

Finance for Loss and Damage within the New Collective Quantified Goal of finance: analysis of the contributors base

IMPORTANT: Legal Response International (LRI) acts as an intermediary in obtaining legal advice from third parties on the query you have raised. That advice is provided to LRI but we are able to share it with you. The third-party advisers have accepted certain duties to LRI but have not and do not accept any duty to you. LRI itself does not and cannot provide legal advice. As a consequence, LRI takes no responsibility for the content of any advice that it forwards, nor does it accept any responsibility for any delay either in obtaining or sending copies to you of the advice it receives.

In forwarding the advice to you, LRI does not intend to create a lawyer-client relationship with you and to the extent permitted by law, any liability of LRI to you (including in negligence or for any damages of any kind) is excluded. Any dispute between you and LRI shall be governed by English Law, and the English Courts will have exclusive jurisdiction. In consideration of LRI sharing the advice with you, you agree to the terms set out above.

*This advice is provided in response to **Query 57/24***

Query:

1. Based on your understanding of the relevant provisions and decisions, what is the contributor base under the NCQG and what is the contributor base under the LDF?
2. If they are different, could that be a bar to the NCQG including L&D as a sub-goal?
3. If not a bar, how can the NCQG accommodate both mandatory contributions by developed countries for mitigation and adaptation, and voluntary contributions by all parties?
4. Are there any helpful precedents of another international mechanism?
5. Could you suggest draft decision text to accommodate this distinction within the NCQG?

Advice:

Introduction

1. The first collective quantified goal for finance was agreed in 2009 in the Copenhagen Accord in COP15 and confirmed later in 2010 in the Cancun Agreements.¹ The COP qualified this as a “collective commitment” of developed (Annex-I) countries which notably consisted of a mobilization of new and additional resources up to USD 100 billion per year by 2020. The wording of the decisions does not make explicit reference to Article 4(3) and Article 11 of the Convention concerning the collective obligation of developed states to source and channel new and additional finance. Despite that, commentators are of the view that this voluntary (non-binding) and collective (not individual) commitment is related to that binding collective obligation, as it is analysed as a delivery of financial collective commitments under the convention.² The commitment extends the type of finance to be mobilized beyond public sources, including private, bilateral and multilateral, and alternative sources.³

¹ Dec. 2/CP.15, para 8 and Dec. 1/CP.16, paras 95-98.

² Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 140.

³ Dec. 1/CP.16, para 99.

2. The collective commitment was extended to 2025 under the COP Decision adopting the Paris Agreement,⁴ which also initiated a process to agree on a New Collective Quantified Goal (NCQG) for finance mobilization holding the existing goal as a floor.⁵ Art. 9 of the Paris Agreement states that:

9.1. “developed country Parties **shall** provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention”,

9.2. non-developed country (other) Parties are **encouraged** to do so on a voluntary basis, and

9.3 developed country Parties “should continue to *take the lead* in mobilizing climate finance...” taking into account the needs and priorities of developing countries.

3. In parallel to these provisions on finance, COP27/CMA4 and COP29/CMA5 established another finance stream related to Loss and Damage. While Article 8 of the Paris Agreement on Loss and Damage does not make explicit mention of finance-related commitments, the COP/CMA decisions established:
- a. **new funding arrangements** for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage, including with a focus on addressing loss and damage by providing and assisting in mobilizing new and additional resources, [...] these new arrangements **complement and include** sources, funds, processes and initiatives **under and outside** the Convention and the Paris Agreement.⁶
 - b. A Fund for Loss and Damage, as an operating entity of the Financial Mechanism of the Convention,⁷ and acting “in the context of establishing” new funding arrangements.⁸
4. As the mandate of the Ad Hoc Work Programme on the NCQG is about to end, this query comprises four questions generally addressing the issues of identifying a contributor base for the NCQG and analyse the extent to which this is a potential barrier to creating a sub-goal for Loss and Damage finance *within* the NCQG.

With such background this advice will answer each question directly.

Advice

5. **Q1: Based on your understanding of the relevant provisions and decisions, what is the contributor base under the NCQG and what is the contributor base under the LDF?**

As seen in para. 2 above, the NCQG is inherently linked to Art. 9 of the Paris Agreement. Differently from Art. 4(3) of the Convention, the Agreement extends the contributor base to finance by confirming a collective (binding) obligation on developed countries⁹ to provide (including mobilizing and

⁴ Dec. 1/CP.21, para 53.

⁵ Ibid.

⁶ Dec 2/CP.27 and 2/CMA.4, para 2 [emphasis added].

⁷ Dec 1/CP.28 and 5/CMA.5, para 5.

⁸ Dec 2/CMA.4, para 2.

⁹ Differently from Annex I of the Convention the term ‘developed country Party’ does not identify a fixed list of countries. This can change through time and practice under the Agreement.

channelling) financial resources, and introducing the possibility for other country Parties to do the same on a voluntary basis. The COP/CMA decisions related to the NCQG remain silent on determining a specific contributor base, including on the specification in the Paris Agreement that other Parties can also mobilize (as part of ‘providing’ in Art. 9.3) resources as contributors of the NCQG.¹⁰

6. As to the contributor base of the Loss and Damage (LD) Fund, a distinction should be made between *new funding arrangements* on LD, and *the Fund*. The latter is an operational entity of the Financial Mechanism entrusted with the channelling (not mobilizing) of multilateral (thus, not bilateral) financial resources related to LD.¹¹ While the Fund has the potential to play a significant role in the disbursement of mobilized LD finance, it is the ‘operationalization of new funding arrangements’ that can be linked to the NCQG, since it presumably includes the question of mobilization of financial resources on LD that include but also go beyond those to be managed by the LD Fund.
7. With this clarification, the contributor base of the LD new funding arrangements remains undefined. Decisions 2/CP.27 and 4/CMA.4 are silent on the matter and, in defining the recommendations for the transitional committee on the operationalization of the arrangements it states the consideration of “identifying and *expanding*” the sources of funding.¹² While this expression does not refer to an expansion of the contributors’ pool, it can still be interpreted as an opening to the possibility that funding sources mobilized by and from other (non- developed) countries can become part of the new funding arrangements.
8. Also, the contributor base of the Loss and Damage Fund remains undefined. The COP/CMA decisions are silent on the matter, and the latest meeting of the Fund’s Board does not include the question of identifying a contributor base in its agenda items and workplan for 2024.¹³
9. While we note that previous COP decisions have requested developed countries to provide developing countries finance when deciding on approaches for addressing loss and damage (Decision 3/CP.18) and when establishing the Warsaw International Mechanism (Decision 2/CP.19) if/what bearing this will have on the discussion on both contributor bases is unclear.
10. Based on these elements, the conclusion is that both the contributor bases for the NCQG and the LD Fund (including the new arrangements), while certainly including developed country Parties, can also potentially include other country Parties. This is particularly the case for the NCQG in relation to the provisions of Art. 9 of the Paris Agreement which open up the possibility for voluntary provision of finance from non-developed countries.
11. **Q2: If they are different, could that be a bar to the NCQG including L&D as a sub-goal?**

The above has found that there is no evident difference between the contributor bases of the NCQG and LD finance. The lack of a clear identification of a contributor base in the relevant CMA decisions does not exclude that LD finance in the ‘operationalization of new funding arrangements’ can also be concretised as sub-goal of the NCQG. This is a political question entering within the prerogatives of the CMA.¹⁴

¹⁰ The decisions under scrutiny are: 1/CP.21, 14/CMA.1, 9/CMA.3,5/CMA.4 and 8/CMA.5.

¹¹ See Governing Instrument of the Fund, Dec. 5/CMA.5, Annex, para 3.

¹² Dec. 2/CP.27 and 2/CMA.4, para 5(c).

¹³ Un Doc. FLD/B.2/9 1 July 2024

https://unfccc.int/sites/default/files/resource/WorkPlan_of_the_Board_for_2024.pdf.

¹⁴ See Article 16(4) of the Paris Agreement.

12. Q3 and Q4: If not a bar, how can the NCQG accommodate both mandatory contributions by developed countries for mitigation and adaptation, and voluntary contributions by all parties? Are there any helpful precedents of another international mechanism?

While this question goes beyond the nature of a legal advice, there are some clarifications that these two joined questions beg. First, the nature of the NCQG for developed countries will not be mandatory: regardless of the wording, the NCQG will remain a ‘collective commitment’ within a non-binding legal instrument (a decision of the CMA). Despite that, as the experience with the previous NCQG shows, there are transparency processes and initiatives that seek forms of collective accountability of developed states when the goal is collectively not met. In other words, while there is a collective general obligation (mandatory) on developed states to provide finance, there is only a collective non-binding commitment (the NCQG) to mobilize a quantum related to it.

13. With this at hand, a helpful precedent that can illustrate ways in which developed and non-developed countries have pooled together financial resources from developed and developing countries on both mandatory and voluntary basis in different sub-streams is the Replenishment of the Global Environment Facility (GEF). The GEF is one of the operating entities of the Financial Mechanism of the Convention and also serves the Paris Agreement. It is also the international institution entrusted with the management of the financial mechanisms of other multilateral environmental agreements. Finance to the GEF by states is pooled within one GEF Trust Fund, managed by the World Bank as trustee. Every five years, the GEF launches a process of replenishments of its Trust Fund, where state members meet and agree on a set of quantified individual financial pledges as contributors. Importantly also developing and least-developed countries contribute to the Trust Fund,¹⁵ since formal voting in the GEF organs is weighted also on the amount of contributions.¹⁶ Thus, the contributor base of the GEF Trust Fund potentially extends to all countries. Developed countries Parties to different Multilateral Environmental Agreements pledge amounts at the GEF replenishment process in application of their collective binding obligation to channel finance (e.g. Art. 4.3 UNFCCC). Thus, in a way there is mandatory component behind that finance which was linked to the NCQG of the Cancun Agreements. What is mandatory is not to channel a specific amount of finance individually, but to make use ALSO of the GEF to channel mandatory finance (UNFCCC Art.11). Developing countries, and few of them, have pledged finance only on a voluntary basis, since there is no collective obligation and no NCQG for them. Moreover, each replenishment phase includes a complex exercise of resource allocation, since finance pledged in the Trust Fund must be channelled to different environmental areas. For example, the allocation of the last replenishment included ‘focal areas’ such as biodiversity, climate change mitigation, land degradation, chemicals and waste, etc.¹⁷ Each focal area is divided in sub-streams of finance on specific themes and activities.

14. While resource allocation concerns more the ‘channelling’ of finance, than its ‘mobilizing’ which the NCQG is tasked to achieve, nonetheless the example illustrates how in international environmental finance there are precedents of coordinated segmentation and scoping of financial streams among states. To be sure, transposing this approach to the current workstream of the NCQG might be difficult and complex. However, the approach also elucidates how it is possible to identify sub-goal(s) related to specific thematic areas, such as LD, within the question of drawing a specific *quantum* of all climate

¹⁵ <https://www.thegef.org/projects-operations/donor-countries>.

¹⁶ See ‘Instrument for the Establishment of the Restructured Global Environment Facility’ (1994, reprinted as amended in 2019),

https://www.thegef.org/sites/default/files/publications/gef_instrument_establishment_restructured_2019_v1.pdf.

¹⁷ https://www.thegef.org/sites/default/files/2023-01/GEF-8_PD_Annex2_Resource_Allocation.pdf.

finance under the Agreement. The CMA holds the authority to adopt and exercise an approach of this kind in implementation of Article 9.¹⁸

15. Q5: Could you suggest draft decision text to accommodate this distinction within the NCQG?

The author could not engage on this aspect, given that an activity of this kind would need several interactions with the querier about the specific aims and political/technical possibilities.

¹⁸ On the possible arguments for the establishment of an LD finance sub-goal under the NCQG see this previous advice by LRI: <https://legalresponse.org/wp-content/uploads/2024/06/Advice-to-Q04-24-LnD-as-subgoal-of-NCQG.pdf>.