

**Including a sub-goal on loss and damage within the New Collective Quantified Goal**

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*This advice is provided in response to **part of Query 04/24***

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**Query:**

***What are some of the considerations relevant for the inclusion of a sub-goal on loss and damage within the NCQG?***

**Advice:**

A. **Potential Arguments in Favour of the Inclusion of Loss and Damage as a Sub-Goal of the NCQG**

**Argument #1:** While previous COP/CMA decisions draw a link between the New Collective Quantified Goal on Climate Change (NCQG) and Articles 2 and 9 of the Paris Agreement, there is nothing in those decisions that indicates that, subsequently, loss and damage cannot be within the scope of the NCQG.<sup>1</sup> Rather, the language used throughout these decisions is that the NCQG is designed to “increas[e] the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emission development”; “mak[e] finance flows consistent with a pathway towards low greenhouse gas emission and climate-resilient development” and “take into account the needs and priorities of developing countries”.<sup>2</sup> In fact, if one accepts that climate finance includes finance for loss and damage (see below), then there is nothing stopping parties from a legal perspective to include a subgoal on loss

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<sup>1</sup> See, in particular, Decision 1/CP.21 (2015): <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=8>; Decision 14/CMA.1 (2018): [https://unfccc.int/sites/default/files/resource/CMA2018\\_03a02E.pdf#page=3](https://unfccc.int/sites/default/files/resource/CMA2018_03a02E.pdf#page=3); Decision 9/CMA.3 (2021) <https://www.nrdc.org/bio/joe-thwaites/what-might-new-global-climate-finance-goal-look-0>; and Decision 5/CMA.4 (2023) <https://unfccc.int/documents/626569>.

<sup>2</sup> Ibid.

and damage. As this is a party-led process, parties (countries) are free to agree to include this in the scope. Furthermore, Decision 2/CMA.4 in the context of funding arrangements acknowledges the “urgent and immediate need for new, additional, predictable and adequate financial resources to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change”.<sup>3</sup>

**Argument #2:** There is no commonly accepted definition of “climate finance” articulated in the Paris Agreement or the UNFCCC. However, there is evidence that the concept is evolving towards an inclusion of loss and damage:

- although it has not been officially adopted, the Standing Committee on Finance (“SCF”) has stated the following to be the current definition in use: “Climate finance aims at reducing emissions and enhancing sinks of greenhouse gases and aims at reducing vulnerability of, and maintaining and increasing the resilience of, human and ecological systems to negative climate change impacts.”<sup>4</sup> Loss and damage arguably fall within the ambit of reducing vulnerability and maintaining and increasing resilience to negative climate change impacts.<sup>5</sup>
- countries established funding arrangements and a fund to address loss and damage. This is a recognition that finance to address loss and damage is envisaged.
- The fund is as an entity entrusted with the operation of the financial mechanism of the Convention, which also serves the Paris Agreement. The inclusion of the loss and damage fund as part of the entities in charge of the operation of this mechanism is a further recognition that finance to address loss and damage is envisaged.
- In its 2023 report on the matter, the SCF:<sup>6</sup>

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<sup>3</sup> Decision 2/CMA.4 (2023) <https://unfccc.int/sites/default/files/resource/decision%202%20CMA%204.pdf>, 14 [1].

<sup>4</sup> Report of the Standing Committee on Finance, Addendum 2: Executive Summary of the Report on Clustering Types of Climate Finance Definitions in Use, 9 November 2023, ¶ 44(a).

<sup>5</sup> Patrick Toussaint, Loss and Damage, Climate Victims, and International Climate Law: Looking Back, Looking Forward, 13 *Transnational Environmental Law* 1, 134, 137 (2024), available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/CB089646C303F95A4C630405E2F81E09/S2047102523000237a.pdf>

<sup>6</sup> As there is wide “variation in perspectives and expectations concerning what should be the scope of a definition of climate finance”, the COP 27 requested the SCF to prepare a report “on definitions of climate finance” so the Parties may consider the adoption of a single definition for use in UNFCCC processes Report of the Standing Committee on Finance, Addendum 2: Executive Summary of the Report on Clustering Types of Climate Finance Definitions in Use, 9 November 2023, ¶¶ 1, 5.

- in reviewing the submissions by the Parties noted that “[i]n terms of coverage and scope, all Parties affirmed the focus of operational definitions of climate finance on mitigation and/or adaptation (including cross-cutting, covering both mitigation and adaptation), **with some also referring to finance for addressing loss and damage** (e.g. relocation) and one referring to finance for disaster risk management”;<sup>7</sup>
- identified the climate-related thematic categories/scope of a definition as including: (1) mitigation and adaptation, and cross-cutting; (2) **averting, minimizing and addressing loss and damage**, and (3) other climate and environmental objectives depending on the focus or context.<sup>8</sup>

**Argument #3:** The original goal and the NCQG were defined as collective goals to mobilize climate finance for “meaningful mitigation actions and transparency in implementation.”<sup>9</sup> However, adaptation finance was subsequently included as part of the mobilization and provision of climate finance in light of the enhanced recognition of the issue within the international climate regime. Likewise, this regime has been recognising the need for specific finance to address loss and damage (see argument 2 above). In a similar way it could be argued that loss and damage comes within the scope of the NCQG. The aim of the NCQG as “decided” by the Parties is to contribute to accelerate the Paris Agreement’s three goals set out in Article 2 (temperature goal, adaptation goal and finance flows goal) (see para. 15 of [Decision 9/CMA.3](#)). As such, Parties clearly envisage that the NCQG goes beyond mitigation and adaptation.

**Argument #4:** The COP 21 decision adopting the Paris Agreement made clear that the NCQG would “tak[e] into account the needs and priorities of developing countries.”<sup>10</sup> Indeed, subsequently, Parties “decided” that “the consideration of the [NCQG] will ... take into account the needs and priorities of developing countries” (para. 16 of Decision 9/CMA.3). The

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<sup>7</sup> Report of the Standing Committee on Finance, Addendum 2: Executive Summary of the Report on Clustering Types of Climate Finance Definitions in Use, 9 November 2023, ¶ 9.

<sup>8</sup> Report of the Standing Committee on Finance, Addendum 2: Executive Summary of the Report on Clustering Types of Climate Finance Definitions in Use, 9 November 2023, ¶ 7.

<sup>9</sup> Report of the Conference of Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, 29 January 2016, ¶ 53, available at <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=8>.

<sup>10</sup> Report of the Conference of Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, 29 January 2016, ¶ 53, available at <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=8>.

following submissions of developing countries to the Ninth Technical Expert Dialogue under the ad hoc programme indicate that addressing loss and damage is a need and priority for developing countries. While developing countries agree on including L&D as a stream of climate finance under the NCQG, not all concur about having it as a subgoal.

- Honduras on behalf of the Independent Association of Latin America and the Caribbean (AILAC)<sup>11</sup>: “To shape the direction of the NCQG, it will be fundamental to deepen the actions for which the mobilization and provision of climate financing resources to developing countries will be directed: **mitigation, adaptation, and loss and damage.**”<sup>12</sup>
- Brazil on Behalf of the Group SUR<sup>13</sup>: The Group SUR further considers that NCQG must reflect both the pressing need for concrete action, including for adaptation, alongside the overarching objective of limiting global warming to 1.5°C. To achieve this, the Goal must include both short and long-term targets, both of which must be concrete, traceable and based on the best science, and not merely aspirational targets. These targets must address the evolving needs and priorities of all developing countries for, at least, **mitigation, adaptation, and loss and damage response**, while being periodically reviewed, flexible, and including quantitative and qualitative aspects.<sup>14</sup>
- Zambia on Behalf of the African Group of Negotiators (AGN): “We recall decision 9/CMA, paragraph 3 and note that the purpose of the new goal is to contribute to the accelerated delivery of ambitious actions and pledges of developing countries’ **mitigation, adaptation, addressing loss and damage** as well as other climate-related strategies and programmes that should be

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<sup>11</sup> The AILAC Group is composed on the following countries: Chile, Colombia, Costa Rica, Guatemala, Honduras, Panama, and Peru.

<sup>12</sup> Submission by Honduras on Behalf of the AILAC Group of Countries of Chile, Colombia, Costa Rica, Guatemala, Honduras, Panama, and Peru, *available at* [https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202404181927---AILAC%20submission%20TED9\\_vf.pdf](https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202404181927---AILAC%20submission%20TED9_vf.pdf)

<sup>13</sup> The Group Sur is composed of the following countries: Argentina, Brazil, Paraguay, and Uruguay.

<sup>14</sup> Submission of Brazil on Behalf of the Group SUR, 22 February 2024, *available at* <https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202402221636---Group%20SUR%20-%20NCQG%20-%202024%20work%20plan.pdf>

implemented and delivered within the principles of the Convention and Paris Agreement [...].”<sup>15</sup>

- Samoa on behalf of the Alliance of Small Island States (AOSIS): Proposing “[s]ub-goals aligned to Article 9, including in particular Article 9, paragraph 4 to ensure that...developing countries are able **to address loss and damage associated with the adverse effects of climate change** to the worst-case projected temperature scenario.”<sup>16</sup>

*B. Potential Arguments Against the Inclusion of Loss and Damage as a Sub-Goal of the NCQG and counter-arguments*

**Argument #1:** Article 9 of the Paris Agreement does not mention loss and damage—just mitigation and adaptation—while Article 8 of the Agreement addresses loss and damage but does not mention the means of implementation and support (Articles 9-12), including financial support.

**Counter-argument #1:** Parties did envisage financial support as a means to pursue the implementation of Article 8. Article 8, in paras. 3 and 4, 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.<sup>17</sup> Furthermore, para. 4(f) of Article 8 specifically lists “risk insurance facilities, climate risk pooling and other insurance solutions” as a type of cooperation and facilitation initiative for the purposes of Article 8. Risk insurance facilities that have been set up in the past have included the provision of financial assistance, as well as technical assistance, to address climate change,

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<sup>15</sup> Submission of Zambia on Behalf of the African Group of Negotiators (AGN) on the New Collective Quantified Goal on Finance, 21 February 2024, *available at* [https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202402211912---Submission%20by%20the%20Republic%20of%20Zambia%20on%20behalf%20of%20\(AGN\)%20%20on%20NCQG.pdf](https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202402211912---Submission%20by%20the%20Republic%20of%20Zambia%20on%20behalf%20of%20(AGN)%20%20on%20NCQG.pdf)

<sup>16</sup> Submission of Samoa on behalf of the Alliance of Small Island States, 19 February 2024, *available at* <https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202402191249---AOSIS%20-%20CC%20Finance%20-%20NCQG%20-%20Submission%20-%20Work%20Plan%202024%20-%202024-02-19.pdf>

<sup>17</sup> See LRI advice <https://legalresponse.org/legaladvice/finance-for-loss-and-damage/>

adaptation and vulnerability.<sup>18</sup> It can therefore be seen that financial support was envisaged as a means to pursue the implementation of Article 8 and that facilities with similarities to the proposed Loss and Damage Fund have already been set up to pursue the implementation of Article 8.

With regard to Article 9 not mentioning loss and damage specifically, this is not a barrier to its inclusion as a sub-goal of the NCQG. As this is a party-led process, Parties are free to agree to including this sub-goal. Furthermore, paragraphs 3 and 4 of Article 9 refer to “taking into account the needs and priorities of developing country Parties” and loss and damage clearly is (this line of argument is further detailed above). Indeed, Parties “decided” that “the consideration of the [NCQG] will ... take into account the needs and priorities of developing countries” (para. 16 of Decision 9/CMA.3).

**Argument #2:** The US has [reportedly](#) made the assertion the NCQG is a “voluntary” goal for those who “choose to pay” and postulated that the language in the Paris Agreement around finance was not mandatory.

**Counter-argument #2:** Although there are various interpretations of Article 9 of the Paris Agreement, the reach of Article 9.1 is not in argument: it is a legally binding provision. Interpretations differ, however, on which countries it applies to. [Previous LRI advice](#) finds that all developed country Parties have an obligation to provide financial resources under Article 9.1. While this forms a new obligation for those developed country Parties that are not in Annex II to the Convention, it continues an existing obligation for those developed country parties that are listed in Annex II to the Convention. By contrast, Article 9.2 encourages “other Parties” to voluntarily provide such support.

Article 9.3. sets out a non-binding commitment on developed countries. However, the use of “should” (“should continue to take the lead in mobilizing climate finance...”) creates an expectation that developed countries will follow through on their commitment. There are, arguably, various degrees of legal bindingness, and the wording used in this provision – together with the obligation to interpret treaty provisions in good faith, in light of the treaty’s objectives, and perform them in good faith - means that it cannot be simply ignored. The language of Article 9.3 (“should”) is in any case stronger than that of Article 9.2 that “encourages” other countries to support “voluntarily”.

**Argument #3:** For some (developed) countries, including a sub-goal on L&D within the NCQG would open up issues of liability and compensation (see for example reported

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<sup>18</sup> See, for example, the Caribbean Catastrophe Risk Insurance Facility: <https://unfccc.int/topics/adaptation-and-resilience/resources/S-N/CCRIF>

position of Switzerland [here](#)). Similarly, reference to the “legal implications” of including this sub-goal have been raised.

**Counter-argument #3:** the issue of L&D has been opposed for years by developed countries for fear of being held responsible and therefore liable to compensate developing countries’ losses and damages arising from the adverse impacts of climate change. Parties to the Convention agreed in paragraph 51 of the COP decision adopting the Paris Agreement, that “Article 8 of the Agreement does not involve or provide a basis for any liability or compensation”. The wording of paragraph 51 is ambiguous. It is arguable that it relates to no more than liability or compensation within the context of the treaty-based regime.<sup>19</sup> Therefore, as Parties have accepted this, it is unclear how some could hold the argument that including a sub-goal on L&D within the NCQG would open up issues of liability and compensation.

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<sup>19</sup> See [LRI advice paper](#) on “If and to what extent does Art.8 of the Paris Agreement in conjunction with accompanying COP decision 1/CP.21, paragraph 51, exclude the application of the general rules of public international law, in particular on state responsibility?”