

Investment layer in revised draft of NCQG decision

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*This advice is provided in response to **Query 106/24***

Context

Under the existing finance goal, developed countries pledged to mobilize US\$100 billion annually by 2020 to address developing countries' needs. This goal was extended to 2025. Most of this finance has been provided in the form of public finance.

In the discussions related to the NCQG some of the options being put forward include a multi-layer approach of a core public finance goal, supplemented by other goals including investment flows to developing countries.

Query

1. What, if any, legal issues might arise if an investment layer is included in the NCQG (given that such an element was not part of the 100bn goal)?
2. If such an element is included in the NCQG how could parties (contributors) be held accountable, especially for the quantity of these flows, bearing in mind that the reporting obligations under the UNFCCC/PA are addressed to parties, i.e. countries and not the private sector.
3. In a scenario where the investment layer is agreed, what type of language would increase the possibility of holding governments accountable for reaching objectives set for this outer layer/investment goal.

Advice:

A new draft text on the NCQG is available, [NCQG4 22/11/24 15:30](#). This advice is complementary to our previous advice responding to the below questions in respect of the previous version (21/11/2024 3:00).

On question 1:

The main legal issue that can be foreseen in case of the inclusion of an investment layer to the NCQG is the risk of diluting developed country parties obligation to provide and mobilise finance to developing countries in case of imprecise formulation and insufficient separation between the public finance and investment goals, interconnected with the risk of accounting inconsistencies. These

problems arose already from the 100bn goal and are known also more generally in the area of climate finance.

Arguably the 100bn goal already included an investment layer, but it did not delineate the responsibilities of states versus those of non-state actors. The decision text (decision 2/CP.15, paragraph 8) goes as follows:

“In the context of meaningful mitigation actions and transparency on implementation, developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries. This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance.” [emphasis added]

We note that the latest version of the draft NCQG decision text ([NCQG4 22/11/24 15:30](#)) uses identical language in paragraph 8:

“In this context, decides to set a goal in extension of the goal referred to in paragraph 53 of decision 1/CP.21, with developed country Parties taking the lead, to USD 250 billion per year by 2035 for developing country Parties for climate action:

(a) From a wide variety of sources, public and private, bilateral and multilateral, including alternative sources;” [emphasis added]

The inclusion of these varied possible sources of funding in the 100bn goal decision text has led to considerable differences in counting the finance provided, and to competing claims as to the achievement or non-achievement of the 100bn goal.

Some might argue that the possibility to count private or other “alternative” sources towards the goal has weakened the obligation on states to provide their share. To put it in slightly oversimplified terms, states were able to say that their citizens, in a private/business capacity, had made sufficient investments in mitigation and adaptation measures so that states did not need to provide funding from public sources anymore.

In some cases, and in the absence of either a definition of climate finance or a clear methodology for determining what counts as climate finance, the private activities counted by states towards the 100bn goal have been criticised as having dubitable climate impact. In other cases, there were important doubts on the additionality and newness of such private sector climate measures. In other words, critics doubt that states actually “mobilized” private investments in climate-relevant activities and rather counted activities that the private sector would have undertaken in any case.

A crucial point for the NCQG would therefore be to avoid such ambiguity and limit as best as possible the opportunities for vague or double counting. This could be achieved by clearly separating the goals of the inner (i.e. public finance) and outer (private, alternative sources) layers of the NCQG, including a separation of the quantitative targets of each goal. The draft decision text (NCQG4 22/11/24 15:30), in using similar language to that used in decision 2/CP.15, does not do this, thereby laying the ground for similar claims/criticisms as those indicated above, particularly if it is not backed up by clear reporting lines. [add reference to the absence of ‘noting the significant role of public funds’ in Art.9.3?]

Separately but relatedly, Article 9.3 of the Paris Agreement with which the NCQG is explicitly connected (or on which it is based) refers to “noting the significant role of public funds”. Whilst paras 15 and 16 of the draft decision text refer to “increasing the mobilization ratio of finance mobilized from public sources” (para.15) and “a significant amount of public resources should be provided through the operating entities of the Financial Mechanism” (para.16), its placing separately from the

goal formulation and language used arguably fall short of operationalising the role of public funds as stated in Article 9.3.

On question 2 (and partially question 3):

Generally, holding countries accountable for fulfilling their obligations under the UNFCCC/PA regime is hampered by the absence of a court or dispute resolution body that could adjudicate and sanction possible contraventions. There have been instances of states being taken to court over failing to deliver on the Paris Agreement's obligations, but these were always national/regional courts, and the examples are rare with success depending on national legal orders. The UNFCCC/PA regime itself has no adjudication or enforcement mechanism. Everything that follows in the below paragraphs must be read in that context.

To be able to hold state parties accountable for climate finance under the investment layer of the NCQG, four main aspects are of relevance, listed in the order of importance:

- (a) a clear separation in the legal text between the public finance and investment goals,
- (b) a clear and separate definition of the quantity of each of the two goals,
- (c) clear and ideally separate reporting requirements regarding the two goals, and
- (d) a precise and detailed list of measures to be taken by state parties to cause/encourage climate-relevant investments, ideally phrased in mandatory terms, and including a call for further voluntary measures at the discretion of the state parties.

Some further considerations regarding these four points are contained in the below paragraphs.

(a) SEPARATION OF THE PUBLIC FINANCE AND INVESTMENT GOALS

As has already been indicated, the investment goal is *not* clearly discernible in the draft negotiating text from 22nd November (NCQG4 22/11/24 15:30), especially not as a goal separate from a public climate finance goal.

The formulation proposed in paragraphs 7 and 8 of the draft text on Goal formulation does not clearly separate the mobilization of public funding from the goal of mobilising other funding, and does not make any attempt at quantifying either. The formulation makes it impossible to perform meaningful accounting towards determining the achievement or non-achievement of the USD 250 goal set in paragraph 8.

To increase accountability for both the public finance and the investment layer of the goal, it is imperative to distinguish them clearly.

The provision should then of course go on to specify that finance needs to be new and additional etc., and detail what it means to "mobilise" finance, as I elaborate in section (d) below.

(b) SEPARATE DEFINITIONS OF THE QUANTITY OF EACH GOAL

I understand that in the current state of the negotiations this might be difficult to achieve, but would strongly recommend including a provision that puts nominal instead of relative numbers to both the public finance and the investment goal, for example as in the following formulation:

"Decides that the NCQG has one provision and one mobilisation component, and that developed country Parties shall provide at least USD X a year in grants or grant-equivalent terms (referred to as the provision goal), and that they shall mobilise at least USD X a year in private investments (referred to as the mobilisation goal)."

A relative number (e.g. XX per cent of the climate finance provided to support the achievement of the NCQG coming from public sources) is not recommended. Linking the amounts of the two layers to each other might lead to countries obstructing private investment out of fear of having to match its quantities proportionally in public money. While the formulation could potentially spur a race to the top, it could also spur a race to the bottom between the public and private sector. In my view, this risk does not outweigh the benefits of such a formulation.

(c) REPORTING REQUIREMENTS

A reporting obligation for state parties regarding the provision of finance in the frame of the investment layer of the goal would need to be established.

The modalities, procedures and guidelines (MPGs, [decision 18/CMA.1](#) and its Annex) set out detailed reporting requirements on parties pursuant to Article 13 of the Paris Agreement. Paragraphs 121(e), 123(f), and 124(i) require that when developed countries report on the climate finance that they have provided they include information on the source of the funding: “The funding source (official development assistance (ODA), other official flows (OOF), other);” (121(e)) or “Funding source (ODA, OOF, other (specify));” (123(f) and 124(i)). This is already a good start, although investment is not mentioned specifically as a source.

Additionally, paragraphs 121(n) and 121(o) of the MPGs require reporting on the definition of public and private finance, causal link between public interventions and the private finance mobilised through those interventions, measurement and thresholds for such causal link.

Paragraph 125 of the MPGs requires reporting on finance mobilised through public interventions and includes a requirement to report on the “Type of public intervention used (e.g. grant, concessional loan, non concessional loan, equity, guarantee, insurance, policy intervention, capacity-building, technology development and transfer, technical assistance);”

These are good bases for reporting on a potential investment goal under a decision to be adopted in Baku. Of course, for the MPGs to apply to the Baku decision, there needs to be a provision clearly mandating that the Paris Agreement Article 13 enhanced transparency framework applies to the NCQG. The current text limits itself to “recall[ing] paragraph 118 of the annex to decision 18/CMA.1,”. We would advise strengthening this language along the lines of para.55 of the previous draft text (Version 21/11/2024 3:00).

(d) PUBLIC MEASURES TO CAUSE/ENCOURAGE INVESTMENTS

Holding contributor country parties accountable for the quantities of climate finance mobilised through private investments will be possible only indirectly, i.e. via the ways in which state parties cause/encourage/enable or discourage/prevent such investments by their nationals or on their territory.

To allow this, it would be extremely helpful if concrete obligations on state parties for enabling investments were included in the decision text from Baku. The phrasing “mobilising funding/investments” alone would make it difficult to hold states accountable. The advantage of the term “mobilisation” is that it allows for creativity in *how* states cause/encourage investments. It could therefore be kept in the formulation, but then complemented by a list of ideally mandatory components of what it means to “mobilise” investments, and a phrase enabling further actions of states’ choosing.

The current language (in para.25) is vague as it limits itself to “Also call[ing] on Parties to enhance their enabling environments, in a nationally determined manner, with a view to increasing climate financing;”

The section on “disenablers and calls for actions” of the previous draft decision (Version 21/11/2024 3:00.) contained a good list of public measures to cause/encourage climate-relevant investment, in particular para.47 (l) on scaling up private sector investment, but it has been removed from the new text.

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