

**Legal status of work that has provisionally commenced based on provisional agendas at SB 58**

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*This advice is provided in response to **Query 21/23***

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**Queries:**

1. At the 58th sessions of the Subsidiary Body for Scientific and Technological Advice (**SBSTA**) and the Subsidiary Body for Implementation (**SBI**) (**SB 58**) of the United Nations Framework Convention on Climate Change (**UNFCCC**), the agendas for the sessions were not adopted at the opening of the sessions. If the agendas were not adopted by the end of SB 58, what would be the legal status of any conclusions, draft decisions, and other outcomes of discussions held at SB 58?
2. Did the outcome of COP 27 create a mandate to add the Mitigation Ambition and Implementation Work Programme (**Mitigation Work Programme**) to the agendas of the Subsidiary Bodies at SB 58? If there is no mandate to add the Mitigation Work Programme to the agendas of the Subsidiary Bodies, would that constitute a legal obstacle to adding the Mitigation Work Programme onto the agendas of the Subsidiary Bodies?

**Advice:**

1. At SB 58 the Parties agreed to launch work on the basis of the SBSTA's provisional agenda and the SBI's supplementary provisional agenda, with the understanding that consultations would continue, and the agendas would be adopted at a later stage. There was a risk that the agendas would not be adopted by the end of SB 58. It is noted that the agendas were eventually adopted at SB 58, however we provide the following advice for future reference.

The draft Rules of Procedure for the Conference of the Parties to the UNFCCC and the SBSTA and the SBI (**Subsidiary Bodies**) (**Draft Rules of Procedure**) do not mention what the legal status of any conclusions, draft decisions, and other outcomes of discussions held at a session such as SB 58 would be if the agendas were not adopted. Therefore, it is not clear whether work that has provisionally commenced can be accepted by the SBI and the SBSTA, or whether conclusions reached by the Parties can be formally adopted.

We are not aware of any instances where agendas for the SBI and/or the SBSTA sessions were not adopted by the end of those sessions and where work was launched during those sessions based on provisional agendas. We note that at the 38<sup>th</sup> session of the SBI (**SBI 38**), the SBI agenda was not adopted, and that Parties were unable to launch substantive work based on the provisional agenda of that session. Parties were able to convene the scheduled in-

session workshops (including the SBI/SBSTA Response Measures Forum, the Durban Forum on Capacity Building and the Dialogue on Implementation of the Doha Work Programme on Convention Article 6). However, substantive discussions on key agenda items, including loss and damage, were unable to take place. No work was launched under the SBI and there were no SBI conclusions adopted by the Parties at that session.

As the Draft Rules of Procedure are silent on the issue of the status of work undertaken on the basis of a provisional agenda (and not formally launched), we would recommend a cautious approach be taken. This would involve assuming that work commenced on the basis of a provisional agenda will not be accepted by the SBI or the SBSTA if the agenda is not adopted by the end of the session, and that conclusions reached by the Parties on a provisional basis will not be formally adopted.

At the 39<sup>th</sup> session of the SBI (**SBI 39**) it was mentioned that, since the SBI was unable to adopt its agenda at SBI 38, items mandated to be considered at SBI 38 and that needed to be considered prior to the next session of the Conference of the Parties were placed on the provisional agenda for SBI 39 (see FCCC/SBI/2013/11). Therefore, mandated agenda items which were not considered at the session would likely be carried over to the provisional agendas of the following sessions of the SBSTA and the SBI, where those agendas could then be adopted. We note that there is nothing (in the Draft Rules or Procedure or elsewhere) to stop Parties from using the work done at the previous session – if they agree to do so. Thus, the Parties could start the work required to be undertaken under the (adopted) agendas of the future session based on the work undertaken at the previous session (i.e. drawing from informal notes or other document capturing the work prepared by chairs etc, provided there is consensus to do so).

Rule 10 of the Draft Rules of Procedure provides that the provisional agenda for an ordinary session shall include any item proposed by a Party and received by the permanent secretariat designated by the Conference of the Parties in accordance with Article 8, paragraph 3 of the UNFCCC (**Secretariat**) before the provisional agenda is circulated. Therefore, a Party or multiple Parties could propose agenda items for the agendas of SB 59 that are based on the discussions held at SB 58.

2. In November 2021, by Decision 1/CMA3, Parties established the Mitigation Work Programme, which is a work programme to urgently scale up mitigation ambition and implementation in a manner that complements the global stocktake.

At COP 27 in November 2022 it was mandated by Decision 4/CMA4 that, amongst other things:

- the Chairs of the Subsidiary Bodies appoint, well in advance of SB 58 and every two years thereafter, in consultation with respective constituencies, two co-chairs for the Mitigation Work Programme; and
- the Subsidiary Bodies take into account the annual report required by para. 15 of Decision 4/CMA4 (**Annual Report**) to consider progress, including key findings, opportunities and barriers, in implementing the Mitigation Work Programme with a view to recommending a draft decision for consideration and adoption by CMA at each of its sessions.

Therefore, in our view the Subsidiary Bodies have clearly been mandated to undertake work in relation to the Mitigation Work Programme. However, the Mitigation Work Programme agenda item was not automatically added to the provisional agendas for SB 58 by the Secretariat, and instead the item was only provisionally added, at the request of Sweden on behalf of the EU, in accordance with Rule 10(d) of the Draft Rules of Procedure.

We note that it is not clear from Decision 4/CMA4 when work in relation to the Mitigation Work Programme is to be undertaken by the Subsidiary Bodies. It has been reported by the Third World Network that according to the Like-Minded Developing Countries (**LMDC**), Brazil, South Africa, India and China (**BASIC**) and the Arab Group, there is no mandate to discuss the substance of the Mitigation Work Programme at SB 58. It was further reported that the developing country groups expressed the view that any substantive discussions should wait until the report of the first Mitigation Work Programme global dialogue is made available, and that discussions can take place at COP 28, when the annual reports of both the first and second Mitigation Work Programme global dialogues will be available.

However, in the rationale that accompanied Sweden's request on behalf of the EU for the Mitigation Work Programme agenda item to be added to the provisional agendas for SB 58, it was stated that as the Annual Report will only be presented annually, it is imperative to have a formal space in the agendas of the Subsidiary Bodies where Parties can exchange views on the content of the annual CMA decision, which will take into account the Annual Report. It was further stated that in order to support the objectives of the Mitigation Work Programme and the annual CMA decisions, it is necessary to include an agenda item at sessions of the Subsidiary Bodies in June, in addition to the sessions of the Subsidiary Bodies at every COP.

At least in part due to the resistance of the LMDC, BASIC and the Arab Group mentioned above, the agendas for SB 58 that were formally adopted (FCCC/SBI/2023/1/Add.1 and FCCC/SBSTA/2023/1) did not include the Mitigation Work Programme agenda item. Instead, it was decided that the work undertaken under the Mitigation Work Programme at SB 58 will be captured by the Subsidiary Bodies' Chairs in an informal note issued under their own authority.

Informal notes have been issued in the past. They generally state the status of the informal note at the start of the document. For example, the Chair of the SBSTA's "informal note on mid-term review of the workplan of the forum" (IN.COP27.i12\_CMA4.i12\_CMP17.i9.1) from COP27 provides that:

*"This informal note has been prepared by the Chair and has no formal status. It is an attempt to capture the discussions of the midterm review of the workplan of the forum at the COP 27, CMP 17 and CMA 4. It does not represent agreement among Parties and does not prejudge further work or prevent Parties from expressing their views in the future."*

Therefore, we presume that the informal note of the Subsidiary Bodies' Chairs regarding the work undertaken under the Mitigation Work Programme at SB 58 would also have no formal status, that it would not represent agreement among the Parties and would not prejudge further work or prevent Parties from expressing their views in the future in relation to the Mitigation Work Programme.

Rule 10(d) of the Draft Rules of Procedure provides that the provisional agenda for an ordinary session shall include any item proposed by a Party and received by the Secretariat before the provisional agenda is circulated. Thus, a Party or multiple Parties could propose agenda items for the agendas of SB 59 that concern additional aspects of the Mitigation Work Programme. Therefore, the absence of a clear mandate to add the Mitigation Work Programme to the agendas of the Subsidiary Bodies would not constitute a legal obstacle to adding the Mitigation Work Programme (or a new aspect of it) onto the agendas of the Subsidiary Bodies as a separate item.