

### ***Placement of loss and damage finance in COP and CMA agendas***

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*This advice is provided in response to **Query 46/22***

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#### **Query:**

How important is it that the issue finance for loss and damage has been placed on the current provisional agendas (item 8f) of both the COP and CMA?

#### **Summary:**

In addressing the question of ‘importance’ we have considered the following:

- the reasons provided by the States that proposed the duplicate agenda items,
- the risks of procedural conflict arising between the duplicate agenda items,
- whether a COP or CMA decision is hierarchically supreme to the other,
- whether the effect of determining item 8(f) under the COP or CMA is different,
- the risks of inconsistency across COP and CMA decisions on the same subject matter.

The agenda items were proposed by the Group of 77 & China (G77 & China) to prompt decisions that address the existing gap in funding arrangements for loss and damage (L&D). There is no clear procedural conflict arising if the same item appears on both agendas and no formal hierarchy between decisions under the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement (CMA). While the Paris Agreement and decisions under the CMA are more consistent with actions to address L&D than the Convention (which is silent on L&D), the authority of the CMA to decide upon a L&D financial mechanism may be limited, as a result of Decision 1/CP.21. It is in the interests of Parties that seek clear and unambiguous decisions on funding arrangements to address L&D that decisions under both the COP and the CMA are practically consistent to the greatest degree possible.

#### **Advice:**

1. What were the reasons to add the agenda item?

On 13 June 2022, Pakistan proposed on behalf of the G77 & China to add the agenda sub-item of “matters relating to funding arrangements for addressing loss and damage” to both the COP 27 and CMA 4 provisional agendas, in accordance with Rule 10(d) of the draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies (UNFCCC Draft Rules).

The G77 & China provided the following reasons for the proposal:

- “The space will allow us to discuss and conclude on solutions to address the longstanding gaps in the existing funding arrangements for addressing loss and damage.”
- “[W]e propose that under this sub-item, the governing bodies would take decisions on: clarifying the status of funding arrangements to finance averting, minimizing and addressing of loss and damage at COP 27, the further elaboration of the design and operational modalities of the facility at COP27, and other matters relating to the operationalization of the facility.”
- “Given the decision-making nature of the proposed sub-item, it is substantively and procedurally distinct from the Glasgow Dialogue. The discussions and conclusions under this sub-item are not contemplated under the Glasgow Dialogue. As such, both can proceed concurrently without redundancy. The Group is of the firm view that the Dialogue is a standalone one with no clear destination. This agenda sub-item seeks to address this shortfall.”

Accordingly, the G77 & China outlined that the agenda item was proposed to both the COP and CMA provisional agendas to substantively decide on solutions to address the gaps in existing funding arrangements for addressing L&D, particularly because a decision on solutions is not contemplated under the Glasgow Dialogue.

2. Do any procedural conflicts arise if the same item appears on both agendas?

The same procedural rules, the UNFCCC Draft Rules of Procedure, govern the sessions of both the CMA and COP. They address the relationship between the governing body (CMA and COP) and the subsidiary bodies (SBSTA and SBI) but not between COP and CMA. The latter are the supreme decision-making bodies under the Paris Agreement and the UNFCCC, respectively, and can set their agenda independently. They also do not require that the consideration of agenda items must be completed by Parties in a session.

The following rules may become relevant:

- Rule 13 - agenda items may be deleted, deferred or amended upon adoption of the agenda (i.e. at the outset of the relevant session),
- Rule 16 - where consideration of an item is not complete within a session, that agenda item will be automatically added to the agenda of the next ordinary session.

Accordingly, there is no clear procedural conflict arising under the UNFCCC Draft Rules if the same item appears on both agendas. Further, there is no procedural requirement that item 8(f) must be decided at COP 27 or CMA 4, and it is possible for those items to be removed, amended, deferred or held in abeyance.

3. The relationship between COP and CMA decisions?

Please refer to LRI’s previous advice (see attached) on the hierarchy between the Convention and the Paris Agreement. There are different interpretations of this issue because Article 30.2 of the Vienna Convention on the Law of Treaties 1969 states: “[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail”. As the Paris Agreement does not expressly state that it is subject to the Convention or that the Convention should prevail in any conflict, there is no clear hierarchy.

Article 2.1 of the Paris Agreement states “[t]his Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change”. This language may imply that the Paris Agreement is intended to be subordinate to the Convention, in that it seeks to ‘enhance’ the implementation of the Convention, rather than override it. Alternatively, it may imply that the Convention’s actions on the same topics have been weak and require strengthening by the Paris Agreement. On balance, however, neither treaty is ‘governing’ or ‘supreme’ over the other. Accordingly, and for the time being, decisions under one treaty regime are not hierarchically supreme to the other.

#### 4. Is the effect of determining item 8(f) under the COP or CMA different?

A key factor that determines the effect of a COP or CMA decision is whether the subject matter of the decision falls within the body’s mandate or authority under the Convention or Paris Agreement (respectively) - which can be influenced by existing decisions under those regimes.

Although the Convention itself does not refer to L&D, silence on L&D is not strictly a bar to its inclusion in COP decisions. L&D was first mentioned in a decision at COP13 in 2007, in the context of calls for enhanced action on adaptation. This was followed by the decision at COP16 (2010) to establish a work programme on L&D. The role of the UNFCCC in addressing L&D, and the establishment of an international mechanism, were further decided at COP18 (2012) and the decision to establish the WIM was subsequently made at COP19 (2013).

The Paris Agreement contains multiple express references to L&D in Article 8. Through the provision, the Paris Agreement provides a mandate for the CMA to expand upon the non-exhaustive areas of “cooperation and facilitation” (Article 8.4) to progress decisions on funding arrangements to address L&D, such as a solidarity fund. Further, the CMA has assumed greater authority in decision-making upon matters concerning L&D: since around 2019, decisions concerning L&D (and the WIM) have primarily been made by the CMA, with the COP largely noting or endorsing those decisions.

Additionally, the Glasgow Dialogue was established under the CMA (and endorsed by the COP). Learnings and understandings concerning L&D under that process may complement and support CMA decisions on L&D funding arrangements.

Critically however, if the agenda item is progressed solely under the CMA, it may be limited by Decision 1/CP.21 which states that Parties “[Agree] that Article 8 of the [Paris] Agreement does not involve or provide a basis for any liability or compensation.” As such, depending on the form in which “funding arrangements” are proposed under items 8(f) (i.e. if they are framed within principles of liability or compensation), there may be exclusions to what funding arrangements can be decided under the auspices of the Paris Agreement.

Accordingly, while there appears to be, from recent UNFCCC practice, a de facto acknowledgement that actions to address L&D should be taken forward by decisions under the CMA, the authority of the CMA to decide upon a L&D financial mechanism may be limited as a result of Decision 1/CP.21.

#### 5. Need for consistency across COP/CMA decisions?

It is in the interests of Parties that seek clear and unambiguous decisions on funding arrangements to address L&D, that decisions under both the COP and the CMA are practically consistent to the greatest degree possible. While retaining item 8(f) on both the COP and CMA agendas provides a greater (although not certain) chance of commitments on L&D financing being negotiated and decided by Parties, there remains the possibility of inconsistency across those decisions – either due to specific Party negotiating intentions or due to the content of existing COP and CMA decisions (see Part 3.4 above).

In theory, parties that are not supportive of funding arrangements to address L&D may seek to create inconsistency across the COP and CMA decisions, to undermine clear application of the outcome of any decision. In practice, this is rather unlikely and, if there is a substantive decision on the issue, it would probably be identical under both agendas or, if it is taken under the COP or CMA, the other body then essentially takes note of it. The pending or long-lasting finalization of governance arrangements such as in the case of the Adaptation Fund or the WIM (either the COP, under which the WIM was established, or the CMA) can delay important substantive work.