A POST-COLONIAL LOSS AND DAMAGE FUND

AN UNEQUAL EXCHANGE OF RESPONSIBILITIES AND RESOURCES

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We understand loss and damage as an existential threat to our people. Central America is highly vulnerable to climate hazards, but we are not alone. West, Central and East Africa, South Asia, South America, Small Island Developing States and the Arctic are also threatened. In highly vulnerable regions, human mortality due to droughts, floods and storms is up to fifteen times higher than in other regions. Humankind and other species living on our territory have become vulnerable to climate change.

Historical and current patterns of inequality rooted in governance structures, socio-economic development, marginalisation and colonialism are factors that increase vulnerabilities to climate change affecting our peoples and ecosystems.¹ In our region, extractivism from the Global North and debt repayment dries up our resources and erodes governance systems. Inequality, marginalisation and poverty place us in vulnerable and unjust conditions.³ Socio-economic trends and growing inequality are at the root of future exposure to climate hazards.⁴

Economic crises in the Global North have a dynamic relationship with the increase in external debt in our region.⁵ In fact, “debt in underdeveloped countries has often been the best (or perhaps the only) way for international financial capital to guarantee its reproduction, whether it is the profitability of banking or the commercial profitability of companies”⁶. In this sense, debt is not only the product of the selfish and corrupt acts of regional elites but also the product of structural inequality.
in an economic model that is dependent on and subject to foreign interests. The Global South is constantly hemorrhaging resources through debt payments to the North - in 2022 alone a record $443.5 billion was reached to repay public and publicly guaranteed external debt.\(^7\)

The systemic extraction of our resources is the basis for sustaining the high-consumption lifestyles and industrialised processes of the Global North, which has drained approximately $152 trillion from the Global South between 1960 and 2018, continuing the colonial logic of resource appropriation.\(^8\) The current sustainability and climate challenges we face in the world are “predictable consequences of an ecologically unequal exchange”\(^9\) between the Global South and the North.\(^9\)

The current climate collapse can be attributed to the Global North as a product of its economic model, making it responsible for 92% of cumulative carbon emissions or, in the UNFCCC categorisation, Annex 1 countries are responsible for 90% of climate collapse.\(^10\) There are 3.6 billion people living in contexts that are highly vulnerable to climate change and none of these individuals belong to the aforementioned groups.\(^11\) We are disproportionately affected by the irresponsible actions of the Global North, and we have to receive reparations and justice. We are suffering transboundary socioenvironmental harm due to climate change.

If the carbon emissions of the poorest half of the world’s population (4 billion people) were to increase by 200%, they would still be compatible with the 1.5°C per capita level.\(^12\) In contrast, 80 million people who make up the richest 1% have per capita emissions 30 times higher than what is compatible with the 1.5°C target. The Global North\(^13\) represents some 1.2 billion people, but...
it would be unfair to distribute responsibility for transboundary environmental damage caused to the South equally among them all. For example, in the United States, where white neighbourhoods predominate, per capita emissions are the highest compared to other groups. The very differences and diversity among social groups, such as socio-economic class, lead to differentiated responsibilities for carbon emissions.

The combined emissions of 90% of the world’s population will barely exceed the total global emissions level compatible with 1.5°C in 2030, while the emissions of the richest 10% (800 million people) alone would consume the 1.5°C budget. Inequality is rooted in socio-economic structures with specific beneficiaries and is produced by social class and governments. This inefficiency and distributional injustice have a strong grip on the United Nations Framework Convention on Climate Change (UNFCCC) processes and are the drivers of climate collapse

A potential colonising strategy and socio-economic lobbying affect the effectiveness of the implementation of UNFCCC objectives. At COP28, 2,456 delegates from fossil fuel lobby groups flooded the UNFCCC process and at least a quarter of the billionaires registered as delegates had "made their fortunes in highly polluting industries such as petrochemicals, mining and beef production". It is no secret that the “fight around climate change is about what economic concessions the rich and the Global North are willing (or not) to make to address the climate crisis.

It is a fact that carbon emissions have continued to rise and that global surface temperature has been reaching 1.1°C above 1850-1900 in 2011-2020, despite 30+ years of negotiation and efforts related to the Paris Agreement.
The UNFCCC mandate to stabilise carbon emissions to avoid dangerous anthropogenic interference with the climate system and within a timeframe sufficient to allow for the natural adaptation of ecosystems has not materialised.\(^1\) Widespread and rapid changes have already occurred in the atmosphere, ocean, cryosphere and biosphere. These changes have resulted in widespread adverse impacts and loss and damage to nature and people.\(^2\) The UNFCCC has failed in its objective resulting in the suffering of the most vulnerable.

**Loss and Damage – A historic struggle of the Global South for ratification**

Addressing loss and damage has been a priority for vulnerable communities since the negotiation of the UNFCCC. It took decades for loss and damage to be included in a legally binding agreement and even more years for a fund to be created.\(^2\) The concept of loss and damage has been used since 2007, without yet having a formal definition within the UNFCCC. However, this phrase is historically related to the demand of vulnerable countries, particularly Small Island Developing States (SIDS), urging the international community to formally acknowledge the necessity for addressing the adverse effects of human-induced climate change that cannot be avoided by adaptation or mitigation, or that will not be avoided in the future by adaptation due to lack of resources.

Within the context of the UNFCCC, damages are considered as impacts with consequences that are “reversible through risk reduction, remediation or restoration initiatives” and losses as impacts that are “irreversible, in the sense that they cannot be restored or repaired”.\(^2\)

At the international policy level, the Paris Agreement succeeded in positioning loss and damage as the third pillar of climate action. Article 8 of the Paris Agreement establishes the importance

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19. Naciones Unidas, “Convención Marco de las Naciones Unidas sobre el Cambio Climático” (Naciones Unidas, 1992), art. 2.
20. Calvino y otros (nota 18) párr. A2
22. Martínez Blanco (n 21)
of a) avoiding and reducing, and b) addressing losses and damages related to the adverse effects of climate change. The agenda concerning loss and damage concentrates on addressing the lived experiences of our communities and the subsequent economic and non-economic impacts.

The call to address loss and damage represents a political stance by vulnerable countries in the face of the effects of climate change. The industrialised economies that consumed most of the global carbon budget have caused enormous transboundary environmental damage with socio-economic and human rights implications and must confront their legal responsibility.

The current responses of the UNFCCC, including the creation of the Loss and Damage Fund (LDF), do not yet correspond to the legal obligations to redress harm, nor do they match in magnitude and urgency the needs and rights of communities. However, with the establishment and implementation of the LDF, it becomes crucial to scrutinize it within the context of a global historical socio-economic discourse. This analysis should take into account existing responsibilities for restitution and the unequal distribution of resources between the Global South and the Global North.

The economic disparities and resulting financial reliance of Southern nations on the Global North can be elucidated by examining the economic advantages and global value transfers at play. These transfers primarily benefit the political elite within these countries, as they consistently import more value-added goods than they export and similarly import more energy than they export. This structural inequality serves as a significant source of vulnerability for regions like Central America, endeudarse bajo las condiciones que les sean impuestas para financiar los sistemas de salud, la seguridad social, el desarrollo de infraestructura, Global South and causing them to enter global markets at a disadvantage.

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23. Martinez. Blanco (n 5).
Debt, financial flows and post-colonialism

A relationship of financial dependence

The efficacy of the financial ties between the Global North and the Global South is influenced by internal capital factors associated with production methods, as well as by political and economic capital structures that build on a mode of extraction and cause adverse ecological and social outcomes. Throughout its history, capitalism as an economic model has consistently faced a contradiction between economic growth and the limits of the socio-natural system. This contradiction has generated the environmental crises we face in our territory.

The colonial capitalist system has historically been based on the expropriation and plunder of natural resources, ecosystem services and social labour necessary for the development and continuation of capitalist production. For centuries, the empires and their descendants, the states of the Global North, have fostered an unequal economic and ecological exchange. An exchange based on increased extraction of natural resources and human labour in the Global South at the lowest possible cost and expanding profits by increasing the value added of products or services.

In the case of the historical factors of capitalist modes of production, both the colonies and the consequent states of the Global South were historically conditioned to an unequal development model, dependent on resource exports (fossil fuels, precious metals, crops, etc.) and the cheapening of human labour for the profit maximisation of the imperialists (economic growth). Weakening the economies of the

exposing them to heightened climate risks.

When an environmental product is sold from a developing state or country to a more developed economy, there is a net benefit to the developed buyer, as it only pays for the monetary value of the product, excluding all the natural and human labour forces that are embedded in the product. On the other hand, the product/money ratio is much higher for the “underdeveloped” country, i.e. the selling economy becomes more dependent on selling the product than the developed economy is on buying the product.

Under this logic, it is recognisable that the countries of the Global North are in a “win-win” position, as they receive much more real wealth in terms of exchange (labour and energy received) than they export or pay for.

As a result of these favorable terms of trade, countries in the Global North possess greater resources to invest in their social and economic welfare. Conversely, countries in the Global South lack these resources, rendering them more vulnerable. Consequently, they are compelled to incur debt under conditions imposed upon them in order to finance essential sectors such as healthcare systems, social security, infrastructure development, and initiatives aimed at fostering development.

It is a vicious circle where our resources are handed over to the North under unfavourable conditions to pay off the debt, we have acquired to reduce our vulnerability. Vulnerability becomes relevant in the face of the threat of climate impacts, the costs of which we must bear, even though we are not the ones who caused them. The above represents the system of biopower that the Global North has over our territories and bodies, violating our rights and stripping us of our dignity.

Financing and debt within the neoliberal era

International financial institutions have played an important role in the construction of these systems of unequal exchange of resources and power. After the Second World War, international actors such as the United Nations, the World Bank and the IMF entered the economic policy arena. These actors sought to promote “development paths” during the Cold War
era, offering former colonial countries and war-weakened economies large loans intended to help them grow (Luxemburg 1971). According to Luxemburg (1971: 401) 27, the processes of globalization and free trade served as methods for maintaining the dependency relationships established during colonialism for these new political and economic structures.

In this context, the former colonizing powers utilized their hegemonic influence to enforce unfavorable economic policies on the former colonies. Globalization initiatives aimed at financing the economy through free market mechanisms and augmenting the indirect influence of these powers on the economies of developing countries.

This was done with the implicit intention of preserving the economic and power balances established at that time. 28

In specific contexts of the Global South, such as Latin America, starting from the 1990s, these reforms aimed at economic liberalization led to the loss of autonomy in economic management for national governments. 29 The influx of capital occurred through the normalization of free market structures and processes, which became the predominant form of global economic policy and, in essence, the sole cultural policy applicable across various spheres of life. 30 31

The process of (neo)liberalisation of the economy has had a direct impact on the relationship of capital with the current climate crisis. A crisis on a global scale that has been caused by the economic model itself. Paradoxically, while the wave of environmental and social concern has grown, due to the increasingly evident effects of ecological destruction by the capitalist production system, neoliberal elites have extolled the market as the only mechanism for allocating resources to deal with the crises. It is a vicious circle where the benefits of the system are directed northwards to the detriment of the rest of humanity and the environment. This same situation is replicated when addressing the negative externalities of such a system, for example in the structure given to the Financing Agreements and the Damage and Loss Fund, where international financial institutions have the main role in providing financial resources to address and losses and damages.

The Loss and Damage Fund in the context of the international financial system

The present global financial system is facing a historically rooted trial, having been designed by and for post-war industrialised countries at a time when climate risks, socio-economic inequalities, or gender inequality were not seen as major challenges on the development path.\(^{32}\)

The present international financial architecture is unlikely to serve its purpose in a world marked by relentless climate change, new poles of power, growing systemic risks, extreme inequality, entrenched gender biases, highly integrated financial markets vulnerable to cross-border contagion, and dramatic demographic, technological, economic, and geopolitical changes.\(^ {33}\)

The UN report Reforms of the International Financial Architecture highlights the following shortcomings, inequalities and inefficiencies in the system\(^ {34}:\)

a. Higher borrowing costs for developing countries in financial markets, even after taking into account the risk of default and market volatility; many governments spend a large share of their revenues on debt servicing while failing to invest sufficiently in the provision of services related to fundamental rights in health, education and social protection.

b. Huge variations in countries’ access to liquidity in times of crisis, with only a small share of Special Drawing Rights (SDRs) allocated to developing countries; for example, the African continent, home to 1.4 billion people and more than 60% of the world’s extreme poor, received only 5.2% of the last SDR issue;

c. Huge underinvestment in global public goods, including pandemic preparedness and climate action;

d. Unstable financial markets and capital flows, repeated global financial crises and recurrent sovereign debt overhang, with detrimental consequences for sustainable development.

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Inconsistencies and injustices in the financial system, coupled with a lack of coordination in global economic management, result in isolated responses to climate, economic, financial, food and other crises, even as natural disasters and disease outbreaks spread rapidly in this interconnected world.  

Hence, the scale of climate change and its disparate impacts necessitate multilateral financing to assist all nations in addressing the challenges posed by climate change. Without means of implementation (finance, technology transfer, capacity building), countries in the Global South do not have the capacity to implement climate action or to cope with exuberating loss and damage. The Global South requires solutions to reduce the huge disparities in resource demand between developing and developed economies.

Article 8 of the Paris Agreement, recognizing the need to address loss and damage, intertwines the imperative to address loss and damage with mitigation and adaptation obligations. Moreover, the Conference of the Parties has recognised the need for financial resources to help “developing” countries, which are also the most vulnerable to climate change, in responding to the adverse impacts of climate change. However, both Decision 2/CMA.4 and Decision -/CMA.5 underscore that no liability-based funding obligations have been designated. The objective of funding from the fund is to explore “new or innovative” sources of finance and funding arrangements to facilitate the implementation of the fund.  

The financial and political mechanisms enforced by the Global North to tackle the climate crisis have been grounded in the structural illusion that the market alone can resolve all issues, along with the notion of shared responsibility for the crisis. Acknowledging the necessity that all states and groups in society must commit to taking action in reducing emissions and the impacts of climate change on the people (shared responsibility in the face of an impending situation), it’s crucial not to equate this with uniform enforceability or accountability. The historical responsibility for the causes and consequences leading to both biophysical and social system challenges must be approached through the principles of justice and differentiated responsibility. The

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35. ONU(2023) Informe de políticas de Nuestra Agenda Común 6. Reformas de la arquitectura financiera internacional  
36. Leia Achampong. (2023) El papel del nuevo objetivo colectivo cuantificado sobre la financiación climática en el llenado del Fondo de Pérdidas y Daños  
37. Martínez Adrian, ‘Daños y perdidas: Una introducción al párrafo 51 y la compensación’  
38. CMNUCC, “Decision /CMA.5 Resultado del primer balance mundial”  
assignment of responsibility for loss and damage must be anchored in tangible facts rather than fiction.

The Global North is the main polluter having caused climate change and is responsible for the production processes and development approaches that have been resulting in devastation and suffering through loss and damage. However, within the dominant narrative, the climate crisis is often disassociated from its roots in capitalist modes of production, characterized by the exploitation of nature and human and natural labor, perpetuated through unequal economic and ecological exchanges. It is precisely this antagonism between reality and the fiction imposed by hegemonic power that necessitates us to address the issue of loss and damage through a pedagogy of resistance. Understanding reality and justice must be based on collaborating and researching with the frontline communities.

It is imperative to analyse the socio-economic crisis we are experiencing not only as a result of climate impacts but also as a result of the historical causes rooted in capitalist modes of production which have systematically rendered the Global South vulnerable. The challenges we face in addressing loss and damage are defined by the plunder, the exploitation of resources and labor as well as the appropriation of the carbon budget by the Global North along with its resultant negative externalities.  

The relationship between the economic system and Loss & Damage

Climate Reparations

Climate reparations hold legitimacy as both a political and legal claim, as people and ecosystems in highly vulnerable countries have a right to justice for damages and losses inflicted upon them by climate change. States have “the obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond their jurisdiction”, in accordance with Principle 21 of the UN Charter. Sovereignty implies an obligation not to cause damage to the environment of other states. The sovereignty of states is not unidimensional to their territory, but interdependent to a socio-natural reality that does not recognise borders. The International Court of Justice has reiterated this principle, repeatedly stating that states must ensure that activities within their jurisdiction or under their control do not cause damage to the environment of other states or areas beyond their jurisdiction as well as emphasizing that states are obliged to use all means at their disposal to prevent activities taking place on their territory or in any area under their jurisdiction that cause significant damage to the environment of another state. It is a principle of international law, and even a general conception of law, “that any breach of an international obligation which has caused damage entails a duty to make adequate reparation”. Reparation for damage caused by the breach of an international obligation involves the principle of restitutio in integrum. Already in 1928, the Permanent Court of International Justice had stated that “reparation must, as far as possible, wipe out all the consequences of the wrongful act and restore things to the original state in which they were.

44. CIJ, Caso de las plantas de celulosa en el río Uruguay (Argentina c. Uruguay). Sentencia de 20 de abril de 2010, párrs. 101 y 204, y CIJ, Ciertas actividades realizadas por Nicaragua en la zona fronteriza (Costa Rica Vs. Nicaragua), Construcción de una carretera en Costa Rica a lo largo del Río San Juan (Nicaragua Vs. Costa Rica). Sentencia de 16 de diciembre de 2015, párrs. 104 y 118.
45. Caso Velásquez Rodríguez Vs Honduras (Corte Interamericana de Derechos Humanos) [25].
46. ibídem
before the act was committed.  

Principle 13 of the Rio Declaration, which was adopted in 1992 at the same time as the United Nations Framework Convention on Climate Change, establishes the duty of States to “cooperate also expeditiously and decisively in the development of further international law on liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control in areas beyond their jurisdiction”. The international community recognized “the integral and interdependent character of the Earth” and, drawing upon general principles of international law, aimed to facilitate the establishment of liability and compensation for the adverse effects of environmental damage, which encompasses climate change.  

Article 8 of the Paris Agreement recognises the importance of addressing loss and damage related to the adverse effects of climate change. Climate change is a product of direct or indirect human activity. In this sense, the Global North has breached its obligation not to harm others, through its 92% responsibility for the carbon emissions that have caused climate collapse. The Inter-American Court of Human Rights has mentioned that under the United Nations Framework Convention on Climate Change (UNFCCC) there are obligations of States for damages caused by climate change.  

This obligation entails restoring the status quo ante and remedying the consequences of the breach, including “the payment of compensation as compensation for pecuniary and non-pecuniary damage including moral damage”. In the case of the adverse effects of climate change, such reparation and compensation should be based on the provisions of Articles 8 and 2.2 of the Paris Agreement, in accordance with the principle of Common But Differentiated Responsibilities to restore what has been damaged and

47. Caso Fábrica Chorzow (Alemania V Polonia) 186 (Corte Internacional de Justicia); Marcos A Orellana and David R Boyd, ESCRITO AMICUS CURIAE CORTE CONSTITUCIONAL DEL ECUADOR CASO NO. 974-21-JP e2NhcnBldGE6J2VzY3JpdG8nLCB1dWlkOic5YzlhM2U3Yi0zZDQ5LTRlMmUtOTQwOS1mZWIxOTBjNDEwZjUucGRmJ30=>.  
48. UNGA (n 44) para 13.  
49. CMNUCC, «Acuerdo de Paris» (CMNUCC 2015), art. 8.  
50. CMNUCC, «Acuerdo de Paris» (CMNUCC 2015), art. 8.  
51. Caso Velásquez Rodríguez Vs. Honduras (N 44) párr. 25.
compensate what has been lost.

It is the obligation of parties to the UNFCCC and related instruments to implement mechanisms for restitution to the pre-damage state, restoration, compensation or payment of a financial penalty, satisfaction, guarantees of non-repetition, care for affected persons, and financial instruments to support reparation. This is our baseline for analysing how the UNFCCC addresses loss and damage.

**Loss and Damage Fund and its Funding Arrangements**

A Transitional Committee (TC) led the process of providing recommendations to create the Loss and Damage Fund and its financial arrangements. The recommendations of the TC were submitted to the CMA/COP and adopted without any debate on the first day of COP28. This was followed by what can be described as the Global North “making it rain”, by announcing pledges of money to operationalize the Loss and Damage Fund. The total pledge was $792 million, which is only 0.2% of what is needed or, when compared to daily global fossil fuel subsidies, four to five hours of spending. En cualquier caso, el Fondo de Daños remains an empty shell with no funds to “respond” to losses and damages.

**Funding**

The purpose of the Loss and Damage Fund is to “assist” developing countries to “respond” to economic and non-economic loss and damage. It is important to note that in Article 2 of the LDF Governing Instrument, there is no mention of addressing. Article 8 of the Paris Agreement mentions addressing but does not mention “respond”, this is non-legally binding language, which was introduced by the COP27 decision regarding the LDF.

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52. ‘CMNUCC, “Decisión 2/CP.27 Arreglos de financiación para responder a las pérdidas y daños asociados con los efectos adversos del cambio climático, incluido un enfoque en el tratamiento de las pérdidas y daños” (nº 21); CMNUCC, “Decision 2/CMA.4 Mecanismos de financiación para responder a las pérdidas y daños asociados a los efectos adversos del cambio climático, incluido un enfoque en el tratamiento de las pérdidas y daños” (nº 34).


55. CMNUCC, “Decision 2/CMA.4 Mecanismos de financiación para responder a las pérdidas y daños asociados a los efectos adversos del cambio climático, incluido un enfoque en el tratamiento de las pérdidas y daños” (nº 34). Consultado el 25 de enero de 2024; Convención Marco de las Naciones Unidas sobre el Cambio Climático. “Decision /CP.28 -/CMA.5
‘Respond’ is placed as a broader category different from addressing with no legal basis while ‘address’ is not included in the purpose of the LDF, but only included as a focus of the Financial Arrangements. Responding is focused on “acting in solidarity to assist those suffering loss and damage” and offering help. The definition of addressing is “to deal with; to treat” which suggests a comprehensive remedy to a harm that has been caused. The consequences of manipulating language can be significant for the rights of particularly vulnerable people.

The LDF seeks to promote and strengthen national responses to address loss and damage, responding to country priorities and circumstances and applying country-led approaches. In addition, the LDF will have a fast-track approval process with simplified criteria and procedures to avoid bureaucratic hurdles. Countries will be able to designate a national authority or focal point, which will be consulted for funding requests and will be responsible for the management and implementation of activities or projects.

The LDF should operate in coherence and complementarity to the existing funding arrangements to respond to loss and damage associated with the international financial, climate, humanitarian, disaster risk reduction, and development architectures. To this end, the LDF needs to create a coordination and cooperation mechanism to promote the availability of funds and avoid duplication or fragmentation. The LDF must help countries themselves to mobilise funds to respond to loss and damage. In this sense, the LDF is a fund, but to a larger extent a financial coordination entity for loss and damage.

Particularly vulnerable developing countries are those eligible to receive LDF resources. Who qualifies as particularly vulnerable countries? This is a question that may become a point of controversy. The financial provisions of the LDF will be determined based on the triggers, the climate impacts indicator, the debt sustainability indicator and other criteria established by the Board and guided by the CMA/COP.

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56. Kate Raffety y otros, ‘¿QUÉ PASÓ EN LA COP 27 SOBRE PÉRDIDAS Y DAÑOS Y QUÉ VIENE DESPUÉS?’ <https://assets-global.website-files.com/605869242b205050a0579e87/6388a7def333e344ab5f9c3_L%26DC_WHAT%20HAPPENED_AT_COP_27_%26_WHAT_NEXT.pdf>.
57. UNFCCC, ‘Decision -/CP.28 -/CMA.5 Operationalization of the New Funding Arrangements, Including a Fund, for Responding to Loss and Damage Referred to in Paragraphs 2–3 of Decisions 2/CP.27 and 2/CMA.4’ (n 55) 43–44 Annex 1.
58. Ibid., 44.
59. Ibid., 41.
60. Ibid., 48.
61. Ibid., 3.
62. Ibid., 12.
63. Ibid., 12.
64. Ibid., 58.
funding that will also merit discussion. The allocation system itself will be operated and developed by the Board, taking into consideration:

(a) The priorities and needs of developing countries that are particularly vulnerable to the adverse effects of climate change, while taking into consideration the needs of climate-vulnerable communities;

(b) Considerations of the scale of impacts of particular climate events relative to the national circumstances, including but not limited to, response capacities of the impacted countries;

(c) The need to safeguard against the overconcentration of support provided by the Fund in any given country, group of countries or region;

(d) The best available data and information from entities such as the Intergovernmental Panel on Climate Change and/or pertinent knowledge from Indigenous Peoples and vulnerable communities on exposure and sensitivity to the adverse effects of climate change and on loss and damage, recognizing that such data, information and knowledge may be limited for specific countries and regions;

(e) Estimates of recovery and reconstruction costs based on data and information from relevant entities, in particular national and/or regional entities, recognizing that such data or information may be limited for specific countries and regions;

(f) A minimum percentage allocation floor for the least developed countries and small island developing States.  

The LDF will finance addressing challenges such as “climate-related emergencies, sea level rise, displacement, relocation, migration, insufficient climate information and data, and the need for climate-resilient reconstruction and recovery” The complementarity of the LDF is focused on priority gaps at different levels, in order to support and improve access to finance for particularly vulnerable developing countries to respond to loss and damage. Support to respond to economic and non-economic loss and...
damage may include complementary funding to humanitarian actions after an “extreme weather event; funding for intermediate or long-term recovery, reconstruction or rehabilitation; and funding for actions that address slow onset events”. 69

Activities financed by the LDF will be subject to an independent integrity unit and must ensure that best practice environmental and social safeguard policies are applied. 70 Grievances due to LDF-funded activities will use the implementing entity’s independent grievance redress mechanism to address complaints. 71

“Fundraising” and Allocation

Finance for loss and damage has been detached from the UNFCCC process for decades. The Paris Agreement only mentioned mitigation and adaptation when establishing the obligations of Global North to provide finance. 72 Currently, financial contributions to the LDF are dependent on a fundraising strategy, that is yet to be developed. 73 This differentiated treatment of Loss and Damage, together with the exclusion of liability and compensation in paragraph 51, has been tailored to the needs of large emitting countries to avoid liability for loss and damage. 74

At COP28, the governance structure of the fund was defined and $792 million were pledged to take steps to operationalize it. 75 The Fund is intended to focus on priority gaps in finance while promoting the development of a funding arrangement between financial entities. The Board of the Loss and Damage Fund has to prepare a long-term fundraising and resource mobilization strategy and will be replenished every 4 years. 76 LDF contributions will come from highly concessional loans, grants (public or private), and “innovative sources”. 77

The LDF can provide grants, but also loans, which is extremely worrying in the current debt crisis faced by the most vulnerable countries. 78 Debt exacerbates vulnerability, particularly in Global South countries, as they already have severely limited fiscal space due to debt payments owed to the Global North. This fuels another unequal exchange of financial resources.

The LDF can also use additional
financial instruments “grants, highly concessional loans, guarantees, direct budget support and policy-based finance, equity, insurance mechanisms, risk-sharing mechanisms, pre-arranged finance, performance-based programmes and other financial products”. These instruments are supposed to consider debt sustainability to augment and complement national resources addressing loss and damage. The details of any of these instruments will merit an in-depth and complex analysis. What is clear now, however, is that loss and damage are being framed as financial opportunities for those entities providing financial services to particularly vulnerable countries. It is a corporate-driven approach to “helping” the vulnerable, turning them into consumers, rather than recognising their right to reparations.

Board of Directors of the LDF

The LDF Board is key in matters related to the governance of the fund, but also in the orchestration of the Financing Arrangements (FA). The Board is supposed to have an equitable and balanced representation of all parties, but it is biased towards the Global North. 46% of the Board members are from the Global North. In contrast, the Adaptation Fund Board has a 30% representation of members from the Global North. This representative inequality of the Board is also illustrated by the fact that the co-chairs of the Board must be one from a developed country and one from a developing country.

This strategic co-optation of the LDF is reflected in the decision-making rule of a four-fifths majority of members present and voting, which implies that to adopt a decision of the Board, the Global North not only has the casting vote but also has to give its consent with strong support. The Global North is neither geographically diverse nor does it represent the majority of the population, therefore the words “equitable and balanced representation” have no meaning, but are symptoms of the structural violence of the UNFCCC.

The balance of decision-making power is relevant, as it is the Board that will have a say in the strategies that will make different types of funding available, set the criteria for the provision and allocation of funding, define which priority gaps will be funded, and orchestrate the financial arrangements...
that will provide the core funding to respond to or address loss and damage. The Global North therefore exercises control through the voluntary nature of contributions to the LDF, but also in the way the financial scheme is designed and implemented.

Participation

The LDF has a mandate to enhance stakeholder participation.\(^{84}\) by inviting active observers to participate in its meetings and related proceedings.\(^{85}\)

To achieve this, the LDF should develop a mechanism for input and participation in the design, development and implementation of its activities. This mechanism will have a broader focus, including the private sector, civil society organisations, and groups most vulnerable to the adverse effects of climate change, including women, youth and indigenous peoples.\(^{86}\) The LDF must also create consultative forums with an even broader stakeholder participation that reflects a geographical balance of participants.\(^{87}\)

In addition, the LDF must set up an observer accreditation process to enable effective participation in its meetings.\(^{88}\) Stakeholders could be involved in the monitoring of programmes, projects and activities funded by the LDF.\(^{89}\)

Civil society and indigenous peoples

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84. incluidos los jóvenes, las mujeres, los pueblos indígenas y las organizaciones no gubernamentales ambientales.
85. Convención Marco de las Naciones Unidas sobre el Cambio Climático, «Decisión -/CP.28 -/CMA.5 Puesta en práctica de los nuevos acuerdos de financiación, incluido un fondo, para responder a las pérdidas y daños a que se hace referencia en los párrafos 2 y 3 de las decisiones 2/CP.27 y 2/CMA.4» (nota 52), párr. 20.
86. Ibid., 29.
87. Ibid., 28, anexo 1.
88. Ibid., 27.
89. Ibid., 62.
The purpose of the Funding Arrangements (FA) is to “assist” developing countries that are particularly vulnerable in responding to loss and damage. \(^90\) It also includes a focus on addressing loss and damage for “extreme weather events and slow onset events, especially in the context of ongoing and ex-post action. \(^92\) The differentiation between the LDF and the Financial Arrangement purpose reinforces the idea that there is a conceptual difference between responding and addressing loss and damage.

Existing mechanisms, such as the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM) and the Santiago network, will work together with the FA. \(^93\) The FA are meant to coordinate and bring coherence to the loss and damage finance architecture. \(^94\) This means, creating an architecture that understands loss and damage as a new field for financial services, whose main customers are particularly vulnerable countries.

The LDF will work as a coordination platform “under the funding arrangements” through the establishment of the High-Level Dialogue. \(^95\) The objective of the High-Level Dialogue is to make recommendations to the Conference of the Parties to the Paris Agreement and the Conference of the Parties to the UNFCCC to improve the implementation of the funding agreements. \(^96\) This High-Level Dialogue will be convened by the Fund and the UN Secretary-General and will provide recommendations related to improving
the implementation of the objectives of the new funding agreements. The LDF Board has to create approaches to develop partnerships with other entities that form part of the FA. The LDF will orchestrate many entities, use many instruments, and engage in a complex governance scheme to respond to loss and damage, while the FA manage to address it. Although these financial innovations allow for progress, within the frameworks and timelines of the dominant financial institutions, people will continue to wait for justice.

Financing loss and damage should not be so complicated. A small number of countries, the Global North, have generated harm and should take responsibility for the negative externalities of the economic model that provided them with so much financial wealth. There is no need to find innovative sources of finance to meet their obligation to repair the loss and damage inflicted on our people and ecosystems.

The countries of the Global North account for 69% of the world’s private wealth and 74% of the world’s billionaires’ wealth is concentrated in this area. The Global North has at least 1,240 billionaires, which serves as an example of the resource grabbing that these countries have promoted. The countries of the Global North have resources to spend on death, with spending on wars in 2022 costing an estimated $1.210.673 billion. The troubles that may arise in the North due to fulfilling their obligations, are absurd and only can become relevant if racism and discrimination are used as filters to analyze this discussion. The North can afford to finance life and an equitable future drawing upon law and justice.

97. CMNUCC, «Decisión -/CP.28 -/CMA.5 Puesta en práctica de los nuevos acuerdos de financiación, incluido un fondo, para responder a las pérdidas y daños a que se hace referencia en los párrafos 2 y 3 de las decisiones 2/CP.27 y 2/ CMA.4» (nota 52). Anexo 2.
98. ibid. 9 Anexo 2.
It is a matter of fulfilling legal obligations to repair loss and damage and prioritizing human dignity, over greed and death. As noted above, Principle 21 of the UN Charter obliges states to ensure that activities under their jurisdiction do not damage the environment of other states. This principle has been repeatedly reiterated by the International Court of Justice.

Global North countries have exceeded their fair share of carbon budget by 92 percent. Nonetheless, climate change hits those countries and communities the hardest that have contributed the least. As climate mitigation falls short of ambitious actions and average temperatures rise, loss and damages are expected to multiply. This leads to projections emphasizing that an annual sum of 400 billion US dollars will be needed to address loss and damage. As a result, Northern countries not only fail not to damage the environment of other states but also deny the right to development.

In the annex to the Paris Agreement, Paragraph 51 states that parties “agree[s] that Article 8 of the Paris Agreement does not imply or give rise to any form of legal liability or compensation”. The adopted paragraph created a barrier in international climate negotiations to address claims for reparations and liability. Despite loss and damage causing serious human rights violations, paragraph 51 illustrates how historically polluting countries try to evade their responsibilities.

In contrast to the enabling of climate reparations, the financial scheme offered by the LDF and the FA turns victims into consumers of financial services, once again extracting resources from the South and shifting them to the North. This is not about justice or “assistance”, but exploitation.

103. Caldas and others (n 43).
104. CIJ (n 44).
105. Hickel (n 10).
107. CMNUCC (n 49), Art. 8., para. 51.
108. La Ruta del Clima, «Nuestro derecho a la reparación climática» [Serie Justicia Climática en América Latina No. 19]
Financial Institutions Reform with Purpose

The climate crisis requires immediate action, which in turn requires financing. Projected spending for economies in transition to reach carbon neutrality by 2030 is estimated to be at least $4.3 trillion annually, with a minimum of $1 trillion earmarked for emerging economies. Contradictorily, emerging nations have been receiving less than 27% of the investment and financial resources needed to address climate change.\textsuperscript{109}

As frequently emphasized, countries of the Global South not only lack access to resources but are also compelled into debt due to their insufficient liquidity for reparations. These factors underscore the increasing urgency for a reform of the financial system. This reform should entail adapting the international development finance system to the needs of countries and the rights of people. It must establish a more inclusive space with greater representation, incorporating more voices from the Global South in shaping the decisions of global markets.

Financial institutions such as the World Bank and the IMF gained enormous influence by providing Third World states with large sums of money that they were then conditioned to use under the neo-colonial visions of dependency that the institutions wanted to create.\textsuperscript{110} The LDF cannot replicate these colonialist traits, jeopardizing the human rights of millions for the economic gains of a few.

The potential location of the LDF at the World Bank poses a risk to climate justice because of the historical power imbalance exercised by international financial institutions. The international economic system is structured to benefit wealthy nations at the expense of countries in need of assistance. Additionally, international financial institutions lack adequate representation and their decision-making processes systematically disadvantage the Global South.\textsuperscript{111}

In addition to requiring governance that is balanced and reflective of the world’s population, international financial institutions should adopt democratic, transparent, and inclusive internal processes.\textsuperscript{112} This would create a more

\textsuperscript{109} Neto y Suchodolski, 2023 Whitepaper_PDBs Ago23_varios_n.pdf (cebri.org).
\textsuperscript{110} Lodigiani (n 27). ibid.
\textsuperscript{111} ibidem.
open, transparent and equitable process of decision-making, priority-setting and economic modeling.

In addition, a double majority voting mechanism needs to be implemented to ensure that decisions are not only defined by the major shareholders but that other countries have a say in the decisions taken.  

Moreover, the UN advocates for reforming the international financial and tax architecture across six key areas: a) Global economic governance; b) Debt relief and sovereign debt costs; c) International public finance; d) Global financial safety net; e) Regulatory and policy frameworks to combat short-termism in capital markets, align private sector profitability with sustainable development and the Sustainable Development Goals (SDGs), and address financial integrity by f) A global tax architecture that promotes equitable and inclusive sustainable development.

The concept of development derives from the Western idea of modernity. In this context, development is based on the nexus between capital, technologies and education, which is expected to bring progress to societies. 114 The universalist and Eurocentric pretensions of modernity and truth translate into the fact that historical identities and perspectives of knowledge are devalued and that everything that is not European is now declared as past. 115

By marginalising other systems of life and forms of knowledge, the imaginary of a “First World” and a “Third World” is constructed. In which it is structurally necessary for the first world to have its underdeveloped counterpart. Modernity or the “First World” becomes legitimate and endures on the basis of inequality. 115 Therefore, development could be interpreted as a strategy and instrument to exert control and subjugation over the Global South. 117

The denial of development to the Global South as a determinant of our being has pragmatic consequences for climate governance. A clear example is the inability to assert rights on equal terms. Concerning loss and damage, the exclusion of reparations and compensation within the UNFCCC is a consequence that perpetuates the status quo of dominance by the Global North, thereby undermining the well-being of the Global South.

To overcome an understanding of development that is rooted in Western worldviews, forms of knowledge, social relations and political technologies must be changed. 118 Para permitir la imaginación de futuros To enable the imagination of alternative futures, it is necessary to critically reflect on the discourses and practices that have taught us what development looks and feels like. 119 A productive paradigm shift is needed, understanding that the Global South has a right to development. However, this development must be

117. ibídem.
118. ibídem., 22
built on a sustainable vision and put an end to extractivist consumption. It is imperative for organizations in the Global South to engage in a pedagogy of resistance when analyzing climate governance and to dare to envision equitable futures.

In the realm of climate reparations, the Global North bears a responsibility to provide economic and technological resources for the self-determined development of the Global South. The current loss and damages deprive our society of a viable future and obstruct the exercise of the right to development. In this context, the international financial system must be restructured to allow for alternative development pathways in the Global South and reflect the obligations of the Global North. Therefore, as ecological, climate, and social challenges escalate globally, multilateral action for loss and damage must not merely be an act of solidarity but a legal responsibility and the provision of climate reparations.

The Loss and Damage Fund and its operationalization must be guided by a human rights and justice approach, enabling it to depart from the colonialist dynamics described here and facilitate swift access to resources for countries in the Global South. In this regard, a minimum of $400 billion per year is necessary to address loss and damage; and the absence of tangible results in terms of mitigation and adaptation implies that this amount will escalate over time. These resources should not carry debt or be subject to economic adjustments that further limit development but should respond to the needs of the communities involved.

The board of directors of the Loss and Damage Fund requires genuine, equitable representation in decision-making regarding resources, criteria, procedures, and other matters. However, given that the fund is administered by the World Bank, there exists a risk of it being entangled in the colonialist tendencies of this institution. This poses a threat to Global South countries, highlighting the importance of civil society keeping a watchful eye on the fund’s development.

We envision a future where the value of our lives, societies, and environments is equal to that of other regions. A future where justice is within our reach, allowing us to dismantle economic structures and ideologies that dehumanize our people and condemn us to a climate crisis we should not have to endure. We dare to imagine and construct the path to climate justice in the face of loss and damage.
