

Ad-hoc Working Group on the Paris Agreement (APA)

Second part of the first session, Marrakech, 7-14 November 2016

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

14 November 2016@10:00

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 prejudice 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 informal consultations under on agenda item 7 of the Ad-hoc Working Group on the Paris Agreement (APA) convened between 8 and 12 November, 2016, Parties discussed 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.¹ Parties provided their views in response to the questions prepared by the APA Co-Chairs in advance of the session,² namely:

1. How could the scope of the mechanism for facilitating implementation and promoting compliance address the mandatory elements included in the Paris Agreement?
2. How should the respective national capabilities and circumstances of Parties be reflected in the design of the mechanism for facilitating implementation and promoting compliance?
3. What will trigger the work of the Committee and how will the proposed triggers and actions be consistent with the facilitative, non-adversarial, and non-punitive nature of the mechanism?
4. What will be the relationship with existing arrangements and bodies under the Convention, if any?
5. How should the participation of the Party concerned in a process to facilitate implementation and promote compliance be enabled?

In addition, a question was put forward by the co-facilitators during the informal consultations on how Parties would like to take the work on this item forward in the next year and what should be next steps, including inter-sessional work, if any.

Parties engaged in a rich exchange of views on the above questions as well as other related issues. This note attempts to capture the discussions in a form of an informal summary reflection and to distill possible elements for modalities and procedures.

Reflections of the Co-Facilitators on the discussion in the informal consultations

Nature of the mechanism:³ Parties highlighted the facilitative, expert-based, transparent, non-adversarial and non-punitive nature of the mechanism, as set out in Article 15 of the Paris Agreement. However, there were different views as to what these terms would imply in the context of the

¹ For brevity, this committee is referred to in this note as 'the Committee'.

² Made available on the UNFCCC website on 9 August 2016 at: <<http://unfccc.int/9680>>.

³ Mechanism to facilitate implementation of and promote compliance referred to in Article 15 of the Paris Agreement (for brevity, referred to in this note as 'the mechanism' or 'Article 15 mechanism').

mechanism and how they would translate into elements of the modalities and procedures. There appears to be an emerging understanding that the mechanism would not apply penalties or sanctions or be a dispute resolution or judicial mechanism. The importance of the preventive aspect was noted, especially where facilitating implementation could prevent non-compliance. At the same time, some also saw measures with a deterrent effect as effective in promoting compliance. (*On the range of measures, see below.*) Some also noted that the operation of the mechanism under Article 15 must respect and cannot change the nature, content or legal character of any of the provisions of the Paris Agreement. Some also noted that the mechanism should afford flexibility to Parties.

Scope: Some considered that the mechanism covered the entirety of the Paris Agreement. Others saw it covering all provisions, albeit in a different way depending on the mechanism's relevant function: broader scope of provisions – in relation to facilitating implementation; only legally binding, Party-specific (e.g., “each Party shall” or “Parties shall”) provisions that can be assessed and measured – in relation to promoting compliance. Some Parties saw it applicable only to provisions addressing individual Parties (whereas provisions of a collective nature would be addressed through other mechanisms, such as global stock-take). Others saw the mechanism also applying to collective obligations. Others yet pointed to a difference between collective and common obligations – the latter understood as individual obligations shared by certain Parties with other Parties, lending themselves to assessment with respect to implementation and compliance. Some also noted that considerations on the scope should take into account the need to avoid duplication with other bodies and processes.

Structure: A single committee structure was broadly supported and its composition as agreed in paragraph 102 of decision 1/CP.21 was recalled. Some saw the Committee as having two functions or two interlinked objectives: facilitating implementation and promoting compliance. Others saw it as one body with one function and one line of action on facilitating implementation and promoting compliance. The importance of ensuring that conflict of interest is avoided was noted. The role of a Bureau was also noted, particularly to consider admissibility of submissions to the Committee if triggers other than a Party-self-trigger are contemplated.

Measures and outputs: Some views were exchanged on how the mechanism could facilitate implementation and promote compliance.

Some of the suggested options for measures and outputs included: provision of a facilitative forum for discussions, consultation and information sharing with Parties, including on experiences and lessons learnt; assistance with preparation of plans to address implementation problems; non-binding recommendations; early warning; provision of access to capacity-building and technological support, including through identification of specific implementation constraints and needs; as well as “serving as a feedback hub” for the support arrangements (finance, technology, capacity building) to streamline assistance. These were seen by some as particularly relevant for facilitating implementation.

Further options for measures and outputs suggested by some specifically for promoting compliance included: recommendations and findings; dialogue between the Committee and the Party concerned and working with the Party concerned to develop plans to come into compliance, including identification of causes and measures to restore compliance; issuing statements of concern and findings of non-compliance; as well as follow-up by the Committee.

Some noted that the Committee could also identify and advise on systemic implementation issues (i.e. where specific implementation challenges are faced by a number of Parties).

National capabilities and circumstances: The need to place the design of the mechanism, including its the scope and functions in the context of the principles of the Convention and the Paris Agreement, in particular common but differentiated responsibilities and respective capabilities in the light of different national circumstances (CBDR-DNC) was noted by some. In this regard, the importance of

reflecting differentiation across the entire agreement was highlighted as providing the overall context for Article 15 and how the committee's work and its modalities would be designed. Others saw the mechanism as equally applicable to all Parties, with CBDR-DNC already reflected in the Agreement's provisions related to obligations and actions of Parties.

The importance of the language in Article 15.2 was emphasized, in particular with regard to the national capabilities and circumstances. It was noted that it would be important to ensure that national capabilities and circumstances are considered by the Committee in its consideration of individual Party's issues and taken into account when deciding on measures and outputs in each specific situation. In this latter context, it was also noted that engagement of the Party concerned in a dialogue with the Committee would be crucial to ensuring that the national circumstances and capabilities were appropriately communicated and taken into account. In relation to this, the importance of engaging domestic implementation agencies in identifying challenges that a Party may face in implementation and the corresponding needs was noted. Some also suggested that flexibility should be built into the modalities, including the areas and types of flexibilities that can be afforded to Parties (e.g. with respect to time, substance and support).

Triggers: There appears to be an emerging understanding that the Committee should respond to requests from individual Parties or groups of Parties in relation to their own efforts to implement the Agreement (Party-self-trigger). Some noted its particular relevance in the context of facilitating implementation. Some expressed the view that the initiation by the Party concerned can be the only trigger, also allowing for a proper reflection of national circumstances, and that any other trigger would not be in accordance with the non-adversarial and non-punitive nature of the mechanism.

A view was expressed that the mechanism, once created, has to be effectively used. It was pointed out that other existing mechanisms with limited triggers or certain particular ones (like Party-to Party triggers) have not been used by Parties in practice under other international treaties.

At the same time, some Parties noted that triggers other than a self-trigger are neither adversarial nor punitive and that the nature of the mechanism only comes into play in the context of the actual consideration procedures and outcomes. It was noted that while contributions were nationally determined, compliance was a matter of common concern and therefore restriction to self-trigger might not be appropriate.

Among other triggers, a Committee trigger was mentioned by some as possibly feasible (with some noting that it could also be linked to the transparency arrangements under Article 13 of the Paris Agreement and /or in cases of systemic implementation challenges or issues, and would need strong and clear procedural requirements). Some also proposed a CMA trigger, while others noted that this approach should be considered carefully given the political nature of the CMA and the need to ensure independence and objectivity of the Committee. A secretariat trigger, potentially also linked with the transparency arrangements was noted by some. Also mentioned was an automated trigger based on objective facts arising from the transparency arrangements under Article 13 and/or the NDC registry. A Party-to-Party trigger and a third party (e.g. civil society) triggers were also among those mentioned, with some expressing concerns about the political nature of the Party-to-Party trigger. It was also noted by some that for triggers other than self-trigger, the modalities would need to provide for ways to ensure that the procedure is not politicized or misused.

Relationship with other arrangements:⁴ Some highlighted the complementarity of efforts between the Article 15 mechanism and other arrangements and the need to establish close links between them.

⁴ Parties considered the relationship of the Article 15 mechanism with other arrangements, which for some included links of the mechanism to arrangements under the Convention and the Paris Agreement, while others noted that the mechanism would not have direct linkages with arrangements under the Convention, but only with those under the Paris Agreement.

Others noted the importance of avoiding duplication of effort with, and potential negative effects, other arrangements and mechanisms, particularly those related to support.

The importance of interlinkages with the arrangements for finance, technology development and transfer and capacity-building was seen particularly relevant by some, especially in the context of facilitative measures. In this regard, some saw the role of the Committee in identifying gaps in assistance provided to the Party concerned under the relevant arrangements and mechanisms and in addressing – or helping to address – such gaps or difficulties experienced by Parties in accessing assistance. Some noted that demonstration of exhausting other means of accessing such arrangements could be needed before addressing the matter in the context of the Article 15 mechanism.

Furthermore, some saw important linkages of the Article 15 mechanism to other processes such as to the transparency framework under Article 13 and the global stocktake under Article 14 of the Agreement. Others noted that the development of ‘rule book’ for the Agreement was still ongoing and definition of linkages to processes under the Paris Agreement was premature.

Involvement of the Party concerned: The active involvement of the Party concerned at all stages was seen as very important for the effectiveness of the mechanism. The need for the Committee to closely consult with the Party concerned on the challenges faced and possible measures to address them, including needs and constraints to provide for a better understanding of national circumstances and capabilities was identified. Ensuring due process at each step, including through possibilities for the Parties concerned to make written submissions and oral representations, was emphasized, particularly, but not exclusively, in the context of any compliance consideration (even where the triggers as such may not require the Party’s consent).

Relationship with the CMA: It was noted that the Committee was under the overall authority of the CMA. The need for the Committee to report on a regular basis to the CMA, in line with Article 15.3, was recalled. In this regard, and in connection with the interlinkages with other arrangements and mechanisms, some suggested that the reports of the Committee could also serve to bring the attention of the CMA to issues related to provision of assistance.

It was noted by some that the independent and impartial nature of the Committee would necessitate independent (i.e. not requiring CMA confirmation) decisions of the body with regard to individual Parties. Others noted that it would be appropriate for the Committee to make recommendations, with the final decision being made by the CMA.

On further work under the agenda item: Parties also shared views on how to arrange their work under this agenda item in order to deliver in a timely and effective manner on the mandate set out in paragraph 103 of decision 1/CP.21. Focused submissions by Parties ahead of the May 2017 session of the APA were generally supported. It was considered that while guiding questions for such submissions could be helpful to provide focus, Parties should be able to put forward their views on any issues or aspects in relation to the operationalization of Article 15 they considered relevant. In addition to submissions, some also proposed other methods of progressing the work under this agenda item in 2017, including syntheses of the information provided by Parties in their submissions, technical papers by the secretariat and technical workshops.

Annex – 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

The purpose of this annex is to map some possible elements that may be considered for modalities and procedures for the operation of the committee to facilitate implementation and promote compliance referred to in Article 15.2 of the Paris Agreement (hereinafter ‘Committee’), in light of the discussions held during the second part of the first session of the APA.

The mapping is presented by us, the Co-Facilitators, under our own responsibility, with a view to facilitating further discussions. It is not meant to be an exhaustive list, does not exclude the identification of additional elements, nor does it prescribe or prejudice in any way the scope, structure or content of the modalities to be developed.

Purpose and nature – Possible elements to consider:

Purpose: Facilitate implementation and promote compliance (Art 15.1)

Nature:

- Expert-based and facilitative (Art 15.2)
- Functioning in a transparent, non-adversarial, non-punitive manner (Art 15.2)
- Paying particular attention to the respective national capabilities and circumstances of Parties (Art 15.2)
- Established and operating in the overall context of the Paris Agreement
- Prevention
- Affording flexibility

Structure and composition – Possible elements to consider:

Basic structure: Single committee

Composition and membership

- Expert-based (Art 15.1)
- Membership as agreed and specified in Decision 1/CP.21 para 102⁵

Bureau

Scope and functions – Possible elements to consider:

Scope

- All provisions of the Agreement
- All provisions that are specific enough, amenable to assessment, with clear parameters that can be measured
- All provisions, but in light of function:
 - o broad/all provisions – facilitation; legally-binding provisions – compliance
- Legally binding provisions addressing individual Parties, as a minimum
- Also common obligations (individual obligations shared by certain Parties with other Parties)
- Also relevant provisions of CMA decisions
- Also provisions relating to domestic action, commitments made by Parties in their NDCs

Functions

- Facilitate implementation and promote compliance (Art 15.1)
 - o As two distinct functions – facilitate implementation and promote compliance
 - o Facilitating implementation and promoting compliance as a continuum

⁵ 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.

- Identify and address systemic challenges and general implementation and compliance questions
- Consulting, diagnostic, distributive and advisory functions

Triggers (initiation of Committee procedures) – Possible elements to consider

Initiation of procedures by:

- Party concerned (Party self-trigger)
 - o As the only trigger
 - o Together with other triggers
- Another Party (Party-to-Party trigger)
- Committee itself (Committee trigger)
 - o For all issues
 - o For systemic issues
- Secretariat
 - o Based on information in the NDC registry or factual information from Art 13 arrangements
- Elements of the transparency framework (transparency trigger or administrative trigger)
 - o E.g. by outputs from expert reviews
- CMA (CMA trigger)
- NGOs (NGO trigger)

Admissibility (for triggers other than self-trigger)

- o Criteria (to be developed in the modalities)
- o Determination of admissibility by the Bureau

General process aspects – Possible elements to consider:

- Transparent procedures, clear process
- Presumption of openness of meetings and documents
- Participation of the Party concerned in the various phases (*see below*)
- Decision-making rules
- Rules of procedures (could be developed by the Committee for consideration by the CMA)

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

To be taken into account in:

- The treatment of the individual Party
- The participation of Party concerned
- The triggering of initiative
- Decision-making
- Measures and actions taken by the Committee
- Flexibility
 - o Areas in which flexibilities can be afforded to Parties
 - o Types of flexibilities (e.g. time, substance and support)

Participation of the Party concerned – Possible elements to consider:

Participation in all stages in the process:

- Through triggering
- During the consideration of implementation and compliance, including on:
 - o At the time of triggering
 - o Identification of causes, challenges and constraints

- Identification of measures
- 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
- Opportunities 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:*

Measures and outputs

- Corresponding to the functions (facilitating implementation and promoting compliance)
- As a continuum or one line of action

Including:

- Sharing of information, experience and lessons learned
- Identification of challenges faced by the Party concerned
- Assistance to Party in elaborating an action plan
- Recommendations and suggestions (to the Party concerned)
- Information and advice
- Assistance for implementation
- Recommendations to relevant bodies related to support
- Facilitating access to finance, technology and capacity-building support
- Promoting multilateral or bilateral solutions to address challenges
- Early warning
- Statements of concern / Cautionary statements
- Declarations/Communications/Findings in relation to compliance
- Reports or recommendations to the CMA
- Follow-up by the Committee
- Advisory statements on systemic or general questions

Relationship to other bodies – *Possible elements to consider:*

- Links to Article 13 (transparency) and Article 14 (global stocktake) of the Paris Agreement
- Links to support arrangements
 - Including capacity-building arrangements, Technology Mechanism, Financial Mechanism
- Serve as a 'feedback hub' for other bodies to help resolve or streamline assistance in implementation
- Link between Committee and mechanism under Article 6 of the Agreement to ensure environmental integrity

Relationship to CMA

- Annual report to CMA
- Recommendations to CMA for action