



# Legal Response Initiative

BRIEFING PAPER 2/14

## Draft options for legally binding financial commitments in a new climate agreement<sup>1</sup>

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### Introduction and background

In 2009 industrialised countries collectively pledged to mobilise USD 100 billion per year by 2020 to support climate mitigation and adaptation efforts in developing countries. Recent research, however, indicates that the adaptation financing requirements of developing countries alone can be conservatively estimated at USD 380 billion a year. Total adaptation and mitigation costs may add up to USD one trillion per annum.<sup>2</sup>

While the actual costs of climate change will remain a subject of speculation, there is a significant gap between the global goal of USD 100 billion and the actual pledges by different countries. As a result developing countries demanded (without success) an interim goal of USD 70 billion by 2016 during the climate conference in Warsaw in November 2013.

It also remains largely unclear how the money will be raised. The 2009 Copenhagen Accord stated: “...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.”

The last sentence, on the sources of funding, has been repeated verbatim in several further decisions of the Conference of the Parties (COP).<sup>3</sup> While the phrase

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<sup>2</sup> For a comparative assessment of existing studies see Manuel Montes, *The Climate Change Financing Requirements of Developing Countries*, Climate Policy Brief no. 11. The South Centre, 2013.

<sup>3</sup> COP decisions 1/CP.16, 2/CP.17, 3/CP.17, 1/CP.18, and 3/CP.19.

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indicates a general political commitment, it lacks clarity and does not provide for a predictable and adequate flow of financial resources to developing countries. Legal counsels in a commercial environment could only advise their clients against entering into such a contractual arrangement.

However, a clear deal on finance is key to the complex structure of a new global agreement on climate. It would facilitate effective action on adaptation and help emerging economies to take on mitigation commitments. This briefing paper, therefore, offers some proposals for binding provisions in a new legal instrument. It touches on compliance and enforcement, but mainly focuses on textual options that clearly signify parties' intention to enter into legally binding commitments. The authors do not advocate any particular solution or amount, and there are numerous other possible approaches.

## External allocation ratio

*“1. Developed country Parties and other parties included in Annex II to the Convention shall provide the necessary financial support for developing country Parties to take effective mitigation and adaptation actions.*

*2. Developed country Parties and other Parties included in Annex II to the Convention shall jointly contribute at least US dollars 100 billion per year to the Green Climate Fund to assist developing country Parties in mitigating climate change and adapting to its adverse effects in accordance with the scale of assessment for the regular budget of the United Nations in the respective calendar year adjusted to reflect participation in this instrument and that only developed countries are obliged to make such contributions. The total amount shall be adjusted in accordance with the world average annual change in consumer prices as estimated by the World Bank as part of the World Development Indicators.”*

The first option uses an existing formula for the allocation of expenses – the UN scale of assessment. The financial system of the UN is based on mandatory and voluntary contributions of its member states. The assessed, mandatory contributions apply largely to the regular budget and the peacekeeping operations. These costs are shared among member states in accordance with the scale of assessment adopted by the General Assembly and prepared by the Committee on Contributions. The Committee consists of experts who currently use gross national income with a low

per capita income adjustment, conversation rates and other criteria to assess a member state's capacity to pay.

There are other possible keys for the apportioning of costs, in particular, the International Bank for Reconstruction and Development's (IBRD) subscriptions of capital shares by developed countries. The distribution of capital shares in the IBRD is a reflection of the role and level of risk in development finance that developed states have already agreed to. In this case, the process to calculate individual amounts would be to, first, extrapolate from the list of subscribing members the developed countries that will be contributors in the 2015 agreement and, second, increase their ratios proportionately to 100% of the total amount due.

The above draft provision reiterates the overall goal of USD 100 billion per year, but also reflects that the value of monetary commitments is subject to inflation and deflation. Alternatively, an absolute financial target could also be determined, from time to time, through subsequent decisions by the parties, or on the basis of a broad agreement (e.g. “to the extent mitigation efforts fail and developing parties communicate their requirements for financial support in order to adapt to the adverse effect of climate change”) supplemented with detailed criteria for eligible activities and donor support.

## Burden-sharing agreement

*“1. Developed country Parties and other developed Parties included in Annex II to the Convention shall be jointly responsible for the effective sourcing, channelling and delivering of a minimum amount of US dollars 100 billion per year in order to assist the developing country Parties in implementing their mitigation goals, and adapting to the adverse effects of climate change. The developed country Parties shall also strive to collectively contribute with more financial resources than the minimum amount thereof.*

*2. For that purpose the developed country Parties and other developed Parties included in Annex II to the Convention agree to the quantified burden-sharing of financial commitments listed in Annex X to this instrument, and to be individually responsible for the sourcing, channelling and delivering of their minimum amounts. The burden-sharing agreement shall be periodically reviewed and updated in order to match the*

measurable financing needs of developing country Parties for mitigation and adaptation.”

Bank to the Green Climate Fund to support mitigation and adaptation efforts in developing country Parties.”

## Annex X

	Quantified financial commitment in percentage	Financial commitment in US dollars		
		2020	2021	2022
State A	15	15 billion		
State B	10	10 billion		
State C				

Using the same financial goal, the draft provision above apportions the overall costs in accordance with a burden-sharing agreement among developed countries. Rather than identifying a pre-existing key for the allocation of expenses, it envisages a climate specific deal agreed by the parties as part of the 2015 negotiations. In addition, the draft provision provides that those countries that are part of the burden-sharing agreement occasionally renegotiate their respective commitments. Shares could be adjusted in light of the parties’ changing economic situations. But it would be equally possible for the principal decision making body of a new global instrument to undertake such a review and suggest, or even determine, countries’ contributions (see below).

In an annex to the new instrument, the overall joint liability would be apportioned according to shares and/or absolute amounts. Individual responsibility for an agreed amount would make it easier to hold parties accountable and identify cases of non-compliance. At the national level, states remain free to raise their contributions from a variety of sources, but in relation to the other parties, payments are a public liability. This burden-sharing approach could also be used for an incremental mobilisation of funding, including, for example, mid-term goals in the period up until 2020. The above provision further encourages additional voluntary contributions by developed countries.

## Contribution reference level

“Developed country Parties and other Parties included in Annex II to the Convention shall contribute at least X% of their Gross Domestic Product as estimated by the World

In the UN General Assembly in 1970, economically advanced countries promised to progressively increase official development assistance to reach a minimum net amount of 0.7 per cent of their Gross National Product. Although donor countries have rarely met this target, the above draft provision uses a similar ratio. To ensure clarity and predictability of parties’ financial obligations, specific criteria (for example, types of consumption, investments and exports etc.) to calculate the Gross Domestic Product (GDP), Gross National Income or another reference amount (e.g. annual state budget) would be required.

The above and all other draft provisions employ the existing differentiation between developed and developing countries under (e.g. Article 4.3 of) the Convention. However, as the Convention is a living instrument, a new agreement may – to some extent – move away from the formal separation of parties’ commitments. In this context, there are proposals to, for example, use the GDP as a general criterion.<sup>4</sup>

## Subsequent decisions

“1. To assist the developing country Parties in implementing their mitigation goals, and adapting to the adverse effects of climate change, the developed country Parties and other Parties included in Annex II to the Convention shall jointly transfer a total annual amount determined by the Meeting of Parties to this instrument in US dollars to the Green Climate Fund.

2. A Parties’ minimum financial contribution to the total annual amount shall be identified by decision of the Meeting of Parties based on recommendations by the UNFCCC Standing Committee on Finance.”

This final draft option leaves the collective and individual annual liability of developed country parties to an internal UNFCCC decision making process. It delegates the authority to determine subsequent financial obligations on an annual basis to new and existing UNFCCC institutions. An important role is given to the COP’s Standing Committee on Finance, but other bodies such as the Adaptation and Technology Executive Committees or the registry for

<sup>4</sup> See, for example, the Ethiopian submission to the ADP of 18 February 2013 available at <http://unfccc.int/bodies/awg/items/6656.php>, 6.

national appropriate mitigation actions could also be involved in determining the overall amount required for adaptation and mitigation.

This approach could be merged with other options. The principal decision making body may, for example, fix the overall amount required, while the parties concerned would negotiate their respective contributions as part of a burden-sharing agreement (see above). Further rules on the disbursement of resources or payment schedules to the Green Climate Fund (or other bilateral and multilateral entities) could be elaborated over time.

## Additional provisions

To ensure a degree of transparency, efficiency and compliance with the legally binding financial arrangements proposed above, additional provisions would be required. Depending on the approach, the Green Climate Fund may, for example, annually publish a list of contributions received by developed country parties, while another list of financial contributions due could be issued by the Secretariat. Thus, failure to make the agreed payments on time would be monitored and could result in some “naming and shaming”.

There are very limited means to ensure compliance or

enforcement of payment obligations. However, an additional provision could possibly stipulate that “a Party which is in arrears in the payment of its contributions to the Green Climate Fund and other financial commitments by more than a year shall have no right to participate in the Meetings of Parties to this instrument and its financial flexible mechanisms”.

The agreement could also emphasise the need for additional voluntary contributions by parties. Those that have no legal liabilities could be encouraged to contribute in accordance with their respective capacity - for example: “Other Parties with an ability to do so are encouraged to make additional contributions to the Green Climate Fund.” It might also be useful to clarify that the developed countries’ annual contributions to support adaptation and mitigation in developing countries should be additional to the overseas development aid allocation and commitments in their national budgets which should represent at least 0.7 percent of the party’s GDP.

In addition, the Meeting of Parties to the new instrument or other institutions would need to be mandated to develop further implementation rules on accounting, financial reporting and control, fund management etc. In this connection, it may also request the Green Climate Fund and other climate finance institutions to join the International Aid Transparency Initiative (IATI).

The international negotiations under the United Nations Framework Convention on Climate Change (UNFCCC) are amongst the most complex multilateral law and policy making processes ever. Meetings are characterized by the use of technical jargon, reference to legal principles and procedural norms. The Legal Response Initiative (LRI) supports delegates from poor and particularly climate vulnerable developing countries as well as civil society observer organizations free of charge through a global network of lawyers from law firms, barrister chambers and universities. They provide hands-on assistance during meetings, publish briefing papers and build the capacity of lawyers and negotiators from developing countries. We constantly seek experienced lawyers with expertise in one or more areas of the law from any jurisdiction with a good command of English to extend our network of pro bono legal expert advisers. Please contact the advice coordinator directly if you are interested in joining the network: [coordinator@legalresponseinitiative.org](mailto:coordinator@legalresponseinitiative.org). If you require legal advice in connection with the international climate negotiations please contact: [enquiries@legalresponseinitiative.org](mailto:enquiries@legalresponseinitiative.org)



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