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### “Loss and Damage”: the liability spectre

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To veterans of the process it was truly astonishing to find a Presidency tabling a Decision to operationalise a Loss and Damage (L&D) Fund in the opening session of the COP, and to have it adopted at the same session. But this is exactly what happened in Dubai with [Decision 2/CP.28 - CMA.5 \(Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2-3 of decisions 2/CP.27 and 2/CMA.4\)](#). To explain why this was extraordinary, not only because ‘big ticket’ decisions are not normally tabled at the outset of a COP, let us go back in time and see how the L&D issue evolved in the multilateral climate negotiations.<sup>[1]</sup>

At the beginning, there was the [1991 AOSIS proposal for an Insurance Mechanism](#), submitted by Vanuatu to the Intergovernmental Negotiating Committee for a UN Framework Convention on Climate Change (UNFCCC). The mechanism included an International Insurance Pool to provide financial insurance “to compensate the most vulnerable small island and low-lying coastal developing countries for loss and damage resulting from sea level rise.”[para 1.5] The pool was meant to be funded by “industrialised developed countries” according to a formula involving GNP and country emission figures “modelled on the 1963 Brussels Supplementary Convention on Third Party Liability in the field of Nuclear Energy”[para. 4] The AOSIS mechanism was not included in the UNFCCC, not least because of its explicit reference to ‘compensation’ and ‘liability’.<sup>[2]</sup>

The first time L&D made it into a COP decision was sixteen years later in the [2007 Bali Action Plan \(1/CP.13\)](#), where reference was made to “consideration of ... means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change”.[para 1.c.iii] The idea of an “international mechanism to address the unavoidable loss and damage” resurfaced in a [submission by the African Group of Negotiators](#) in 2009 (COP 15, Copenhagen) but it was not until 2010 (COP 16 Cancun) that the COP decided to do something on L&D, namely to establish “a work programme in order to consider ... approaches to address loss and damage associated with climate change impacts in developing countries ...”[para. 26, [The Cancun Agreements \(1/CP.16\)](#)]

Two years later, the [2012 Doha Decision 3/CP.18](#) was the first COP decision dedicated to addressing loss and damage. In it, it was decided (para. 9) to establish in 2013 “institutional arrangements, such as an international mechanism, ... to address loss and damage associated with the impacts of climate change in developing countries that are particularly vulnerable to the adverse effects of climate change”. This duly happened at COP19 with the establishment of the [Warsaw International Mechanism on Loss and Damage \(WIM\)](#).

In Paris (COP 21, 2015) the negotiating text initially contained “an option from developing countries that included liability and compensation, and another from the Umbrella Group – including the US – that deletes all mentions of the topic altogether.”[[CB Timeline](#)] In the end L&D received a dedicated article (Art. 8) in the Paris Agreement focussing on the governance and the activities of the WIM.

L&D got its stand-alone article, yet its formulation was somewhat retrograde: While the WIM is solely about “addressing” L&D,<sup>[3]</sup> Art. 8 recognizes “the importance of *averting, minimizing and addressing* loss and damage associated with the adverse effects of climate change”[[emphasis added](#)] thus referring implicitly also to mitigation (averting) and adaptation (minimizing). Moreover, in the Paris cover decision ([1/CP.21 Adoption of the Paris Agreement](#)) the COP “agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation” [para. 51] demonstrating that the spectre of liability was perceived by some, particularly the US, as a live and active problem.

The conceptual triad (‘averting’, ‘minimizing’ and ‘addressing’) dominated the L&D narrative for many years to come. An OCP/ecbi blog post in October 2022 ([The time is ripe ... for serious discussions on finance to address and indeed respond to L&D through a dedicated pilot fund](#)) on the eve of COP27 in Sharm El Sheikh provides a summary of this and proposes that the Paris triad be replaced by the notion of ‘responding’ to L&D, to be implemented through a Pilot Loss and Damage Response Fund, the elements of which were elaborated in a separate [OCP/ecbi blog post](#), which illustrated the relevant ‘response’ concept and its components relevant for the fund as follows:

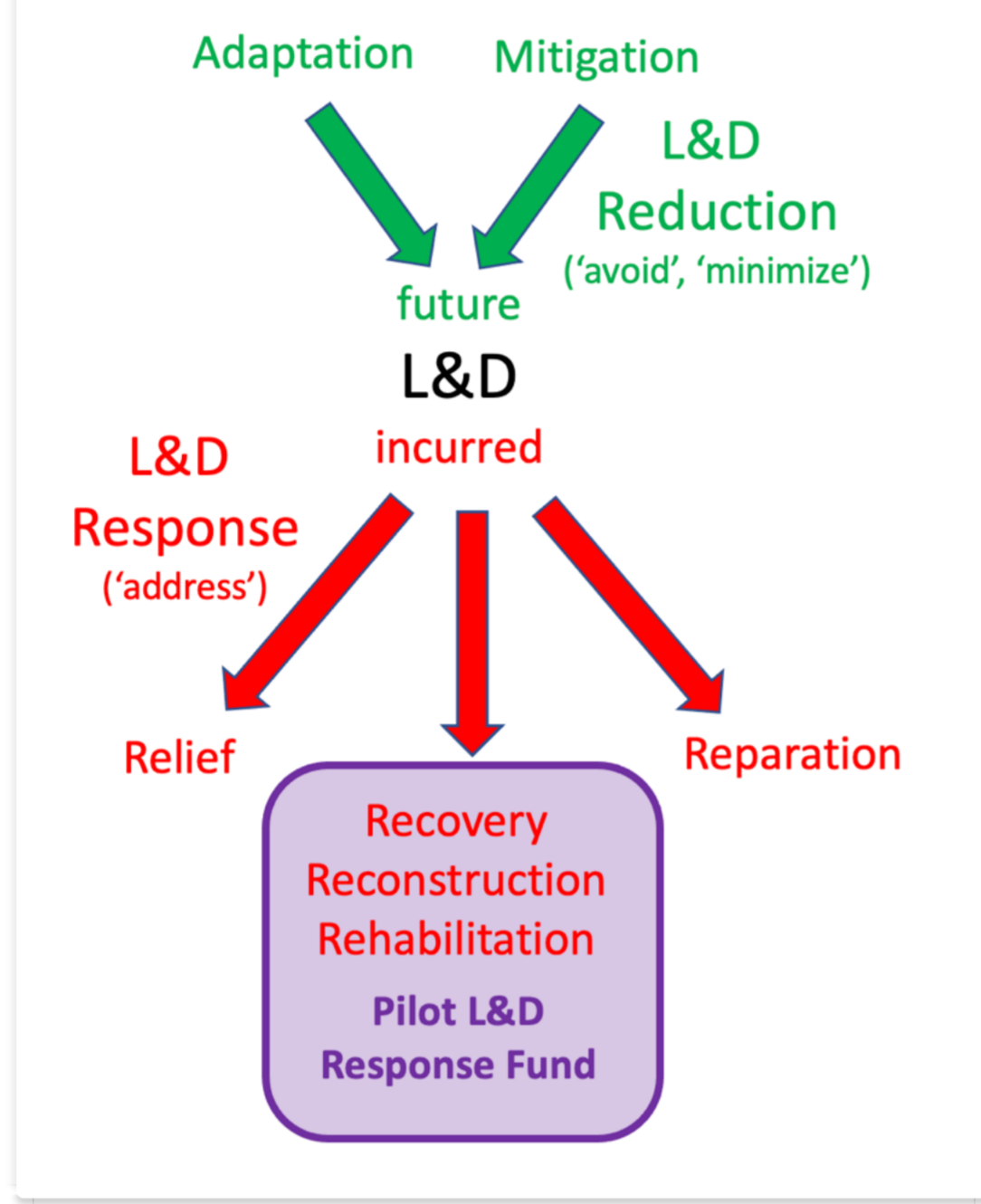
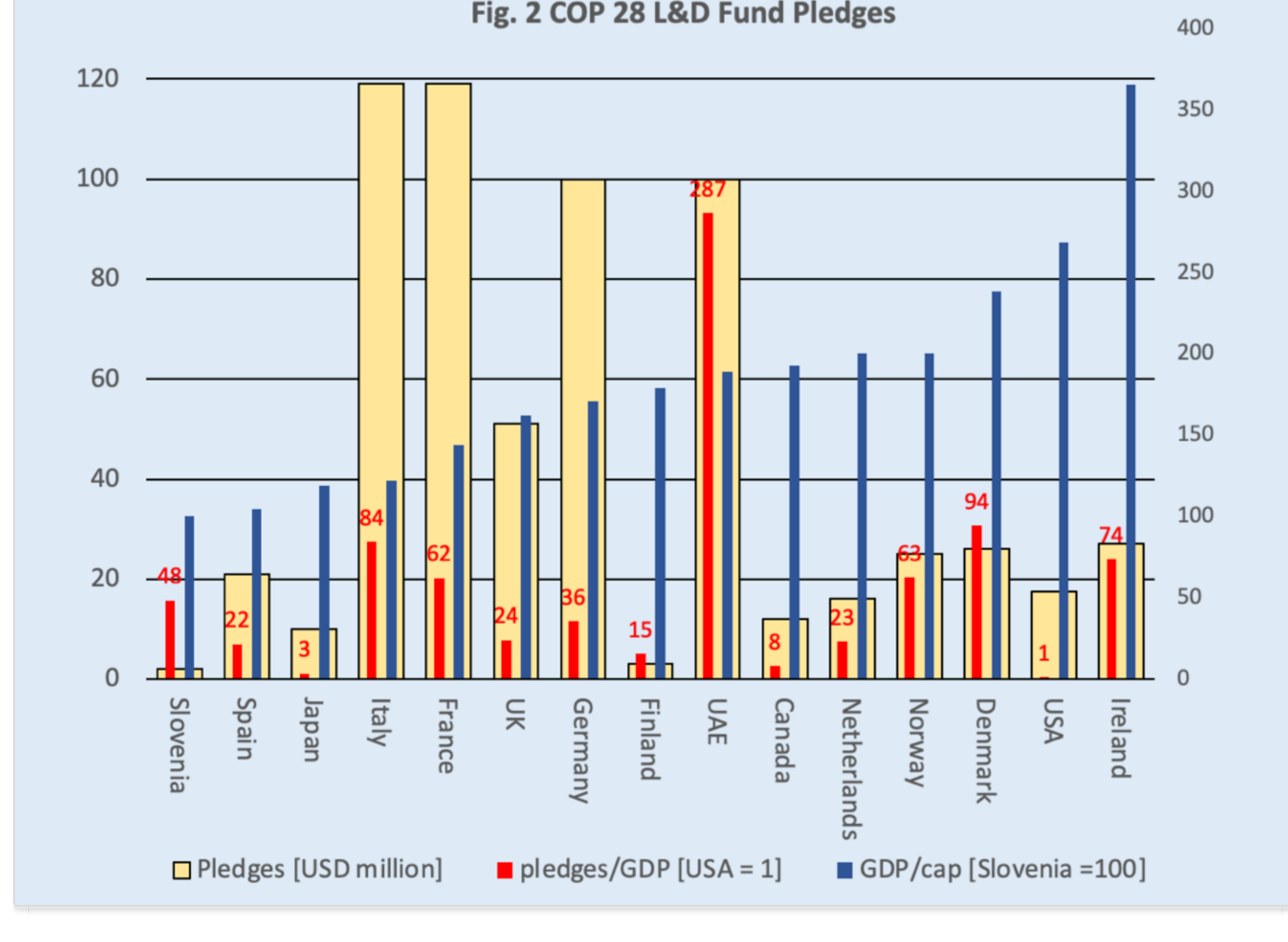


Figure 1. The role of the Response Fund in the L&D Management Toolkit

As reported in the subsequent [OCP/ecbi blog post](#) the COP at its 28th Session (Sharm El Sheikh, 2022), acknowledged the “urgent and immediate need” for financial resources to assist particularly vulnerable developing countries “in *responding* to loss and damage associated with the adverse effects of climate change ... in the context of ongoing and *ex post* (including *rehabilitation, recovery and reconstruction*) *action*”<sup>[4]</sup>, and decided to “establish a *fund for responding to loss and damage* whose mandate includes a focus on addressing loss and damage”<sup>[5]</sup>

This Fund, as mentioned above, was operationalised by the [headline decision](#) taken on the opening day of COP 28 in Dubai (2023). It is noteworthy that the Paris concept-triad was superseded by simple references to ‘responding to L&D’<sup>[6]</sup> and yet the spectre of liability was still present, as witnessed in the CarbonBrief [Key outcomes agreed at the UN climate talks in Dubai](#):

“The board will also be tasked with giving the fund a name. This came as the US – which for decades resisted the entire concept of “loss and damage” – pushed back against references to a “loss and damage fund”. Instead, US climate envoy John Kerry [repeatedly referred](#) to the “climate impact response” fund. The US State Department declined to comment on the reasoning behind this to Carbon Brief.”



Given the long-term problem of US governments with the “loss and damage” narrative due to the spectre of liability outlined above, it is not difficult to guess what the reasons for this is. And given that it was most likely that very same issue which prevented progress on the issue of responding to adverse climate impacts over the past twenty years, it might be not unreasonable to try out the climate impact response narrative, if only to remove the liability spectre as a reason for not participating meaningfully, which cannot be said of the US pledge in the initial pledging round in Dubai (see [UNFCCC pledge tracker](#), and Fig. 2): The US pledged USD 17.5million! Of the 15 country pledges, 9 were larger than that in absolute terms, two of them (Italy and France) almost 7 times more. The picture becomes even clearer if we look at relative measures, such as the pledges as share of GDP: all but one country made a pledge double digit larger than the US, indeed, the UEA pledge relative to its GDP is a staggering 287 times larger than that of the US.

Anything to enable the US to participate meaningfully must be worth trying. If not “Climate Impact Response Fund” then maybe “Climate Impact Recovery, Reconstruction and Rehabilitation (CIR3) Fund”? The fact is, a name can be a sign of something to come, an omen. What we need to avoid is that it is regarded as a bad omen, if we want to avoid what happened over the last thirty years!

Last but not least, I was told that the Fund will indeed need to be given a proper name (not just ‘Fund’) if it is to obtain legal personality as was decided in para. 15 of the Dubai Decision. So the Board of the Fund will have to face this issue, sooner rather than later.

[1] For a more detailed account, see the excellent Carbon Brief piece on [“Timeline: The struggle over ‘loss and damage’ in UN climate talks”](#) (27 September 2022) by Josh Gabbatiss.

[2] All that remained was a reference to ‘insurance’ in Art. 8.]

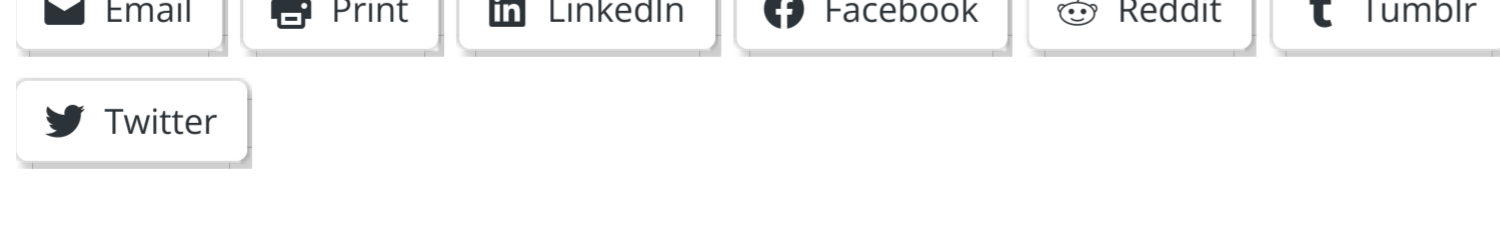
[3] The COP “1. Establishes the Warsaw international mechanism for loss and damage, [...], to address loss and damage associated with impacts of climate change.”[[Decision 2/CP.19, 2013](#)]

[4] 2/CP.27 and 2/CMA.4, para 1, emphasis added.

[5] Ibid. Para.3, emphasis added.

[6] The only reference to the triad was in the context of referring to the “Santiago network for averting, minimizing and addressing loss and damage”.

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