**Submission to the call for input called ‘Promotion and protection of human rights in the context of mitigation, adaptation, and financial actions to address climate change, with particular emphasis on loss and damage’ (the ‘Call for Input’).**

To Dr. Ian Fry, Special Rapporteur on the promotion and protection of human rights in the context of climate change.

Submission by Dr. Kinnari Bhatt, founder of Surya Advisory, an ethical business and just transition legal advisory firm.

Kinnari Bhatt is a practising solicitor, has a PhD and is widely published. She is a panel expert on land rights and indigenous rights with the Independent Redress Mechanism of the Green Climate Fund. She is the author of [Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects.](https://www.cambridge.org/nl/academic/subjects/law/public-international-law/concessionaires-financiers-and-communities-implementing-indigenous-peoples-rights-land-transnational-development-projects?format=HB&isbn=9781108484657)

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**Introduction**

Dr Kinnari Bhatt of Surya Advisory recently provided input to the Legal Response Initiative (LRI) on the topic of the establishment of a dedicated funding mechanism for mobilizing and channelling finance for loss and damage. This input was provided in direct response to questions from a delegate who shall remain anonymous. It was written with the perspective of least developed countries in mind.

The attached advice is directly relevant to the 56th session of the subsidiary bodies taking place in Bonn. We think that it is of direct relevance to your Call for Input and especially to question 6 (a) of your questionnaire. To recall, question 6 (a) of the questionnaire states as follows:

*‘In 2021 at 26th session of the UN Climate Change Conference (COP26), some Parties and civil society organisations proposed a new financial facility to support loss and damage. Please provide ideas and concepts on how a new facility would operate and how the funds needed to underwrite this fund would be established and maintained.’*

To this end, Surya Advisory warmly shares this work with you.

Annex One of this submission contains the advice provided to the LRI. Kindly note that this advice will be placed on the LRI’s website in due course. We hope that you find it a useful contribution to your Call for Input.

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The Hague and London, June 10th 2022.

**Annex One: Advice provided by Surya Advisory to the Legal Response Initiative**

Produced by LRI 19 May 2022

***What Implementation Options could the Glasgow Dialogue bring?***

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*This advice is provided in response to* ***Query 5/22***

**Query:**

1. Based on relevant previous UNFCCC practice and decisions (if any), and your own assessment, can you outline what could be the possible tangible outcomes of the Glasgow Dialogue between Parties, relevant organizations and stakeholders to discuss the arrangements for the funding of activities to avert, minimize and address loss and damage associated with the adverse impacts of climate change (“Glasgow Dialogue”), ranging from most desirable to least satisfactory?

2. On the assumption that the Dialogue does result in the establishment of a dedicated funding mechanism for mobilizing and channelling finance for L&D linked to the Financial Mechanism of the UNFCCC, can you outline what a roadmap for this outcome might look like?

**Advice:**

**1. Question 1**

**1.1 Background**

Although loss and damage (L&D) initiatives have been proposed as early as 1991, consideration of L&D under the UNFCCC is recent compared to other major themes such as mitigation and adaptation. All previous practice on L&D can be located [here: L&D decisions and conclusions](https://unfccc.int/topics/resilience/resources/decisions-and-conclusions-about-loss-and-damage) and the various reports and technical documents on L&D are located [here: documents and technical reports.](https://unfccc.int/topics/resilience/resources/documents-on-loss-and-damage)

Of particular importance for this advice piece are the following milestones:

* Creation of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (‘WIM’ at COP19 in 2013) decision 2/CP.19)). [[1]](#endnote-1)
* Establishment of an [executive committee of the WIM (WIM ExCom)](https://unfccc.int/process/bodies/constituted-bodies/wim-excom/members) to guide the implementation of the functions of the Warsaw L&D Mechanism.
* Agreement on Article 8.4 of the Paris Agreement.
* The [report of the Standing Committee on Finance called ‘Financial instruments that address the risks of loss and damage’](https://unfccc.int/sites/default/files/resource/2016%20-%20report.pdf), presented at COP 22, 2016.
* UNFCCC technical paper ‘[Elaboration of the Sources and Modalities for Accessing Financial Support for Addressing Loss and Damage’](file:///C:\Users\Ahreum.Lee\AppData\Local\Microsoft\Windows\INetCache\Content.Outlook\1L50F75R\Technical%20paper%20on%20the%20sources%20of%20and%20modalities%20for%20accessing%20financial%20support%20for%20addressing%20loss%20and%20damage) (UNFCCC 2019).

To date, no specific arrangements on the financing of averting, minimising and addressing loss and damage have been agreed under the UNFCCC.

**1.2 Work of the WIM**

The WIM was agreed with three broad functions:

1. Enhancing knowledge and understanding of loss and damage;
2. Strengthening dialogue, coordination and coherence between various bodies on loss and damage;
3. Enhancing action and support, including finance, to address loss and damage.

The Paris Agreement reaffirmed the Warsaw International Mechanism for Loss and Damage as the main vehicle under the UNFCCC process to avert, minimize and address L&D associated with climate change impacts, including extreme weather events and slow onset events. Article 8.2 of the Paris Agreement integrates the WIM and its functions thus anchoring L&D in a crucial agreement and providing initial guidance for next steps.

In [Action Area 7 of its initial two-year workplan](https://unfccc.int/process/bodies/constituted-bodies/executive-committee-of-the-warsaw-international-mechanism-for-loss-and-damage-wim-excom/workplan#eq-7), the WIM ExCom announced its intention to research and disseminate information regarding a range of financial tools that ‘address the risks of loss and damage’. WIM ExCom’s list of funding instruments to investigate includes ‘comprehensive risk management capacity with risk pooling and transfer; catastrophe risk insurance; contingency finance; climate-themed bonds and their certification; catastrophe bonds;[[2]](#endnote-2) and financing approaches to making development climate resilient’. (UNFCCC Secretariat, 2014).

Consequently, the range of financial instruments addressed at the SCF’s 2016 annual forum included insurance, contingency finance, catastrophe bonds and social protection schemes. Among the conclusions were that, while a range of financial instruments were available for addressing the risks of L&D, there was a need for more work to be carried out to develop financial instruments, in particular in respect of slower onset processes, such as sea level rise, rising land and sea temperatures and ocean acidification. It further noted the complexities in the tracking of L&D finance (UNFCCC, 2016).

The 2019 technical paper essentially built on this previous work of the WIM and its collaboration with the SCF and focuses on four types of financial approaches namely (i) risk transfer schemes, (ii) catastrophe and resilience bonds, (iii) social protection schemes, and (iv) contingency finance. The 2019 UNFCCC technical paper provides further detail on these four mechanisms.

In brief, finance for risk management means direct funding to pay for adaptation, risk management and resilience-building – turning un-avoided risks into avoided risks. Risk finance means insurance in a broad sense. This may be through commercial insurance markets, or through international risk-transfer agreements – such as contingency funds, like the Caribbean Catastrophe Risk Financing Facility, where nations would pool resources to cover local emergencies. Finally, curative finance describes the finance needed for slow-onset risks, to cover the costs of managed retreat and loss of livelihoods – a last resort pillar of sorts.[[3]](#endnote-3) The Loss and Damage Reserve Fund in Bangladesh and the former FODEN reserve fund in Mexico are examples. Curative finance has, for political reasons, not featured enough in L&D discussions.

In addition, the Paris COP 21 requested WIM Ex Com to establish a clearing house for risk transfer that serves as a repository for information on insurance and risk transfer (see decision 1/CP.21, paragraph 48). The clearing house was launched at COP 23 and is named the Fiji Clearing House for Risk Transfer. It catalyses action and support by non-state actors, especially from the insurance industry, including the private sector, by directly connecting those seeking assistance with those providing solutions, and by enhancing knowledge and understanding on risk transfer solutions in the context of climate risk management. The COP also created a task force to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change (see decision 1/CP.21, paragraph 49).

Numerous studies[[4]](#endnote-4), however, argue that the overall approach to L&D to date falls short of providing clear guidance and initiating discussions on the way forward because, as controversial as they may be among parties, work done so far does not analyse or contextualize the information it provides.[[5]](#endnote-5) For instance, there is uncertainty on how green/climate bonds could realistically used to finance L&D projects. This is because climate bonds can serve as an attractive long-term investment instrument in areas such as infrastructure projects where they can produce significant returns for bondholders but such a scenario seems unlikely to apply in a L&D context where there is no investor return. The only conceivable use of green and climate bonds would be for projects and programmes in the adaptation or mitigation window which can generate a rate of return.

**1.3 Potential outcome**

The global discussion on L&D has by and large focused on disseminating information on these four market based approaches to financing L&D: risk transfer schemes, catastrophe bonds, social protection schemes and contingency finance. A large amount of time has been spent on information around insurance. This is even though insurance is not itself a source of finance and is a controversial option for developing countries due to poor availability and the high premiums which will add to developing countries sovereign debt burdens, already under strain due to COVID and pre-existing structures.

Moreover, the range of approaches reveals weaknesses in applying traditional market based tools for the challenge of L&D. For instance most market based tools will require a rate of return to be ‘bankable’ to investors, they can only apply to sudden disasters (after the event) through mobilising insurance or catastrophe bonds structures. This means that current market based tools are simply not able to address important L&D issues such as slow onset climate events and non-economic losses. Contingency funds or ‘rainy day funds’ (similar to cost overrun facilities in conventional financing) would be practicable for rich developing countries with large budget surpluses. It is not clear how developing countries could provide such mechanisms without global public and even private financial assistance (channelled for instance through trust structures discussed below) given that developing countries rarely enjoy excess sovereign funds.

The finance approaches favoured in the UNFCCC technical paper and the work of the WIM can, off course play a role but they are not sufficient. More visionary ideas for finance are required that can operate in a ‘twin track’ cooperative structure: both inside and outside of the UNFCCC mechanism. The benefit of this approach would be building a broader base of political support for L&D by, for instance, mobilising private and philanthropic funds and litigation efforts outside of the system which can catalyse action within the system. Options are discussed below, with the overall caveat that the political reality around L&D will in all likelihood, make these ideas unpalatable for developed countries.

The **l**east satisfactory outcome of the Glasgow Dialogue, in my view, would, therefore be the continuation of:

* the same ‘go slow’ mentality which has focused on understanding, talking and dissemination of information about types of instruments rather than progress on procuring action and support for financing L&D.
* continuation of discussions solely on the status quo four market based finance options contained in the 2019 UNFCCC technical paper with no discussion on how to fund L&D or recommendations on how the requisite financial ‘plumbing’ can be operationalised, or an outcome which ‘parks’ these crucial issues to a later, unspecified time.

Perhaps the most desirable outcome of the Glasgow Dialogue would be one that creates a roadmap for entering into an operational phase on finance which has the aim of putting flesh on the WIM’s function of enhancing action and support on L&D finance.

**2. Question 2**

Based on the author’s own experience and research, a roadmap for operationalising finance for L&D could contain the following specific objectives and milestones. Overall, it would be fruitful to think about a roadmap which takes a ‘twin track’ approach of finance from inside and outside the UNFCCC architecture to include non-state actors from the private sector, philanthropy and other third sectors in addition to states. Each of the following components should be read in this way. This means that L&D will not be funded from just one large global fund but will constitute multiple mechanisms of varying sizes and structures which involve different actors.

**2.1 Creating a positive list of what constitutes L&D**

A positive list approach would give guidance as to what could be counted towards loss and damage support absent any formal definition as is currently the case. Article 8.4 of the Paris Agreement contains the beginnings of a positive list. Drawing on this a roadmap can begin to flesh out how the so far neglected items in that list could be financially sourced and structured. In particular, non-economic losses (which should also incorporate the use of customary law and traditional knowledge), slow onset events and resilience of communities, livelihoods and ecosystems.

**2.2 Mobilising L&D based on legal norms**

Climate finance is governed by a formal treaty, the UNFCCC. The UNFCCC creates an obligation and legal umbrella for funding to be provided through core UNFCCC principles of ‘do no harm’ and ‘polluter pays’. The treaty reflects the ‘do no harm’ and ‘polluter pays’ principles through its equity and common but differentiated responsibilities and respective capabilities’ framework under Article 2.2.

These broad principles of international law, do no harm and polluter pays, are particularly relevant for considering L&D finance. They open the door for employing polluter pays, equity and do no harm human rights based approaches to more visionary sources of finance and structuring methods for channelling finance sources or ‘windows’ of finance. Human rights based approaches to financing L&D could be placed on the WIM agenda. Examples include the creation of financing for non-economic losses, redress/accountability funds, and special direct access windows for particularly vulnerable groups such as indigenous peoples. Grounding finance mechanisms for L&D within these legal principles broadens the scope of finance instruments beyond market ‘mutuality’ based forms of financing such as insurance. Such an approach should also engage with lessons learnt from failures in the market focused microfinance sphere.[[6]](#endnote-6) There will be very high political barriers to such an approach but it may be possible to source redress mechanisms with public or private finance gathered from innovative financial sources.

Encouraging WIM to move beyond market based approaches to start dialogues based on L&D as a issue of public international law and global inter-state relationships is an option, but there will be political tension. Options for working outside the WIM could, therefore, be fruitful. The WIM ExCom could, for example, put in place a process to explore the various options to fund loss and damage with an emphasis on innovative sources – and encourage input from a wide range of stakeholders outside the WIM, including the private sector.

There are various suggestions and ideas to implement equity through new and additional financial sources, This includes, for example, a global carbon pricing levy/fossil fuel levy, financial transaction tax, bunker fuels levy and global carbon pricing. In parallel other innovative sources and potential actors involved should be identified.

**2.3 Multilateral development bank trust funds**

Inter-governmental trust funds[[7]](#endnote-7) are most typically established with contributions from one or more donors to support a variety of pre-specified activities. Donors can be states, private entities and international organisations. Whilst the majority of international trust funds are related to international development issues there is no reason why these legal structures could not be applied to climate finance. Indeed the UN often participates in the administration or execution of trust fund objectives either alone or in partnership with the World Bank and other multilateral development banks. The Asian Development Bank has considerable experience in setting up and operationalising regional trust funds.

Trust funds could be sourced using public and private finance sources. They can be structured at a global, state and regional level. For instance the German development bank could set up a fund sourced with airline levies. Those funds could then be channelled to a regional e.g. EU, or global L&D solidarity fund for instance which is administered by UN agencies. The Green Climate Fund could play a role here. A regional trust fund could involve regional entities such as the European Union or ASEAN community and be open to public and private contributions. The ASEAN has previous experience in administering humanitarian trust fund which could be applied and scaled through innovative partnerships. Trust funds could be used for the payment of insurance premiums to vulnerable countries and provision of grant support to national L&D funds

**2.4 WIM ExCom to engage with the Green Climate Fund**

There are a variety of views as to whether the Green Climate Fund (GCF) would need a new mandate from the COP to deal with L&D. This is because the GCF governing instrument does not make any reference to loss and damage. However, the language in the GCF governing instrument is quite broad and the Board under has the authority ‘to add, modify and remove additional windows and substructures or facilities as appropriate’[[8]](#endnote-8).

The GCF Board could formally define certain ‘result areas’ under loss in line with its current approach to mitigation and adaptation financing. Given that the GCF emphasises transformational and paradigm shift approaches, closer attention to innovative finance for L&D should not be beyond its mandate. Indeed the GCF’s Updated Strategic Plan 2020-2023 expressly refers to L&D and collaborating with the UNFCCC and others to help conceptualize relevant investments.

Regarding resources to be allocated for L&D in the GCF, by mandate, the GCF is already authorized to mobilise resources from innovative/alternative sources (para. 30 of the GCF governing instrument). Thus, the COP could request the GCF to prioritise this work and address it when GCF replenishment and development of policies takes place. These impact areas could mirror those identified under the WIM and should be determined in consultation with the WIM.

**a) A third Loss and Damage Window**

Adding a L&D finance window to the existing windows for mitigation and adaptation is possible, but explicit COP guidance may be needed – possibly in response to a WIM ExCom/SCF recommendation. To ensure additionality to adaptation/mitigation financing, funding mobilised through alternative sources (all or a significant percentage) could be collected in a separate GCF Loss and Damage Trust Fund. Funding from alternative sources would be its main contribution and a GCF Loss and Damage Trust Fund could also be open for contributions from developed countries and other public and private sources. Thus, the GCF would have two trust funds, the ‘normal’ GCF Trust Fund financing the administrative operation of the GCF as well as its funding for mitigation and adaptation, and a Loss and Damage Trust Fund.

**b) Using Existing GCF Mitigation and Adaptation Programmes**

If an explicit L&D window is not palatable a further option would be to work through WIM ExCom to ascertain how L&D financing is already taking place through the GCF’s established programmes: its Readiness and Preparation Support Programme, Project Preparation Facility and through its Projects and Programmes. Research shows that L&D finance is already taking place through the GCF’s mitigation and adaption windows, although in an implicit manner.[[9]](#endnote-9) Policy options include working through WIM ExCom with the GCF to:

* make L&D a more explicit part of existing GCF programme activity,
* require GCF Direct Accredited Entities to start using SCF instruments,
* request the GCF to develop a policy on L&D; and
* commence requests for proposals for L&D related projects and programmes.

**2.5 Consideration of Islamic Social Finance**

Islamic finance is growing within international finance. Islamic social finance consists of tools and institutions that could be used to alleviate poverty and fund L&D. Given that equity and participation are key tenants of Islamic finance, more attention could be given to these instruments and engagement with key financiers such as the Islamic Development Bank. WIM ExCom could be requested to examine this area. Alternatively this could take place outside of WIM but in consultation with WIM ExCom.

**2.6 Creation of a global voluntary fund outside the UNFCCC**

This could be sourced entirely by private and philanthropic capital and used to source the ‘hard to finance’ areas such as contingency or ‘rainy day’ funds. This type of fund should be global or regional in scale both to supply enough funds, to meet the ethical debt owed by richer states and to address the very practical situation that developing countries do not have excess funds. This sort of solidarity fund could be catalysed through a trust fund mechanism as discussed above. Importantly, the WIM could still play a role in the creation of such a fund and the benefit of such a cooperative approach would be that it galvanises political and social discussion more broadly.

1. WIM’s overall mandate is to address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change (2/CP.19 para.). [↑](#endnote-ref-1)
2. Catastrophe bonds are loans issued to vulnerable countries which turn from repayable loans to non-repayable grants following predefined disaster thresholds and triggers stated within the loan agreement. [↑](#endnote-ref-2)
3. See ‘COP26: A pressing need to set up a comprehensive risk finance framework for Loss and Damage’, 2021, Flood Resilience Portal, <<https://floodresilience.net/blogs/cop26-a-pressing-need-to-set-up-a-comprehensive-risk-finance-framework-for-loss-and-damage/>>. [↑](#endnote-ref-3)
4. See Pandit Chhetri, R., Schaefer, L. and Watson, C. (2021) Exploring loss and damage finance and its place in the Global Stocktake, Part of the ‘Financing Climate Action: IGST Discussion Series’ <https://www.climateworks.org/wp-content/uploads/2022/04/Loss-and-Damage-Finance-iGST.pdf> Richards, J and Schalatek L, (2017) Financing Loss & Damage A Look at Governance and Implementation Options, Heinrich Böll Stiftung, North America, <https://www.boell.de/sites/default/files/loss_and_damage_finance_paper_update_16_may_2017.pdf>, and Durand, A., Hoffmeister, V., Weikmans, R., Gewirtzman, J., Natson, S., Huq, S., (2016) ‘Financing Options for Loss and Damage: a Review and Roadmap, German Development Institute, < <https://www.die-gdi.de/uploads/media/DP_21.2016.pdf>> . [↑](#endnote-ref-4)
5. Climate Finance for Addressing Loss and Damage How to Mobilize Support for Developing Countries to Tackle Loss and Damage, (2019), Brot für die Welt Evangelisches Werk für Diakonie und Entwicklung, <<https://reliefweb.int/sites/reliefweb.int/files/resources/ClimateFinance_LossDamage.pdf>>. [↑](#endnote-ref-5)
6. See Bhatt, K. (2018), Book Review: Borrowing Together: Microfinance and Cultivating Social Ties. Becky Yang Hsu. Cambridge University Press. 2018, London School of Economics Review of Books, Review of Borrowing Together: Microfinance and Cultivating Social Ties,

   <http://eprints.lse.ac.uk/88225/1/lsereviewofbooks-2018-01-16-book-review-borrowing-together.pdf>. [↑](#endnote-ref-6)
7. See Bantekas, I. (2021), The Legal Personality of World Bank Funds Under International Law, 56 Tulsa L. Rev. 209 (2021), <<https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=3227&context=tlr> >. [↑](#endnote-ref-7)
8. Governing Instrument of the Green Climate Fund, para 39. [↑](#endnote-ref-8)
9. See Kempa, L., Zamarioli, L., Pauw, W.P. & Çevik, C. (2021). Financing measures to avert, minimise and address loss and damage: options for the Green Climate Fund. Frankfurt School UNEP Centre research paper. [↑](#endnote-ref-9)