

Finance for Loss and Damage

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*This advice is provided in response to **Query 15/23***

Query:

- 1. Are there any provisions in the Convention and/or the Paris Agreement that explicitly or implicitly create an obligation to provide financial resources for loss and damage?**
- 2. If the answer is in the negative, are there any other provisions (in COP/CMA decisions) that support the view that an obligation to provide finance has been created?**

Advice:

Executive summary

While the Convention and the Paris Agreement do not contain obligations to provide financial resources to specifically address loss and damage, the language in Article 8 of the Paris Agreement potentially covers the provision of financial resources to developing countries as a means to pursue the implementation of Article 8. [While COP/CMA decisions are not legally binding on the Parties, there appears to be a clear collective commitment to create financial flows that directly respond to loss and damage in particularly climate vulnerable developing countries. However, it seems unlikely that developed country Parties would ever agree to an obligation to pay in this context.]

1. Obligation to provide financial resources for addressing loss and damage in the Convention and/or Paris Agreement

The UN Framework Convention on Climate Change (Convention) and the Paris Agreement create a very limited number of obligations for their Parties. In the case of the Paris Agreement, these are solely of a procedural nature and require a Party to, for example, communicate or maintain a nationally determined contribution (NDC) under Article 4 para. 2, submit information on greenhouse gas emissions and progress (Article 13 para. 7) or participate in the facilitative, multilateral consideration of progress (Article 13 para. 11).

The Convention, in Article 4 para. 3, in comparison, contains a substantive obligation for the developed country Parties listed in Annex II to “provide new and additional financial resources” to developing country Parties in order to meet certain costs associated with, for example, the establishment of emission recording and reporting systems, policy development or research. In addition, the developed

country Parties are required to facilitate and finance the transfer and access “to environmentally sound technologies and know-how” (Article 4 para. 5) and to financially support the adaptation of particularly vulnerable developing countries to the adverse effects of climate change (para. 4).

This commitment (to financially support the adaptation of particularly vulnerable developing countries) could be considered to include finance to address loss and damage associated with the adverse effects of climate change. However, in the international climate negotiations, developing country Parties have consistently rejected this argument as they regard loss and damage as a distinct subject area and separate from adaptation.

The Paris Agreement (in Article 9 para. 1) reinforces the existing obligation by developed country Parties to provide financial resources “in continuation of their existing obligations under the Convention”. But it does not create any new financial obligations regarding, for example, specifically the costs of addressing loss and damage in developing countries.

The Paris Agreement contains the first freestanding article on loss and damage (Article 8). Previously, the term had only been recognised in decisions of the parties. The provision integrates the existing Warsaw International Mechanism for Loss and Damage (WIM) into the Agreement and contains a non-exhaustive list of areas for cooperation between the Parties. Unlike other components of the Paris Agreement (e.g., Article 7 para. 13 on support for adaptation) Article 8 does not have a specific link to the means of implementation and support (Articles 9 to 12), including financial support. This could be because of the last-minute inclusion of the article into the final text of the Paris Agreement.

Article 8, in paras. 3 and 4, however, encourages (“should”) the Parties in general terms to “enhance understanding, action and support” with respect to loss and damage. While this provision does not create an obligation or clear expectation of financial assistance, the term “support” potentially covers the provision of financial resources to developing countries as a means to pursue the implementation of Article 8.

2. Obligation to provide financial resources for addressing loss and damage in other provisions

2.1 COP/CMA decisions

Prior to the adoption of the Paris Agreement, the WIM was established at COP 19 in 2013 as the main vehicle under the UNFCCC to promote the implementation of approaches to address loss and damage associated with the impacts of climate change. Its functions comprise enhancing knowledge and understanding of comprehensive risk management approaches; strengthening stakeholder collaboration; and also enhancing action and support, which explicitly includes technology, capacity-building and finance.¹ As part of the decision establishing the WIM (in para. 14) developed country Parties were also requested to provide developing country Parties with finance, technology and capacity-building.

Following a review of the WIM, in their decision in COP 25 Madrid in 2019, the Parties “urged” the scaling-up of action and support, as appropriate, including finance, technology and capacity-building, for developing countries that are particularly vulnerable to the adverse effects of climate change.² The decision addresses private and non-governmental organizations, funds and other stakeholders and refers to a wide variety of sources for funding (paras. 33 and 34 of the decision).

In Glasgow in 2021, Parties established the Glasgow Dialogue to discuss the arrangements for the funding of activities to avert, minimize and address loss and damage associated with the adverse

¹ Decision 2/CP.19, para. 5

² Decision 2/CMA.2, para.32

impacts of climate change.³ The decision on the Dialogue (in para. 64) also urges developed country Parties, the operating entities of the Financial Mechanism, and other entities and institutions to provide enhanced and additional support for activities addressing loss and damage.

At the following meeting in Egypt in 2022, Parties agreed on a new item under the COP and CMA agendas to discuss matters relating to funding arrangements responding to loss and damage. During the subsequent negotiations, they decided to establish new funding arrangements comprising a designated fund whose mandate includes a focus on addressing loss and damage.⁴ A transitional committee was set up to make recommendations on the operationalization of the new arrangements (para. 4 of the decisions) and (in para. 13) the Parties reiterated their request for enhanced and additional support to a variety of stakeholders, including developing country Parties.

COP/CMA decisions are not legally binding on the Parties.⁵ But there is now a clear political commitment to create financial flows that directly respond to loss and damage in particularly climate vulnerable developing countries. There is, however, no agreement yet on where exactly the new and additional resources (from a wide variety of sources) will come from.

In their future deliberations, Parties could consider the creation of new obligations on, for example, companies or other entities but it appears rather unlikely that developed country Parties will ever accept an obligation (to pay) in this context. At some point, they will commit financial resources to support the new arrangement – and some governments have already pledged money.⁶

2.2 Rules of public international law

The principle or duty of prevention, or “no harm”, is a widely recognised principle of public international law – the law that applies between states. In general terms, it requires a state to prevent, reduce and control the risk of environmental harm to other states and in areas beyond national jurisdiction. The principle is quoted in the preamble to the Convention.

The legal precedent usually cited in this context concerns a Canadian smelter whose sulphur dioxide emissions caused air pollution damage across the border with the United States.⁷ The arbitral tribunal in that case found that no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, and that the Government of Canada had to pay compensation for damage caused in the United States.

The rule has been authoritatively confirmed by the International Court of Justice (ICJ). In its advisory opinion on the threat or use of nuclear weapons, the ICJ stated that: “The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment”.⁸

As the result of a breach of an international obligation (that constitutes an internationally wrongful act) the responsible state may have to provide reparation for the consequences of the breach.⁹ If and to what extent the principle applies in the climate change context and may result in specific state

³ Decision 1/CMA.3, para.73

⁴ Decisions 2/CMA.4 and 2/CP.27, Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage, paras.2 and 3

⁵ In principle, they could subsequently change them again. In practice, however, that rarely happens.

⁶ See for example: <https://www.gov.scot/news/funding-pledge-for-loss-and-damage/>

⁷ Trail Smelter Arbitration (United States v Canada) UN Reports of International Arbitral Awards (UNRIAA), 16 April 1938 and 11 March 1941, Vol III at 1905–82

⁸ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996, ICJ Rep 226, para.2

⁹ ILC ‘Draft articles on the responsibility of states for internationally wrongful acts’ (n 33) Articles 30 and 31

obligations is subject to a request for a legal advisory opinion by the International Court of Justice (ICJ).¹⁰

¹⁰ UN General Assembly Resolution, Obligations of states in respect of climate change, 29 March 2023; ICJ Order, 20 April 2023, available at: <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230420-ORD-01-00-EN.pdf>