal formalization would be the development of a Loss and Damage Protocol under the Paris Agreement. This would mirror the precedent set by the Kyoto Protocol and would allow parties to negotiate binding provisions specific to climate-induced loss and damage. Such a protocol could include minimum annual contributions based on historical emissions and gross national income, as well as clear eligibility criteria and a dispute resolution mechanism³³.

Nevertheless, the political issue of the change of the protocol is doubtful. Past attempts in advancing legal commitments like that on emission cuts through the Kyoto Protocol have encountered immense opposition and involvement. However, formalizing L&D requirements would tie the mechanism into the treaty law due to its increased stability and legitimacy³⁴.

Institutional Independence and Reform of Fund Governance

The current interim arrangement with the World Bank risks diluting the fund's accountability to the UNFCCC framework and to recipient states. Moving forward, the fund must be placed under the direct governance of the UNFCCC COP or an independent L&D Secretariat, with representation from affected states, civil society, and indigenous groups.

³¹ "Climate Litigation in the Global South: Constraints and Innovations | Transnational Environmental Law | Cambridge Core," accessed June 29, 2025, <https://www.cambridge.org/core/journals/transnational-environmental-law/article/abs/climate-litigation-in-the-global-south-constraints-and-innovations/C2FE951D203AC61414E72C9244125258>.

³² "PDNA_report," n.d.

³³ David W. South, "Loss and Damage Fund—Operationalized at COP28 but Funding and Allocation Process Unresolved," *Climate and Energy* 40, no. 7 (2024): 29–32, <https://doi.org/10.1002/gas.22389>.

³⁴ Daniel Bodansky et al., *International Climate Change Law* (Oxford, New York: Oxford University Press, 2017).

Such an institutional redesign would help align the fund's governance with the principles of equity, transparency, and accountability embedded in the Paris Agreement. It would also resolve the conflict of interest posed by the World Bank's dual role as both trustee and donor representative³⁵.

Enforcement and Monitoring Mechanisms

To increase legal credibility, the fund must incorporate compliance mechanisms that monitor donor commitments and disbursements. These could include mandatory annual reporting by contributing states, public disclosure of fund allocations, and independent oversight by a climate finance compliance body. The Global Stock take process under Article 14 of the Paris Agreement could also integrate L&D financing into its assessment criteria³⁶.

In addition, it is wise to come up with a register of climatic damages, like that suggested under the UNFCCC transparency framework to be able to record losses related to climate systematically. Not only this would facilitate fund allocation decision but also may be used in the future legal claims and negotiation cycles.

Strengthening Legal Pathways through Advisory Opinions and Human Rights Mechanisms

The forthcoming international court of justice (ICJ) advisory opinion on legal roles of states with regard to climate change offers a seldom opportunity to elucidate the legal premise of L&D. Putting the Court in the position of certifying the legal obligations of states to prevent and correct transboundary climate damage would form a basis of legal responsibility in international or domestic courts in the future³⁷.

Moreover, the normative and legal force of L&D duties may be augmented by seeking the help of human rights mechanisms to establish L&D is a subset of the right to life, livelihood, dignity, e.g. through the UN Human Rights Committee, regional tribunals and so on. Such a strategy is conciliatory with the human rights-based approach which is gradually gaining momentum among vulnerable states and the civil society members³⁸.

Legal Integration with Other Regimes

Lastly, a more coherent and effective L&D may be brought about by some form of integration with other legal regimes operating internationally, including humanitarian law, disaster risk reduction and management (e.g. the Sendai Framework), and trade law. Such a would necessitate cross sectoral legal harmonization yet would substantially augment the normative decent of L&D at international governance.

Altogether, on the one hand, the Loss and Damage Fund can be seen as a moral and political step forward, but on the other hand, the Loss and Damage Fund is not complete yet on a legal level. It will be crucial to shift towards a legally binding, accountable, and inclusive legal regime beyond a soft law instrument that will assist in achieving the transformative potential of the Fund in climate justice.

Conclusion

³⁵ Michael Franczak, "Can the World Bank Deliver on Climate Change? Testing the Evolution Roadmap through Loss and Damage," n.d.

³⁶ "A Call for Action: Insights from the pre-COP28 Scholarly Discourse and beyond the Operationalization of the Loss and Damage Fund - Shumba - 2024 - Climate Resilience and Sustainability - Wiley Online Library," accessed June 29, 2025, <https://rmetsonline.wiley.com/doi/full/10.1002/cli2.70001>.

³⁷ "Obligations of States in Respect of Climate Change," accessed June 29, 2025, <https://www.icj-cij.org/case/187>.

³⁸ "Climate Justice - Centre for Human Rights," accessed June 29, 2025, <https://www.cfhr.com.pk/focus-areas/climate-justice>.

The creation and condition of the Loss and Damage Fund in COP28 are moving toward the critical focus which should have been drawn to the irreparable damages that have been suffered by susceptible countries due to the climate change. The term loss and damage came to the core of the climate-related discussions took many decades of promotion by states of the Global South, in particular by small island developing nations. Still, its formal basis is not very solid today, and it depends on political agreement rather than established law.

The present paper has engaged with developments of Loss and Damage regime, its legal standing, and modalities of its operation. It has revealed that although the Fund is a representation of moral development and diplomatic concession, it does not hold clear legal obligations over the major emitters. It is funded by voluntary contributions, is temporarily administered by the World Bank and its lack of an enforcement mechanism harms both its effectiveness and international legality. Comparative views depict disdefined and disproportional international approach towards loss and damage. Even though the European Union and related donors have financed the Fund, they still deny any form of legal responsibility. In the meanwhile, extremely vulnerable countries, which tend to be the least responsible ones when it comes to global warming, find it challenging to gain access to resources in an adequate, timely, equitable, and rights-based manner.

To realize its vision of climate justice, the Fund has to address legal change dramatically. These are: codification of obligations, including in a specific protocol, creation of separate governing institutions, enforcement mechanisms via the use of monitoring mechanisms, and inclusion of loss and damage in the larger international legal framework, including human rights and humanitarian law. No less important is the developing jurisprudence of international courts that can provide advisory opinions and further judgments, which may lead to the recognition of the state liability on the damage caused by climate.

In its present form, the Loss and Damage Fund is a crucial but incomplete tool. If the global community is to uphold the principles of equity, accountability, and intergenerational justice, the legal architecture of loss and damage must evolve beyond soft law diplomacy and toward enforceable, inclusive, and rights-based climate governance.