

Ad-hoc Working Group on the Paris Agreement

Third part of the first session, Bonn, 8-18 May 2017

Agenda item 7 – Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15.2 of the Paris Agreement

Informal Note by the Co-Facilitators Final version

Note: This informal note is our attempt to informally capture the views expressed by Parties on this agenda item to date. The note has been prepared under our own responsibility and thus has no formal status. The content of the note is not intended to prejudge further work that Parties may want to undertake nor does it in any way prevent Parties from expressing other views they may have in future.

Overview of the informal consultations on this item

During the third part of the first session of the Ad-hoc Working Group on the Paris Agreement (APA 1.3), held in May 2017, Parties continued to discuss possible modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15.2 of the Paris Agreement (hereinafter ‘the Committee’).

Following the invitation by the APA from November 2016 (APA 1.2),¹ Parties made submissions that addressed a range of issues and possible elements identified during APA 1.2. At the meeting in Bonn, Parties’ discussions focused on exploring further details on five of the general elements identified during APA 1.2, in November 2016: scope and functions; commencement/initiation of Committee activities; measures and outputs; consideration of national capabilities and circumstances; and linkages and relationships with other arrangements under the Paris Agreement (PA).

In their discussions, Parties identified a number of interlinkages with the mechanisms and arrangements under the PA. Future consideration of such interlinkages may be required in light of progress under the relevant agenda items. Some Parties also noted that certain concepts, such as ‘systemic’/ ‘systematic’ issues or challenges, may need further clarification.

We have attempted to capture the views expressed in these rich discussions in the outline below, based on the views elaborated through inter-sessional submissions and the discussions during APA 1.3. We have also attempted to distill and refine possible elements for modalities and procedures and their attributes, or sub-elements, while maintaining the overall range of views presented.

It is understood that the elements outlined in this informal note and related considerations are not in any way exhaustive and their inclusion in the note does not preclude Parties providing further views on these or from raising any other elements or considerations.

Iterative process

The first version of this note was made public on 15 May 2017 following the discussions during the first week of APA 1.3. The present version represents the final version of the informal note, as revised following the last meeting of the informal consultations on this agenda item on 16 May 2017.

¹ FCCC/APA/2016/4, paragraph 26.

Possible elements that may be considered for the modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15.2 of the Paris Agreement

Purpose and nature – Possible elements to consider:

Established under the Paris Agreement

Considerations:

- Nothing in the design or operations of the Art 15 Mechanism can change the content or legal character of the Paris Agreement (PA)'s provisions
- *Considerations* regarding the identification and further elaboration of core principles:
 - o Art 15 Mechanism must reflect equity and the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) in line with the Convention
 - The modalities need to respect and be informed by the core principles, including with regard to nature, scope, functions, commencement, measures/outputs, and procedures
 - This includes differentiation between developed and developing countries
 - o The PA already addresses CBDR-RC in the light of different national circumstances
 - Differentiation is already embedded in the PA provisions
 - Art 15 mechanism is applicable to all Parties

Purpose: Facilitate implementation and promote compliance (Art 15.1)

- Encourage, assist and enable Parties to implement provisions and comply with their obligations
- Prevent situations of non-implementation or non-compliance
- Thereby:
 - o Enhance effectiveness and durability of the Agreement
 - o Enhance credibility, confidence, consistency and effectiveness of actions, and trust among Parties
 - o Complement other processes and mechanisms under the PA

Nature

Expert-based and facilitative (Art 15.2)

Functioning in a transparent, non-adversarial, non-punitive manner (Art 15.2)

- Transparent (*see below: Procedural matters*) (Art 15.2)
- Non-punitive (Art 15.2), i.e.:
 - o No enforcement
 - o No penalties or sanctions
- Non-adversarial, (Art 15.2), i.e.:
 - o Not a mechanism to settle disputes
 - o Respecting national sovereignty
- Consultative (*see below: Participation of the Party concerned*)
- Paying particular attention to the respective national capabilities and circumstances of Parties (Art 15.2)

Structure and composition – Possible elements to consider:

Basic structure

- A single committee of 12 members (*see also below: Functions*)

Composition and membership

- Expert-based (Art 15.1)
- Membership as agreed and specified in Decision 1/CP.21 para 102²:

² 12 members with recognized competence in relevant scientific, technical, socioeconomic or legal fields to be elected by the CMA on the basis of equitable geographical representation, with two members each from the five regional groups of the United Nations and one member each from the small island developing States and the least developed countries, while taking into account the goal of gender balance.

- Due regard to the members' expertise and equitable geographic representation
- Taking into account the goal of gender balance
- Mandate of 3 years
- Committee members serve in their personal capacity
- Alternate members
- Promote smooth transition following changes in membership (staggering of terms)

Chairing arrangements, Bureau

- If Bureau:
 - Consisting of a Chair, Vice-Chair (VC) and 3 Committee members (representation from 5 UN regional groups)
 - Chair and VC elected from amongst Committee members with periodical rotation on a geographical basis

Administrative support

- Arrangements using existing structures, e.g. Secretariat

Other arrangements: Drawing on additional expertise

Scope and functions – Possible elements to consider:

Scope

Considerations as to a possible comprehensive scope:

- In principle, all provisions of the Agreement, without restricting scope from the outset
 - Covering mandatory provisions and non-mandatory provisions
- Obligations under Articles 4, 7, 9, 10, 11 and 13
- *Considerations* as to common or collective obligations (obligations shared among certain Parties)
 - Should not be *per se* excluded
 - E.g. under Art 9 (several “shall” provisions)
 - But collective aspirations (Art 2.1) or collective assessment (Art 14) are not subject to the Art 15 Mechanism
 - Not possible to assess ‘compliance’ of an individual Party with a common or collective obligation
- Also relevant provisions of decisions by the CMA³ (e.g. modalities, procedures and guidelines (MPGs))
- Provisions relating to domestic action, contributions made by Parties through their NDCs:
 - Not appropriate under Art 15 due to the nationally-determined character of NDCs and sovereignty over their content

Considerations as to possible limitations of the scope:

- In light of function:
 - Facilitating implementation with regard to all provisions
 - including non-binding provisions and expectations (e.g. “should”)
 - Promoting compliance with regard to legally binding provisions –
Considerations:
 - only individual
 - also collective
- Legally binding provisions on individual obligations of Parties, as the start/minimum
 - Should be prioritized (noting small size of Committee)
 - May be broadened if/as gaps are being identified

Considerations on differentiation:

- In line with differentiation in PA provisions (e.g. Art 9.1, 9.3 and others)
- No differentiation of scope, Art 15 mechanism is applicable to all

³ Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.

Functions

Facilitate implementation and promote compliance (Art 15.1)

- *Considerations* if two distinct functions
 - o With differences based on scope, triggers, and/or measures
 - o As a dual function; distinct but complementary; not mutually exclusive
 - o Two distinct roles, reflecting differentiated approach throughout PA and national circumstances
- *Considerations* if as a continuum within the spectrum of functions
 - o With the difference being determined by what is the appropriate measure/output in each case
 - o Overall focus on facilitation and promotion, in line with the facilitative nature
- *Considerations* if functions include identification of systemic challenges, trends, and general implementation and compliance questions
 - o Issuing advisory opinions on interpretation of provisions would not be appropriate in light of the non-judicial nature

Commencement of Committee activity (triggers/referral/initiation) – Possible elements to consider:

Committee activity may commence:

- By the Party concerned
 - o *Considerations* if referral only by the Party concerned
 - Only self-referral is consistent with facilitative nature
 - Other referrals would risk the Committee becoming politicized, adversarial, intrusive and redundant
 - Only self-referral as a start, further types of referral to be considered depending on elaboration of other elements under the PA
 - Self-referral alone is insufficient; shown by experience of other mechanisms
 - Other referrals by a neutral third party possible under certain conditions and clear guidance
 - Possibility of voluntary Party's self-referral based on outputs from the transparency framework under Art 13 \leftrightarrow ⁴
 - o *Considerations* on differentiation:
 - For developing countries self-referral only; for developed countries other referrals possible (e.g. automatic/objective trigger)
 - No additional differentiation in the Art 15 Mechanism necessary as this is embedded in the PA
- By another Party/group of Parties
 - o *Considerations* if referral by another Party/group of Parties:
 - Any Party should be able to submit with regard to another Party
 - Possible under certain conditions and safeguards
 - If follows consultation and with consent of Party concerned
 - Could be adversarial, too political, open to misuse
- By way of an automatic/objective trigger \leftrightarrow
 - o For legally-binding individual obligations, for clearly identifiable 'binary' issues (yes/no)
 - E.g. whether Party submitted a NDC (recorded in registry) or a report required under Art 13 PA
 - Body to initiate to be decided; e.g. could be Committee, or Secretariat, or expert review team
- By the Committee itself
 - o For all issues (with more details specified in modalities, e.g.)
 - Ensuring neutral, transparent, non-adversarial, non-punitive nature, and/or with consent of the Party concerned
 - As a preventive approach, to help a Party before getting in a situation of non-compliance
 - o For systemic issues

⁴ The symbol \leftrightarrow indicates areas where the modalities and procedures for the operation of the Art 15 Committee may have linkages to other areas of the PA that some Parties considered could be further explored. The respective area of interlinkages is either identified in the relevant sub-bullet or may need to be further explored.

- On the basis of information:
 - Gathered and provided by the Secretariat
 - From transparency arrangements of Art 13 ↔
 - Provided by other bodies, mechanisms and arrangements under PA ↔
- By the CMA
 - For systemic issues
 - CMA to retain competence to request an activity by the Committee
 - In such a decision by the CMA the Party should recuse itself

Admissibility

- E.g. for self-referral, Party concerned to provide information on efforts made to use other arrangements and mechanisms

Procedural matters – Possible elements to consider:

- Transparent procedures, clear process
- Presumption of openness of meetings and documents
- Committee to deliberate and adopt decisions in a closed session
- Conflict of interest
 - Members to abstain from participation in deliberations and decision-making with respect to their own Party
- Main decision-making rules
 - Decisions
 - by consensus only or
 - by consensus or a 2/3 majority vote as a last resort
 - Quorum
 - Procedures for intersessional (electronic) decision-making to enhance efficiency and reduce cost
- Any decisions to be supported by reasoning
- Sources of information
- Safeguards for confidential information
- Participation of the Party concerned in the various phases (*see below*)
- Rules of procedure (could be developed by the Committee for consideration by the CMA)

National capabilities and circumstances of Parties – Possible elements to consider:

Considerations on how to reflect national capabilities and circumstances of Parties (NCC) in the modalities:

- Through the design of the modalities:
 - Consistent with/in addition to CBDR-RC/differentiation and equity
 - In the form of different treatment of developed and developing countries
- Through a mandate to the Committee to consider NCC on a case-by-case basis:
 - Rather than by way of distinguishing different categories of Parties
 - While differentiation is embedded in the provisions of the PA, including recognition of various aspects of flexibility

Considerations on relevant areas/aspects:

- To be taken into account in procedural and substantive matters, including with regard to:
 - Scope and functions
 - The commencement (triggering) of Committee activities
 - The treatment and participation of the Party concerned
 - Measures and actions taken by the Committee

Considerations on flexibility

- Areas and types of flexibilities that can be afforded to Parties include:
 - Consultation/process, e.g. timelines for the Party concerned to respond or provide information
 - Assistance provided to a Party during the process before the Committee

- Measures and outputs, e.g. by considering the Party's ncc when determining the measures and outputs, including support
- Substantive standards of action, e.g. by applying a lower burden in standard of action
- Need to balance proportionality, predictability and flexibility

Participation of the Party concerned – Possible elements to consider:

Participation in all stages of the process, including:

- At the time of triggering
- Identification of causes, challenges and constraints
- In identification of measures, conclusions or recommendations
- Development of action plans
- Consideration of national capabilities and circumstances
- Prior to any decision

Forms

- Consultation at different stages
- Dialogue with Party of facilitative nature
- Written inputs
- Representation at meetings, including right to make representations and opportunity to respond

Natural justice and due process

- Right to fair hearing and recourse
- Safeguards to avoid conflicts of interest

Measures and outputs – Possible elements to consider:

General considerations

- Nature and principles of the mechanism to inform any measures and outputs
- Committee, when identifying appropriate measures/output, to take into account:
 - National capabilities and circumstances (ncc)
 - Causes, degree, nature and frequency of non-compliance
 - Lack of capacity versus lack of will
 - Taking into account capacities and technology needs of developing countries
- *Considerations* regarding the relationship between measures/outputs and the respective functions:
 - If measures and outputs correspond to the functions (facilitating implementation and promoting compliance):
 - Certain measures for facilitating implementation, further measures to address compliance
 - (e.g. advice, recommendations (to the Party concerned only), recommendations regarding assistance and support – to facilitate implementation)
 - (e.g. compliance action plan, statements of concern or findings of non-compliance – to address compliance problems)
 - Allocating certain measures and outputs to certain functions is not consistent with the approach of a continuum of functions
 - If measures and outputs exist as a continuum:
 - Incremental steps of measures along the continuum, while keeping in mind the facilitative and non-punitive nature
 - Depending on the scope (e.g. a narrow scope could mean a wider range of measures)
 - A continuum in terms of different types of measures; range of possible measures for the Committee to draw from

Specific measures

Considerations on range of possible measures:

- Sharing of information, experience and lessons learned

- Identification of challenges faced by the Party concerned
- Action plan/Implementation plan/Compliance plan
 - o Initiation/request for elaboration of implementation/compliance plan:
 - Whether only upon request by the Party concerned
 - Whether also by the Committee
 - With consent of the Party concerned
 - Without need for consent in case of non-compliance
 - o Overall purpose of the plan
 - Facilitative
 - A roadmap to bring the Party concerned to improved implementation/ into compliance
 - o Possible elements of the plan:
 - Description of implementation challenges/causes of non-compliance
 - Description of measures the Party intends to take to improve implementation/achieve compliance
 - Timelines
 - Follow-up arrangements (including information to Committee about progress)
 - o Development of the plan
 - With Committee's assistance, if requested by the Party concerned
 - In a way that is respectful of the nationally determined nature of NDCs
- Recommendations and suggestions (to the Party concerned)
- Information and advice
 - o E.g. for non-binding elements
- Facilitating access to finance, technology and capacity-building support:
 - o Information on accessing support, e.g. types of support available promote compliance
 - Safeguards to avoid creating perverse incentive to be considered
 - Possible requirement to exhaust efforts under other arrangements
 - o Access to/refer to/send technical experts to assist Party concerned
 - o Recommendations/referral to relevant bodies related to support ↔
 - Focus on gaps in the provision of technology, finance and capacity-building
 - *(see below – Relationship to other bodies – on the need to protect the independence of other bodies and mechanisms and avoid duplication of effort)*
- Early warning
 - o Can be useful to preempt situations of non-compliance
 - o Would not be consistent with facilitative, non-punitive nature
- Statements of concern / Cautionary statements:
 - o Can be useful to preempt situations of non-compliance
 - o Would not be consistent with facilitative, non-punitive nature
- Declarations/Findings/Communications in relation to compliance:
 - o Conclusion that a Party has not complied with a provision is not punitive
 - Including identification of causes of non-compliance and frequency of non-compliance
 - May be issued if non-compliance continues after expiry of timeline specified in the plan
 - o Would not be consistent with facilitative and non-punitive nature
- Follow-up by the Committee
- Reports or recommendations to the CMA
- Identification of systemic issues
 - o At the request of CMA
 - o Based on systemic challenges identified in the course of the Committee's work
 - o To be reflected in the reports to CMA
 - o Could serve as background information for GST ↔

Relationship to other bodies – Possible elements to consider: ↔

General ↔

- Relationship and linkages between the Art 15 Mechanism and other arrangements to be further explored
- Avoid duplication of effort or functions of other bodies
- No interference with independence and governance of other bodies and processes
- Link to support arrangements critical for the facilitative role of the Committee

Specifics ↔

- *Considerations* on possible links to the transparency framework under Art 13 PA
 - o Information from the transparency framework (*see also above: Commencement of Committee activity*)
- *Considerations* on possible links to the global stocktake (GST) under Art 14 PA
 - o Reports of Committee (e.g. on assistance and support) can be input to the GST
- *Considerations* on possible links to support arrangements
 - o Including capacity-building arrangements, Technology Mechanism, Financial Mechanism
 - o If direct links:
 - Linkage is at the core of the Art 15 Mechanism
 - Linkage should and can be carefully crafted
 - Could provide a negative or perverse incentive and delay implementation (especially link to finance)
- *Considerations* on possible links between Committee and Art 6 PA (e.g. the Mechanism under Art 6.4)
 - o May be useful to ensure environmental integrity; specific rules are required
 - o Not consistent with non-punitive nature

Relationship to the CMA – Possible elements to consider:

General

- Committee guided by CMA

Election

- Members to be elected by CMA (decision 1/CP.21 para 102) (*see Structure and composition*)

Reporting

- Committee shall report annually to CMA (Art 15.3)
- Content of reporting:
 - o Reports on its work
 - o Reporting on findings/measures in individual cases:
 - Reports on all to CMA
 - Informs CMA only if requested by the Party concerned
 - o A summary of its activities and actions taken
 - o Reports to flag systemic issues
 - o Recommendations to the CMA:
 - If Committee considers the measures implicate important issues under the PA or the authority of other PA bodies
 - In case of non-compliance of Party concerned: to provide technical assistance; capacity-building
 - In cases of repeated non-compliance or systemic issues regarding implementation
 - On overcoming systemic barriers to implementation and compliance
 - Only at the request of the Party concerned; and the CMA is not required to take any decision
- CMA to take note of Committee's findings in individual cases

Other

- CMA able to trigger action by Committee
- Appeal to the CMA

Review of the mechanism

- CMA should periodically review the work of the Mechanism to increase effectiveness
- If necessary, Parties may consider a review/revision of the modalities and procedures

Annex

In the meeting of the informal consultations on this item on 16 May 2017, the Co-Facilitators proposed the following guiding questions for targeted submissions by Parties, with the aim to promote further understanding of views and to inform any technical workshop and continued consideration under this item:

1. How can potential linkages to other arrangements under the PA be designed to ensure that the Committee operates effectively while still preserving the independence of these arrangements?
2. What kind of outputs of the Committee’s activity would effectively facilitate implementation and promote compliance, and how?
3. How would the consideration of national capabilities and circumstances of Parties be operationalized in the modalities for the operation of the Art 15 Committee?

In their submissions, Parties may also wish to address any areas that may have not been addressed in depth so far, as well as any other question, element or aspect that Parties may wish to address under this agenda item.