

### **Adaptation finance decisions**

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This advice is provided in response to **Query 16/22**

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#### **Query:**

1. Does the request by the COP (in Decision 4/CP.26 para.9) to some developed country Parties to significantly increase their provision of adaptation finance, including by, as appropriate, considering doubling adaptation finance with the aim of achieving a balance between mitigation and adaptation, differ, in substance, from that by the CMA (in Decision decision 1/CMA.3 para.18) urging developed country Parties to at least double their collective provision of climate finance for adaptation to developing country Parties from 2019 levels by 2025, in the context of achieving a balance between mitigation and adaptation in the provision of scaled-up financial resources? What is the difference? What legal arguments could be made by parties to say that the CMA request is the more authoritative of the two?
2. What is meant by "doubling", "at least double" and "collective provision"? How is this going to be calculated? What will be the baselines? How will this be operationalised?
3. Based on UNFCCC practice, through which process could parties take the issue of adaptation finance forward? E.g. could they propose an agenda item? And if so, under which body? Or are there other options, for instance setting up a work programme?

#### **Advice:**

Climate finance is a broad term referring to financing provided by public, private or alternative sources at a local, national or international level which seeks to support actions and projects that will address climate change. Two key categories of climate finance are (i) mitigation finance, denoting financing which aims to reduce emissions and enhance carbon sinks to mitigate the impact of current emissions, and (ii) adaptation finance, provided with the aim of adapting to the adverse effects and reducing the future impacts of a changing climate.<sup>1</sup>

In recent years the vast majority of climate finance has focused on mitigation investment, such as solar and wind projects, with adaptation finance accounting for just 7 per cent of total climate finance.<sup>2</sup> This

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<sup>1</sup> UNFCCC, 'Introduction to Climate Finance', available at <<https://unfccc.int/topics/climate-finance/the-big-picture/introduction-to-climate-finance>>.

<sup>2</sup> Climate Policy Initiative, 'Global Landscape of Climate Finance 2021', p.25, available at <<https://www.climatepolicyinitiative.org/wp-content/uploads/2021/10/Full-report-Global-Landscape-of-Climate-Finance-2021.pdf>>.

is in part due to the fact that the Paris Agreement's mitigation provisions establish comparatively precise goals and legal obligations, whereas the agreement's adaptation provisions are more general and, for the most part, are hortatory and expository rather than obligatory.<sup>3</sup>

According to the UNFCCC website, there is however a "political aspiration" for a 50:50 split between mitigation and adaptation finance.<sup>4</sup> The call for an increase in adaptation finance was made clear at the Glasgow Climate Change Conference ("COP26") and the emphasis on adaptation finance is also clearly stated in Article 9, paragraph 4, of the Paris Agreement ("The provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation, taking into account...") and in the both decisions (4/CP.26 and 1/CMA.3) subject to this query.

This advice will provide some background and context for the Decisions, will analyse and interpret the language and relative authority of the decisions, and will put forward suggestions on how to take the Decisions forward.

### 1. Difference between the COP and CMA decisions

Although the Decisions do not seem to differ in substance (both reflect the desire coming out of COP26 for Parties to double their provision of adaptation finance from 2019 levels), on a literal analysis of the language of the Decisions, the wording of the COP Decision appears less conclusive. Notably, the main request is for Parties to "significantly increase" their provision of adaptation finance, as opposed to a specific, quantifiable measurement ("double") in the CMA Decision. Further, under the COP Decisions Parties only need to "consider" doubling adaptation finance "as appropriate".

On the other hand, the language in the CMA decision is seemingly stronger in that it "urges" parties to take action (rather than "requests" parties to make considerations). However, in both Decisions, the Parties could only agree to language that "notes" certain issues or "urges" certain actions, as opposed to strong language that "decides" on actions or "commits" parties to any defined metric. This is in line with general views on the Glasgow Climate Pact which, compared to previous COP agreements, is "notably weak".<sup>5</sup>

In terms of authority, the COP Decision is a decision of the Conference of the Parties on Climate Change ("COP"), the supreme decision-making body of the UNFCCC, which is responsible for reviewing the implementation of the UNFCCC. There are 197 Parties to the UNFCCC, of which 193 are parties to the Paris Agreement. There is some dispute as to whether or not the UNFCCC is legally binding – however, this is a matter of international law which is beyond the scope of this advice.

The CMA Decision was taken by the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement ("CMA"), which is made up of the 193 Parties to the Paris Agreement (not including Iran, which had the eighth-highest fossil fuel emissions in 2019<sup>6</sup>), and which oversees the implementation of the Paris Agreement. The Paris Agreement is widely held to be legally binding.

We note that the UNFCCC is the parent treaty to the Paris Agreement and, as noted above, it has more signatories. One key difference between the two treaties is that the UNFCCC expresses a qualitative

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<sup>3</sup> Daniel Bodansky, Introductory note to the Paris Agreement for the Audiovisual Library of International Law, available at <<https://legal.un.org/avl/ha/pa/pa.html>>.

<sup>4</sup> UNFCCC, 'COP26 Outcomes: Finance for Climate Adaptation', available at <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact/cop26-outcomes-finance-for-climate-adaptation#eq-2>>.

<sup>5</sup> Reed Smith, 'Post-COP26: A follow-up briefing on key business issues', available at <<https://www.ehslawinsights.com/2021/11/post-cop26-a-follow-up-briefing-on-key-business-issues/>>.

<sup>6</sup> UCSUSA, 'Each Country's Share of CO2 Emissions', available at <<https://www.ucsusa.org/resources/each-countrys-share-co2-emissions>>.

objective, whereas the Paris Agreement has a quantitative goal (limiting temperature rises to well below 2°C (and ideally 1.5°C) above pre-industrial levels).<sup>7</sup>

It is also worth noting that the text of the CMA Decision makes direct reference to Article 9, paragraph 4 of the Paris Agreement, suggesting that this Decision is made by reference to, or subject to, this treaty, which could imply that this Decision may have greater legal standing. However this interpretation is questionable and has not been picked up by commentators on the CMA Decision.

Although both the UNFCCC and the Paris Agreement themselves are international treaties (noting that there is some dispute over whether or not they have true legal enforcement mechanisms, or ‘teeth’),<sup>8</sup> it is not always clear under international law whether decisions adopted by Parties at COP and CMA (such as the Decisions) are legally binding on the parties. It has been previously suggested that only an amendment (either to the UNFCCC or the Paris Agreement) would be legally binding as it would then form part of the treaty itself.<sup>9</sup> By way of example, the 2010 Cancun Agreements,<sup>10</sup> which were adopted as COP decisions,<sup>11</sup> are widely acknowledged not to be legally binding.<sup>12, 13</sup>

The question of whether or not these two Decisions are legally binding according to international law is perhaps a moot point, when considering that much of the implementation of the UNFCCC, Paris Agreement and previous COP decisions has been effected by (legally) unconventional means – perhaps precisely because of the legal ambiguity regarding their enforcement. As with many international agreements, one obvious compliance mechanism is peer pressure.<sup>14</sup> For example, the NDC Registry, set up under Article 4, paragraph 12 of the Paris Agreement, is a publicly-accessible registry maintaining the nationally determined contributions (“NDCs”) of all Party members,<sup>15</sup> allowing the public to see whether governments have updated their NDCs in accordance with the Decisions, and introducing an element of accountability and transparency (and associated peer pressure) to global climate finance commitments.

Climate litigation has also been effective at giving ‘teeth’ to the Paris Agreement – the May 2021 decision against Royal Dutch Shell took account of the emissions targets set under the Paris Agreement when deciding the amount by which Shell was required to reduce its emissions,<sup>16</sup> and was supposed to have immediate effect, despite Shell’s ongoing appeal (launched in March 2022).<sup>17</sup> The same principle might be applied to the reference to “doubling” targets under the Decisions – these measurements may be used to inform future case law.

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<sup>7</sup> Pau de Vilchez Moragues, *Climate in Court: Defining State Obligations on Global Warming Through Domestic Climate Litigation*, p.119, available at <<https://books.google.co.uk/books?id=Ux5sEAAAQBAJ>>.

<sup>8</sup> World Economic Forum, ‘Is the Paris Climate Agreement legally binding? Experts explain’, available at <<https://www.weforum.org/agenda/2021/11/paris-climate-agreement-legally-binding/>>.

<sup>9</sup> LRI, ‘Legal status of UNFCCC documents’, available at <<https://legalresponse.org/legaladvice/legal-status-of-unfccc-documents/>>.

<sup>10</sup> COP Decision 1/CP.16, available at <<https://unfccc.int/sites/default/files/resource/docs/2010/cop16/eng/07a01.pdf>>.

<sup>11</sup> Daniel Bodansky, Introductory note to the Paris Agreement for the Audiovisual Library of International Law.

<sup>12</sup> PWC, ‘The UN Climate Change Conference in Cancun: What the Cancun Agreement means for business’, available at <<https://cdkn.org/sites/default/files/files/What-the-Cancun-Agreement-means-for-business.pdf>>.

<sup>13</sup> The Guardian, ‘Cancún climate agreements at a glance’, available at <<https://www.theguardian.com/environment/2010/dec/13/cancun-climate-agreement>>.

<sup>14</sup> World Economic Forum, ‘Is the Paris Climate Agreement legally binding? Experts explain’.

<sup>15</sup> UNFCCC, NDC Registry, available at <<https://unfccc.int/NDCREG>>.

<sup>16</sup> Cleary Gottlieb, ‘Dutch Court Orders Shell to Reduce Emissions in First Climate Change Ruling Against Company’, available at <<https://www.clearygottlieb.com/news-and-insights/publication-listing/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company>>.

<sup>17</sup> PGMBM, ‘Big Oil’s ‘Black Wednesday’ One Year On’, available at <<https://pgmbm.com/big-oils-black-wednesday-one-year-on/>>.

## 2. Understanding and calculating “doubling”, “at least double” and “collective provision”

The CMA Decision refers to an adaptation finance baseline of “2019 levels”. The COP26 Glasgow Climate Pact (available on the COP26 website) affirms this, stating that “[r]ecord amounts of adaptation finance have been pledged, including committing to doubling 2019 levels of adaptation finance by 2025.”<sup>18</sup> This shows that the commitments to increasing adaptation finance coming out of COP26 refer to a 2019 baseline.

Both the CMA Decision and COP Decision refer to “doubling” contributions to climate finance. The COP26 Presidency’s compilation of 2021-2025 climate finance commitments<sup>19</sup> gives some insight into the interpretation of the meaning of “doubling” commitment targets. Two Parties which have committed to “double” their commitments have interpreted this in the literal sense (i.e. 2x) – the UK government has committed to double its international climate finance support from £5.8 billion (2015 – 2021) to £11.6 billion (2021/22 – 2025/26),<sup>20</sup> and the Canadian government has also announced a doubling of its international climate finance from \$2.65 billion (2015–2021) to \$5.3 billion (2021–2026).<sup>21</sup> This shows that references to “double” and “doubling” may be interpreted literally. It is important to note however that these commitments are to general international climate finance provision, rather than adaptation finance specifically.

It is further unclear whether “collective provision” in the CMA Decision refers to the total aggregate provision of all developed country Parties, which would conflict with the COP Decision which may refer to doubling individual Parties’ contributions. There is a lack of legal commentary on the interpretation of this phrase.

## 3. Taking the issue forward

There is no clear-cut way for parties to take this issue forward. Possible methods include proposing an agenda item, participating in a work programme, or tabling an amendment either to the UNFCCC or the Paris Agreement. Some of these methods are more onerous than others, such as proposing an amendment to the treaties, which would require significant stakeholder input, thus making them more impractical to pursue. Establishing a work programme on how to interpret and implement the Decisions would provide the UNFCCC secretariat with a framework and strategy to take the Decisions forward, however such work programmes are required to be established or mandated internally, most likely by COP itself, such as the Nairobi Work Programme<sup>22</sup> and the Paris Agreement Work Programme.<sup>23</sup> The Subsidiary Body for Implementation (SBI) is the body that considers the biennial work programmes for the secretariat, and more information on the SBI and current work programmes can be found on the UNFCCC website.<sup>24</sup> Outlined below are some more direct ways in which parties could address the issue ahead of the Sharm el Sheikh Climate Change Conference (“**COP27**”) in November 2022.

<sup>18</sup> COP26 Glasgow Climate Pact, p.5, available at <<https://ukcop26.org/wp-content/uploads/2021/11/COP26-Presidency-Outcomes-The-Climate-Pact.pdf>>.

<sup>19</sup> COP26, ‘COP26 Presidency Compilation of 2021-2025 Climate Finance Commitments’, available at <<https://ukcop26.org/wp-content/uploads/2021/10/21-10-18-Table-of-climate-finance-commitments-Online-version-SECOND-EDITION-1.pdf>>.

<sup>20</sup> UK Government, ‘UK aid to double efforts to tackle climate change’, available at <<https://www.gov.uk/government/news/uk-aid-to-double-efforts-to-tackle-climate-change>>.

<sup>21</sup> Government of Canada, ‘Canada’s climate finance for developing countries’, available at <<https://www.international.gc.ca/world-monde/funding-financement/climate-developing-countries-climatique-pays-developpement.aspx?lang=eng>>.

<sup>22</sup> ‘The NWP’s Mission’, available at <<https://express.adobe.com/page/TpuJ4xeNwFEeY/>>.

<sup>23</sup> ‘Joint reflections note by the presiding officers of the Ad Hoc Working Group on the Paris Agreement, the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation’, available at <[https://unfccc.int/sites/default/files/resource/APA\\_SBSTA\\_SBI.2018.Informal.pdf](https://unfccc.int/sites/default/files/resource/APA_SBSTA_SBI.2018.Informal.pdf)>.

<sup>24</sup> UNFCCC, ‘Subsidiary Body for Implementation (SBI)’, available at <<https://unfccc.int/process/bodies/subsidiary-bodies/sbi>>.

There are certain mechanisms for the UNFCCC to receive comments or submissions on certain topics. One option could be to make a submission through the UNFCCC Submission Portal.<sup>25</sup> Submissions can be made by Parties to the UNFCCC, as well as non-Party stakeholders (“NPS”) with or without observer status. NPS without observer status may make submissions in response to a specific call for submissions, for example from a particular body such as a Standing Committee. NPS with observer status (i.e. admitted intergovernmental organisations (“IGOs”) and admitted non-governmental organisations (“NGOs”)) may upload submissions directly through the Submission Portal. Getting in touch with an NPS with observer status and asking them to raise a submission would be one way of taking the issue forward.

NPS without observer status may also make direct submissions by sending their submission by email to the UNFCCC secretariat (email address: [submission-info@unfccc.int](mailto:submission-info@unfccc.int)). Submissions should clearly state the particular call they are responding to, carry the name, logo and contact details of the organisation making the submission, and be in PDF format. Examples of previous submissions made by NPS to the COP can be found on the UNFCCC website.<sup>26</sup>

Relevant open calls for submissions include:

- “Voluntary submissions to the COP 27 / CMP 17 / CMA 4” (currently open with no deadline);
- “Parties views on how to achieve the objectives under the work programme” (Glasgow Sharm el Sheikh work programme on the global goal on adaptation; deadline 30 April 2022 but latest submission published 1 June 2022);
- “Call for inputs: definitions of climate finance” (29th Standing Committee on Finance Meeting; deadline 30 April 2022 but latest submission published 29 June 2022).<sup>27</sup>

#### 4. Conclusion

In conclusion, there is limited literature relating specifically to the interpretation and enforcement of these two Decisions. This is likely because they are relatively recent, having been published less than a year ago in the wake of COP26. The Decisions appear to be drafted in a way that may put their enforceability into question – they are not themselves made by way of a legally binding treaty, even though they are made by the bodies that uphold the UNFCCC and Paris Agreement. However, as discussed above, there may be other more unconventional and alternative tactics which could be employed to encourage compliance with the Decisions, including leveraging peer pressure by way of the NDC Register, general lobbying of local governments and private business, climate litigation or using the UNFCCC Submission Portal.

In the absence of stronger international legal enforcement mechanisms, it is likely that the way these targets will be implemented will be on a case-by-case basis, with individual Parties pursuing their own methods of implementation. While not directly linked to the Decisions and COP26, the Loan Market Association’s (“LMA”) recent focus on green and sustainable financing, including in particular the Green Loan Principles, is one example demonstrating individual governments’ and organisations’ desire to set meaningful frameworks through which to implement adaptation finance.<sup>28</sup>

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<sup>25</sup> UNFCCC, Submission Portal, available at <<https://www4.unfccc.int/sites/submissionsstaging/Pages/Home.aspx>>.

<sup>26</sup> UNFCCC, Submissions from Non-Party Stakeholders, available at <<https://unfccc.int/process/parties-non-party-stakeholders/non-party-stakeholders/submissions-from-non-party-stakeholders/cop>>.

<sup>27</sup> Call for inputs: definitions of climate finance, available at <[https://unfccc.int/sites/default/files/resource/Call\\_for\\_inputs\\_Definition\\_ClimateFinance\\_2022\\_.pdf](https://unfccc.int/sites/default/files/resource/Call_for_inputs_Definition_ClimateFinance_2022_.pdf)>

<sup>28</sup> LMA website, ‘Green Loan Principles’, available at <[https://www.lma.eu.com/application/files/9716/1304/3740/Green\\_Loan\\_Principles\\_Feb2021\\_V04.pdf](https://www.lma.eu.com/application/files/9716/1304/3740/Green_Loan_Principles_Feb2021_V04.pdf)>.