

Loss and Damage decisions adopted after intense and difficult negotiations

Madrid, 20 Dec (TWN) – A significant outcome of COP 25 were decisions on the 2019 review of the Warsaw International Mechanism on Loss and Damage (WIM), which were finally adopted on Dec 15, through intense and difficult negotiations, since the start of the talks in Madrid on Dec 2.

Reaching consensus on the WIM decisions took much effort and wrangling, given the divergent positions between developing countries united under the **G77 and China**, and strong opposition from developed countries, especially the **United States (US), Japan, and Australia**.

Several developing country delegates involved in the matter, spoke to Third World Network and said that the negotiations were very difficult, given the unwavering position, particularly of the US, during the informal consultations which took place behind closed doors in the final days of the COP.

At the final meetings of the UNFCCC Subsidiary Bodies (SBs) held on Monday, 9 Dec, as regards the WIM review, conclusions together with a proposed draft decision text were adopted and forwarded to the COP and the CMA (Conference of Parties to the Paris Agreement) for further consideration by Parties.

This draft text contained several issues that had not achieved consensus during the negotiations under the SBs in the first week of the talks. These issues were:

- (a) the inclusion of language on the scaling up and additionality of financing from developed

countries to developing countries to assist the latter to address loss and damage arising from climate change impacts, including through having the WIM Executive Committee (ExCom) have a strengthened relationship with the Green Climate Fund (GCF);

- (b) the establishment under the ExCom of the WIM, an expert group that would look at how action and support with respect to addressing loss and damage could be enhanced; and
- (c) the establishment of a ‘Santiago network’ on addressing loss and damage that would broaden access to resources by developing countries and support the implementation of their actions to address loss and damage.

These were core issues that had been raised by the **G77 and China** in a conference room paper that they had submitted on 7 Dec 2019.¹

These issues could not be settled at the SBs because of clearly divergent positions between developed and developing countries. While developing countries were united on their position through their submission, the developed countries showed varying degrees of opposition to the G77 proposals, said developing country sources close to the negotiations.

While some developed countries such as **Norway, Canada, New Zealand**, and the **European Union (EU)** recognized the need to scale up financing, other developed countries such as the **US, Australia, and Japan** insisted that what was needed was to ensure that existing resources being

¹ See G77 and China, Submission On the Review of the WIM and the Report of the WIM Executive Committee, 7 December 2019, at

https://unfccc.int/sites/default/files/resource/CRP.SBSTA_i4_SBI.9.pdf

provided both within and outside the UNFCCC system to support actions on loss and damage should be better accessed and maximized, rather than have new and additional resources.

Delegates said that developed countries also generally questioned the need to have a mandate explicitly requesting the ExCom to establish an expert group on action and support, as well as on the need to establish the Santiago network, arguing that these were not necessary, as the ExCom already had the mandate under its existing terms of reference that enables it to establish such subordinate bodies. The developed countries were also of the view that there were already many existing networks and partnerships of organizations, the private sector, and other stakeholders whose work in other areas such as disaster risk reduction were very closely related to loss and damage.

At the same time as the negotiations under the SBs were going on in relation to the WIM review, the COP 25 Presidency was also undertaking ministerial-led consultations with a number of developed and developing countries in relation to the issue of the governance of the WIM. This issue essentially is over the question of which governing body i.e. the COP or the CMA has authority over the WIM.

The developing countries through the G77 and China had a strong position stating that the WIM is currently subject to the joint governance of both the COP and the CMA. Developing countries also argued that as the WIM and its ExCom were established by the COP (see decision 2/CP.19) in 2013 and that as they had been subject to the guidance and authority of the COP since then and even after the entry into force of the Paris Agreement (PA) in 2016, with many decisions adopted under the COP.

On the other hand, developed countries were united in stressing that the WIM and its ExCom were now, by virtue of Article 8.2 of the PA, solely and exclusively under the authority of the CMA and not the COP. The developed countries stressed that Article 8.2, (which states that “the WIM shall be subject to the authority and guidance of the CMA... may be enhanced and strengthened, as determined by the CMA”), clearly indicates that the WIM and the ExCom are now under the sole authority of the CMA, rather than the COP.

According to developing country delegates, having the WIM be subject to the exclusive authority and guidance of the CMA implies that the WIM’s work is circumscribed within the confines of Article 8 of the PA, which then automatically means that para 51 of the decision adopted in Paris would apply (decision 1/CP.21) in relation to the implementation of the WIM’s work. (Para 51 provides that Parties agree “that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation.”)

Developing country sources said that as a condition for developed countries to agree to the joint governance by both the COP and the CMA over the WIM and the ExCom, they wanted the inclusion of language reflecting para 51 of the Paris decision. Developing countries viewed this condition as a bar to any future claims for liability or compensation under the Convention as well as the PA. The G77 was opposed having any reference to para 51 in a COP decision, arguing that it applied only in the context of Article 8 of the PA and nothing more.

In the second week of the talks, ministerial-led consultations on the draft decision text on the WIM review were co-facilitated by Minister **Simon Stiel (Grenada)** and Minister **Ola Evestuen (Norway)**.

According to sources from developing countries, sometime in the evening of Wed, 11 Dec 2019, a drafting group was convened by the ministerial co-facilitators to develop possible texts led senior negotiators from **Jamaica** and **Austria**.

According to a developing country delegate, Parties continued to maintain their positions. The developed countries, especially the **US**, the **EU**, and **Japan**, conditioned their agreement with respect to any outcome on the WIM review to first having clarity on the outcome on the governance issues.

The drafting group continued to work till early morning of Thursday, 12 Dec without any agreement or conclusions, said sources, and resumed work mid-morning of 12 Dec, with the **G77 and China** forwarding bridging proposals with respect to language on scaled up, new and additional financing from developed countries; strengthening the collaboration between the ExCom, the Standing Committee on Finance, and the operating entities of the Financial Mechanism; greater specificity with respect to the activities of the expert group, and Santiago network. The G77

proposals were used as the initial basis for the drafting group's work and enabled all sides to engage on the text, but no 'landing zone' was found.

Sometime during the night of 12 Dec, which spilled over to the wee hours of the following morning, according to several delegates, the ministerial co-facilitators met individually with separate groups, including the **US** and the **EU**. The **G77 and China** decided to meet as a group, and presenting a strong united front.

Later in the morning of Friday, 13 Dec, the COP Presidency convened a meeting at the level of heads of delegation (HODs) on the issue of the WIM governance. According to a developing country delegate, the **G77 and China**, together with its subgroups, again reiterated the position that the WIM is and should continue to be under the authority of the COP and the CMA, with developed countries also continuing to maintain their position that it should be under the CMA only due to Article 8 of the PA. Hence, no agreement was reached at this meeting and the impasse continued.

On Sat, 14 Dec, sources said that in order to resolve the impasse on all the issues of the WIM, the COP Presidency convened a small group meeting in the afternoon and evening, facilitated by Minister **Teresa Ribera** of **Spain**.

According to sources, one key issue that was most difficult in the negotiations was over the text on loss and damage finance and the GCF, which was being discussed by the finance negotiators. There was resistance from the **US** which insisted on limiting loss and damage financing to only the existing GCF windows and structures while the **G77 and China** pressed for more flexibility in light of the need for scaled up, new and additional financing on loss and damage.

Developing country sources also told TWN that the **US** also attempted to weaken language in the WIM review decision text that explicitly urged developed countries to scale up the provision of financing, technology transfer, and capacity building to developing countries, while encouraging other Parties to do so voluntarily. This was language that was acceptable to the **G77 and China** but was opposed by the **US** as it could not accept any "bifurcated" reference to the source of support with only developed countries being responsible, arguing that the PA had already done away with the bifurcated approach. The **G77**

and China and other developing country representatives could not agree with the **US**, as the Convention and the PA made clear about the responsibility of developed countries in providing financial support to developing countries, leading to no agreement on the matter.

On the issue of the WIM governance, further efforts were made by Minister **Ribera** to find a resolution but Parties continued to maintain their positions, which led the Spanish Minister to request the assistance of the Minister from **Grenada** to find a compromise among a small group of developing country representatives and the US. Sources said that the **G77 and China** it made clear any outcomes from the small group must be subject to agreement by all members of the Group, a position that the US negotiators also said applied to their developed country counterparts.

However, according to a developing country source, no agreement was reached, with the Spanish Minister clarifying that she would report to the COP Presidency on a way forward with her own recommendations as the facilitator of the discussions.

From the evening of 14 Dec and going into the early morning of 15 Dec, Parties waited for the COP Presidency to issue revised texts, including on WIM review and on its governance.

Another HOD consultation for all Parties was convened by the COP Presidency, facilitated by the Spanish Minister, at around 2am of 15 Dec in order to circulate revised texts, including on the WIM review, governance and on finance. Sources said that again, there was no agreement on the way forward on the issues, with the **G77 and China** reiterating their position and the **US** maintaining theirs.

When further revised draft decision texts on the WIM review under the CMA and on governance under the COP were released around mid-morning of 15 Dec, according to developing country delegates, the texts tried to show a balance, albeit tilted towards the position of the US. These texts were put forward essentially on a take it or leave it basis, with the COP Presidency stressing that there was no longer any time to do any further revisions to the texts.

At the closing plenary, the WIM review decision was adopted as a CMA decision,² while the WIM governance decision was adopted as a COP decision³.

After the adoption of these texts, **Palestine** on behalf of the **G77 and China** put on record the Group's understanding of the decisions:

“For the G77 and China, the issue of loss and damage is crucial, and is central to the protection of our interests as developing countries. Therefore, we have engaged deeply and proactively in the negotiations on this decision text in the CMA with respect to the WIM review. We believe that the WIM review decision text just adopted by the CMA represents the outcome of the WIM review, as it puts in place an expert group under the WIM ExCom to enhance action and support, and establishes the Santiago Network on Loss and Damage to enhance the flow of assistance and resources to developing countries on loss and damage”.

“However, para 32 of the WIM review decision text is concerning to the Group. We note with concern that the previous iteration of the text had urged developed countries to scale up their financing to developing countries on loss and damage. That paragraph is now revised to a generic reference to scaling up of financing without any reference as to where it comes from. It is important to stress that both the Convention and its PA specifically commit developed countries to provide finance and other support to developing countries. This will be our understanding of this paragraph”.

“Furthermore, we have to stress that the COP had mandated the conduct of the WIM review under decision 4/CP.22 and the WIM continues to operate under the COP even as it also operates under the authority of the CMA. Therefore, on the COP decision with respect to the WIM review and the governance of the WIM, let me state the following on behalf of the Group of 77 and China:

- As stated earlier, the WIM and its ExCom operate under the authority of the COP as well as the CMA, pursuant to previous decisions of the COP and also the PA.
- The COP decision on the WIM that has just been adopted recognizes that issues related to

the governance of the WIM have not been concluded and will therefore continue at COP26 and CMA3 in 2020, and will be reflected in the form of an agenda item on this issue for COP26 and CMA3. We note that our discussions on this issue here at COP25 and CMA2 did not produce any outcome and that such discussions do not prejudice any further consideration of this matter under the COP and the CMA.

- Finally, nothing in this COP WIM decision text, nor in the CMA WIM review text, prejudices the outcome of our discussions on WIM governance”.

According to developing country delegates close to the negotiations, the adopted decisions, while not going as far as developing countries had wanted due to opposition from developed countries, particularly the US, they still constitute a positive forward movement in terms of ensuring that the space continues to be opened up in the UNFCCC context for discussions on loss and damage to continue.

On the WIM review decision that was adopted, the following are key highlights:

Paras 30 to 38 constitute the finance-related paras of the WIM review decision. Taken together, they constitute a call for the scaling up of the provision of support, including finance, technology, and capacity building for developing countries to address loss and damage.

According to a developing country delegate, it would have been a stronger call if:

- the G77 proposal prevailed for explicit language regarding the need for “new and additional financing” to be provided by developed countries for loss and damage;
- if para 32 had not been weakened by the US insistence to delete any explicit reference to developed countries as the Parties that should be scaling up such support; and
- para 38 had not been weakened due to US insistence on limiting the provision by the GCF of financial resources for activities relevant to loss and damage “to the extent consistent with the existing investment,

² See https://unfccc.int/sites/default/files/resource/cma2019_L07_adv_WIM.pdf

³ See https://unfccc.int/sites/default/files/resource/cp2019_L12_adv_WIM.pdf

results framework and funding windows and structures” of the GCF. This language has the potential to constrain further the GCF’s limited resources for adaptation support to be further limited by resources for loss and damage, contrary to the developing countries’ view that loss and damage financing should be separate from and additional to adaptation financing.

However, para 39 of the decision provides a strengthened and clearer mandate for the ExCom to collaborate with the GCF to clarify and support developing countries in accessing GCF funding through the development of funding proposals related to loss and damage. This is consistent with what developing countries had proposed.

Paras 40 and 41 provide a clear mandate for the ExCom to establish an expert group on enhancing action and support by the end of 2020, as had been proposed by developing countries. However, the mandate for the expert group is not as strong as had been proposed by the G77 and China, because para 41 puts boundaries on the activities to be undertaken by the expert group as had been proposed by developed countries;

Paras 43 to 45 provides the mandate for the newly established Santiago Network for loss and damage, while clarifying that the implementation of the network would be through the ExCom. The network is intended to serve as a catalytic network for the provision of technical assistance by relevant organizations, bodies, networks and expert, to developing countries in relation to work on the ground on loss and damage. The G77 had proposed that the network would provide an important role in broadening access to resources for developing countries in relation to loss and damage and to facilitate the delivery of support for implementation actions on the ground.

The decision text in paras 43 and 44 only focus on technical assistance is not as strong as what the G77 had proposed, but at least the network has been established and can then be evolved.

Paras 46(b) (and its footnote 9) on the destination of the reports of the subsidiary bodies regarding the outputs of future reviews of the WIM, together with paragraph 47 (and its accompanying footnote 10) (noting that considerations relation to WIM governance will continue at CMA3 in Nov 2020), make clear that governance issues are still on the table with respect to the CMA.

While much weaker than what developing countries had wanted to see, according to some delegates, there is a clear indication that the WIM governance is under both the COP and the CMA and the door is still open for continued discussions on this issue. At the same time, para 47 now tilts the balance in favour of the CMA as being the sole governing body over the WIM as the substantive decision text on the WIM review was adopted under the CMA and not under the COP.

Paragraphs 46(a) and 47 when read together indicate that WIM governance discussions have not yet concluded, did not produce an outcome at this COP, and that such lack of outcome is without prejudice to further consideration of this issue at CMA3. Para 47 lays the basis for the consideration of this issue as an agenda item for CMA3.

On the WIM governance decision adopted under the COP, the implications of the operative language contained in its paras 1 and 2 are similar to what is in para 47 of the WIM review decision under the CMA. Para 2 and its accompanying footnote, in particular, ensure that the WIM governance discussions have not yet concluded, did not produce an outcome at this COP, and that such lack of outcome is without prejudice to further consideration of this issue at COP26. Para 2 and its footnote provides the basis for the inclusion of an agenda item on the WIM in the agenda for COP26.

Taken together, paragraphs 46(b) and 47 of the WIM review decision and para 2 of the COP WIM decision text mean that WIM governance will be a key political issue that will have to be debated further and dealt with at CMA3 and COP26 next year in Glasgow.