

### **COP and CMA mandates and references to the UNFCCC**

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*This advice is provided in response to part of **Query 36/24***

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#### **Background:**

The query arises in the context of proposals from certain developed countries to add items for discussion to the CMA agenda, which are currently already discussed under the COP agenda, namely issues concerning gender, action for climate empowerment and capacity building. This advice primarily explores the scope and mandate of the CMA and the principles to which it may refer when making decisions.

#### **Query:**

- a) What are the respective mandates of the COP compared to the CMA? Does the COP only implement the UNFCC Convention, and the CMA the Paris Agreement?
- b) Can UNFCC Convention principles be referred to in a CMA decision even if they are not principles of the Paris Agreement? What about provisions of the UNFCC Convention?

#### **Executive Summary:**

The Conference of the Parties (the “**COP**”) to the United Nations Framework Convention on Climate Change (the “**UNFCCC**”) and the Conference of the Parties serving as the meeting of the parties to the Paris Agreement (the “**CMA**”) to the Paris Agreement serve as separate supreme bodies in charge of governance and implementation only of the respective international treaties.

The CMA’s mandate is limited to overseeing and promoting the effective implementation of the Paris Agreement. It was established by the COP for this specific purpose and has sole responsibility for effecting the Paris Agreement work programme as set out in Decision 1/CP.21. The COP therefore does not have a role in implementing the Paris Agreement (beyond establishing the CMA). Likewise, the implementation of the UNFCCC sits squarely within the COP’s and not the CMA’s remit.

This is not to say however that the two bodies and their respective treaties should be viewed as hermetically sealed. The Paris Agreement is borne out of the UNFCCC and recognises that it is “*guided by*” the principles of the UNFCCC, as promulgated in Article 3 thereof. Whilst this does not allow for COP decisions to be directly transposed onto the CMA, or CMA decisions to determine interpretation and implementation under the UNFCCC, there is scope for the CMA to have regard to the principles of

the UNFCCC when making its decisions and recommendations and indeed, this is actively encouraged under the Paris Agreement in respect of certain issues.

In circumstances where there is significant overlap in issues to be negotiated by the COP and CMA, it is possible for these to be tabled as joint agenda items. Although, even within that context, it is necessary for the parameters of each governing body's decision-making to be clearly set.

**Query (a): What are the respective mandates of the COP compared to the CMA? Does the COP only implement the UNFCCC Convention, and the CMA the Paris Agreement?**

### The framework of international climate change architecture

The COP<sup>1</sup> and CMA<sup>2</sup> are the supreme bodies in charge of governance and implementation of the UNFCCC and the Paris Agreement respectively.<sup>3</sup> These treaties, together with the Kyoto Protocol, form the fundamental basis for international climate negotiations and decisions made by State parties at the annual meetings of the parties. The COP and CMA are comprised of all the parties to the relevant treaty.

Introduced in 1992, the UNFCCC sets out the basic legal framework and principles for international climate change cooperation, with the aim of stabilising greenhouse gases to avoid “*dangerous anthropogenic interference with the climate system*”.<sup>4</sup> The structure of the UNFCCC sets out a framework with established objectives, institutional architecture and the process. The Kyoto Protocol, adopted in 1997 at the 3<sup>rd</sup> COP, and the Paris Agreement, adopted in 2015 at the 21<sup>st</sup> COP, are often seen as supplementary enhancements to boost the effectiveness of the UNFCCC.<sup>5</sup> Whilst in many ways this is correct in terms of the treaties' objectives, it should be remembered that each of the treaties operate independently, and State parties signatory to the UNFCCC are not required to ratify the Paris Agreement. Likewise, each of the COP and CMA, whilst established through a COP decision, are distinct governing bodies, with their own specific mandates.

Each of the UNFCCC, the Kyoto Protocol and Paris Agreement are ‘treaties’ in accordance with Article 2(1)(a) of the Vienna Convention of the Law of Treaties (the “VCLT”). Accordingly, under international law, each are legally binding on the State parties that have ratified them.<sup>6</sup>

### COP Mandate

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<sup>1</sup> Conference of the Parties, established by Article 7 of the UNFCCC.

<sup>2</sup> Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.

<sup>3</sup> The third supreme governing body is the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP).

<sup>4</sup> UNFCCC, Article 2, Objective:

[https://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf)

<sup>5</sup> IISD, UNFCCC: <https://enb.iisd.org/negotiations/un-framework-convention-climate-change-unfccc>

<sup>6</sup> The UNFCCC and Paris Agreement are both in accordance with the definition of ‘treaty’ as per Article 2(1)(a) of the Vienna Convention on the Law of Treaties: “*Treaty* means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Also see, D. Bodansky, ‘The Paris Agreement’: “*Legal form – Like the Kyoto Protocol and unlike the Copenhagen Accord, the Paris Agreement is a treaty within the meaning of international law, but not all its provisions establish legal obligations.*”

<https://legal.un.org/avl/ha/pa/pa.html>

The mandate of the COP is set out in Article 7 of the UNFCCC. Paragraph 2 provides that the COP “shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention”. The COP is supported by advice received from supplementary bodies for science and technology (SBSTA) and for implementation (SBI).<sup>7</sup>

### CMA Mandate

The mandate of the CMA is set out in Article 16(4) of the Paris Agreement, which provides that it will “keep under regular review the implementation of this Agreement and shall make, within its mandate, the decisions necessary to promote its effective implementation”. The CMA may similarly establish such subsidiary bodies as deemed necessary for the implementation of the Paris Agreement, and exercise “such other functions” as may be required for the implementation of the Paris Agreement.<sup>8</sup>

The CMA and its mandate were initially established at COP 21 pursuant to COP Decision 1/CP.21 which both adopted the Paris Agreement and provided further guidance as to how core elements of the Agreement (mitigation, adaptation, loss & damage, finance, technology development, capacity-building, transparency and the global stocktake) should be considered and addressed within the United Nations Climate Change governing and subsidiary body structure.<sup>9</sup> Indeed, the Paris Agreement, requires that a number of its obligations must be fulfilled “in accordance with” Decision 1/CP.21, relevant CMA decisions, or both.<sup>10</sup>

Simultaneously, the COP determined the Ad Hoc Working Group on the Paris Agreement (the “**APA**”) would be tasked with preparing for the entry into force of the Paris Agreement and for the convening of the first session of the CMA.<sup>11</sup> Whilst the COP gave itself the responsibility of overseeing the implementation of the work programme as set out in Decision 1/CP.21,<sup>12</sup> it was envisaged that, once constituted, the CMA would have complete autonomy over the Paris Agreement work programme. To this end the APA made a specific recommendation at the Subsidiary Body meetings in Bonn in 2016: on entry into force of the Paris Agreement, the CMA would assume authority of the Paris Agreement work programme, and pertinently, the COP would cease authority and either conclude or transit its work to the CMA.<sup>13</sup> Accordingly, and as per the information note prepared by the UNFCCC Legal Affairs Programme (the “**2016 Information Note**”), on entry into force of the Paris Agreement, the CMA became the sole body with the authority to take decisions on matters concerning the Paris Agreement:

*“As the governing body, the authority of the CMA extends to all substantive, procedural, administrative and operational matters. No other entity or body may discharge any mandate or undertake any activity concerning the Agreement, without the explicit consent of the CMA, save as may be specified in the Agreement itself”.*<sup>14</sup>

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<sup>7</sup> UNFCCC, Articles 7, 10.

<sup>8</sup> Paris Agreement, Article 16(4):

[https://unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf)

<sup>9</sup> Decision 1/CP.21, Adoption of the Paris Agreement, 29 January 2016:

<https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=2>

<sup>10</sup> See Paris Agreement, Articles 4.8, 4.9, 4.13, 6.2 and 9.7 .

<sup>11</sup> Decision 1/CP.21, Article I(10).

<sup>12</sup> Decision 1/CP.21, Article I(9).

<sup>13</sup> APA Agenda Item 8, Presentation Bonn, 25 May 2016: [https://unfccc.int/files/meetings/bonn\\_may\\_2016/in-session/application/pdf/apapresentation\\_item8.pdf](https://unfccc.int/files/meetings/bonn_may_2016/in-session/application/pdf/apapresentation_item8.pdf)

<sup>14</sup> 2016 Information Note, 7 April 2016, paragraph 14:

[https://unfccc.int/files/paris\\_agreement/application/pdf/entry\\_into\\_force\\_of\\_pa.pdf](https://unfccc.int/files/paris_agreement/application/pdf/entry_into_force_of_pa.pdf)

Of the supreme bodies therefore, the CMA alone bears responsibility for the implementation of the Paris Agreement. As discussed below, this has implications for the remit of CMA decisions and the extent to which they may be based on UNFCCC principles.

**Query (b): Can UNFCCC principles be referred to in a CMA decision even if they are not principles of the Paris Agreement? What about provisions of the UNFCCC?**

Principles of the UNFCCC and Paris Agreement

The principles of the UNFCCC are articulated in the preamble and at Article 3 of the Convention. The latter sets out as follows:

- (1) Parties should protect the climate system for the benefit of present and future generations on the basis of equity and in accordance with their common but differentiated responsibilities and respective capacities.
- (2) The special needs and circumstances of developing country parties should be given full consideration.
- (3) Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.
- (4) Parties have a right to, and should, promote sustainable development.
- (5) Parties should cooperate to promote and support an open international economic system that would lead to sustainable economic growth and development in all parties, particularly developing country parties, thus enabling them to better address the problems of climate change.

As discussed further below, the Paris Agreement as a whole is stated to be ‘guided by the principles’ of the UNFCCC. This says little about its relation to the UNFCCC, except that the two treaties share certain foundational ideas.

However, in the case of the principle of “common but differentiate responsibilities and respective capabilities” (“**CBDR-RC**”) the Paris Agreement has deviated from this principle. Article 2.2 states that the Paris Agreement will be implemented to reflect equity and CBDR-RC, “in light of different national circumstances”. This qualification, while not further defined in the Agreement, underlines a shift away from the formal differentiation between developed and developing country parties (under the UNFCCC and the Kyoto Protocol) towards a more nuanced self-differentiated model.

Independent Treaties and Bodies

When considering whether UNFCCC provisions and principles should be referred to and applied by the CMA, the starting point is to note that the UNFCCC and the Paris Agreement are independent treaties. There is no explicit requirement or provision that the Paris Agreement be interpreted in accordance with the UNFCCC or that the UNFCCC and its annexes are directly applicable to the Paris Agreement.<sup>15</sup>

Commentators have noted there is ambiguity as to whether the Paris Agreement should be defined as a ‘protocol’ within the meaning of Article 17 of the UNFCCC.<sup>16</sup> Article 17 provides for the adoption of protocols to the UNFCCC which act as an amendment or addition to the treaty. However, Article 17

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<sup>15</sup> See LRI Paper, ‘Applicability of UNFCCC annexes to the Paris Agreement’, 1 May 2020:

<https://legalresponse.org/legaladvice/applicability-of-unfccc-annexes-to-the-paris-agreement/>

<sup>16</sup> Johns R. Bodle and S. Oberthür. 2017. “Legal Form of the Paris Agreement and Nature of Its Obligations”. In: D. Klein (eds). “The Paris Agreement on climate change, analysis and commentary”. Oxford: Oxford University Press, p.92. Similarly, Decision 1/CP.21 does not specify whether the Paris Agreement would form a protocol under the UNFCCC

does not then elaborate on the nature of the relationship between the UNFCCC and its protocols, in other words whether its protocols must be interpreted in alignment with and in deference to the UNFCCC. In the absence of a clear provision stating the same, it seems more likely that the Paris Agreement was intended to operate as an independent treaty rather than being subordinate to the UNFCCC.<sup>17</sup>

The COP and the CMA likewise operate as two distinct bodies. This is set out explicitly at Article 16, paragraph 2 of the Paris Agreement, which provides that:

*“Parties to the Convention that are not Parties to this Agreement may participate as observers in the proceedings of any session of the Conference of the Parties serving as the meeting of the Parties to this Agreement. When the Conference of the Parties serves as the meeting of the Parties to this Agreement, decisions under this Agreement shall be taken only by those that are Parties to this Agreement.”* (emphasis added)

It is therefore only State parties to the Paris Agreement that exercise the rights to full participation in the proceedings of and decision-making by the CMA on all matters concerning the Paris Agreement. Non-signatory observers cannot participate in the decision-making by the CMA.<sup>18</sup> As noted by the UNFCCC Legal Affairs Programme, if the host country of a session of the COP that a CMA is to be held in conjunction with is not a party to the Paris Agreement, the President of the COP would not be in a position to preside over the CMA. The President of the CMA would then have to be elected by and from the representatives of State parties to the Paris Agreement.<sup>19</sup>

### The UNFCCC and CMA Decisions

Whilst distinct treaties and bodies, the UNFCCC, Paris Agreement and their respective governing bodies are intertwined. As noted above, the UNFCCC and the Paris Agreement stem from the same underlying principles. One of the first recitals in the Paris Agreement’s preamble, expresses the Agreement to be: “[i]n pursuit of the objective of the Convention, and being guided by its principles”. Similarly, Article 2(1) of the Paris Agreement states that, “[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”.

It is clear from the above that the Convention’s principles are to guide the Paris Agreement, not only as stated in the preamble and Article 3 of the Convention but as interpreted and developed by subsequent COP sessions. On such a reading there is clearly scope for the CMA to refer to and consider UNFCCC principles when reaching decisions concerning implementation of the Paris Agreement, and in fact the CMA has done so already.<sup>20</sup>

Further, the Paris Agreement explicitly recommends that the CMA has regard to the UNFCCC when negotiating and determining specified issues. In particular:

- (1) Article 4(14) concerning mitigation notes that, “[p]arties should take into account, as appropriate, existing methods and guidance under the Convention” when recognising and implementing mitigation actions with respect to anthropogenic emissions and removals.

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<sup>17</sup> See LRI Paper, ‘Relationship between the Convention and the Paris Agreement’, 23 August 2022:

<https://legalresponse.org/wp-content/uploads/2022/10/Advice-Q11-22-UNFCCC-and-Paris-Agreement.pdf>

<sup>18</sup> 2016 Information Note, 7 April 2016, paragraph 18.

<sup>19</sup> Ibid, paragraph 22.

<sup>20</sup> See the preamble of Decision 2/CMA.5 on the Global goal on adaptation: “Recalling relevant provisions and principles of the Convention and the Paris Agreement”.

[https://unfccc.int/sites/default/files/resource/cma2023\\_16a01E.pdf#page=22](https://unfccc.int/sites/default/files/resource/cma2023_16a01E.pdf#page=22)

- (2) Article 5(2) concerning conservation of sinks and reservoirs of greenhouse gases, encourages parties to *“implement and support....the existing framework as set out in related guidance and decisions already agreed under the Convention”*.
- (3) Articles 9(8) and 10(3) provide that the Financial Mechanism and Technology Mechanism established under the UNFCCC shall serve as the respective finance and technology mechanisms of the Paris Agreement.
- (4) Articles 11(2) and 13(3) state that the capacity-building activities and transparency framework should be guided by lessons learned and build on arrangements under the UNFCCC.
- (5) Finally, Article 16(5) notes that the rules of procedure of the COP and financial procedures applied under the UNFCCC shall be applied under the Paris Agreement, *“except as may be otherwise decided by consensus by the [CMA]”*.

In such instances, decisions of the COP and provisions of the UNFCCC can and should be referred to in CMA decisions.

This accords with principles of treaty interpretation under the VCLT. Article 31(3) of the VCLT states that when interpreting treaties, *“[t]here shall be taken into account, together with context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”*. Given the significant overlap in parties and principles and the fact the Paris Agreement was implemented subsequent to the UNFCCC, it is not unreasonable to expect that parties may refer to the UNFCCC in seeking to interpret and understand the later Paris Agreement.