

## Questions and answers on some legal and institutional aspects of the 2015 agreement

Prepared by the Legal Affairs Programme  
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### I. Introduction

The COP, by its decision 1/CP.17, launched “a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action”. The COP further decided that “the Ad Hoc Working Group on the Durban Platform for Enhanced Action shall complete its work as early as possible but no later than 2015 in order to adopt this protocol, another legal instrument or an agreed outcome with legal force at the twenty first session of the Conference of the Parties and for it to come into effect and be implemented from 2020”. Thus, the COP is expected to adopt, at its twenty-first session in Paris, a protocol, another legal instrument or an agreed outcome with legal force (hereinafter “2015 agreement”).

- ❖ The secretariat is well aware that the legal form of the 2015 agreement has not been conclusively determined. Consequently, the three options outlined in decision 1/CP.17 remain on the table. The development of the questions and answers below does not therefore prejudice the legal form of the Paris outcome.
- ❖ The questions and answers have been prepared by the secretariat at the request of the ADP Co-Chairs.
- ❖ These questions and answers address a number of legal and institutional issues that Parties will need to consider in the event that the 2015 agreement is to be adopted as a protocol under Article 17 of the Convention. The secretariat remains ready to provide a more elaborate technical briefing on the legal and institutional issues if deemed necessary and useful to Parties.
- ❖ The questions and answers address governance arrangements, institutional issues, final clauses, and transitional arrangements.

### II. Governance arrangements

Question: What are the possible legal options for governance arrangements for the 2015 agreement?

Considerations and options:

Article 17, paragraph 5, of the Convention provides that decisions under any protocol shall be taken only by the Parties to the protocol concerned. Thus, a separate decision-making body would be required for a protocol. The possible options for governance arrangements, which are based on examples of other multilateral treaties, include:

- A Conference of the Parties serving as a meeting of the Parties to a Protocol (e.g. the CMP of the Kyoto Protocol, or the COP-MOPs of the Cartagena Protocol on Biosafety and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (hereinafter ‘Nagoya Protocol’));
- A Conference of the Parties and a Meeting of the Parties (e.g. the MOP of the Montreal Protocol on Substances that Deplete the Ozone Layer to the Vienna Convention for the

Protection of the Ozone Layer (hereinafter ‘Montreal Protocol’), and the MOP of the Protocol on Liability and Compensation to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal);

- One governing body for both the parent convention and its protocols that provides a single forum for decision-making by the respective parties to the convention and to its protocols, where only parties to a specific protocol take decisions related to that protocol (e.g. the Executive Body of the Convention on Long-Range Transboundary Air Pollution, which oversees the Protocols adopted under this Convention, or the Meeting of the Contracting Parties to the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols, which meets to consider the implementation of both the Convention and its Protocols).

### **III. Institutional arrangements**

Question: What legal options would facilitate the utilization, by the 2015 agreement, of existing and future institutional arrangements established under the Convention?

Considerations and options:

Many Parties have referred to the 2015 agreement building on or utilizing the existing institutional framework of the Convention to support its implementation. As the 2015 agreement will be under the Convention, the COP could decide that the 2015 agreement shall use the institutions established under the Convention, through the following options:

- Expressly embedding a particular institutional arrangement in the 2015 agreement, for example, institutional arrangements that are permanent in nature. Such a provision in the 2015 agreement could state, for example, that the financial mechanism of the Convention shall serve as the financial mechanism of the 2015 agreement, following the precedents of the Kyoto Protocol (Article 11), and the Nagoya Protocol (Article 25). In such a case, the governing body of the 2015 agreement could also be given the authority to provide guidance to the financial mechanism;
- A general anchoring of institutional arrangements under the Convention in the 2015 agreement that would allow the governing body of the agreement to make a decision in the future on the use of particular institutions. This option may be suitable for those institutional arrangements that may not be permanent. Such a provision could provide that the subsidiary bodies (including the ‘constituted bodies’) and mechanisms of and processes under the Convention may serve the 2015 agreement upon a decision of the governing body of the 2015 agreement, including its authority to provide further guidance as necessary. This option covers existing and future institutional arrangements under the Convention, and would be operationalized through subsequent enabling decisions of the governing body of the 2015 agreement. An example can be found in Article 30, paragraph 1, of the Cartagena Protocol on Biosafety which provides that “any subsidiary body established by or under the Convention may, upon a decision by the Conference of the Parties serving as the meeting of the Parties to this Protocol, serve the Protocol, in which case the meeting of the Parties shall specify which functions that body shall exercise”;
- A combination of the above options: embedding particular institutional arrangements in the 2015 agreement and including a general anchoring provision.

#### IV. Final clauses

Question: What are the standard final clauses found in multilateral treaties?

Considerations and options:

Some Parties have noted the need for final clauses in the 2015 agreement and suggested that these could follow standard clauses in multilateral treaties. Some have called for following the example of the Kyoto Protocol.

Final clauses usually cover issues such as participation; signature; ratification, acceptance, approval and accession; entry into force; participation of regional economic integration organizations; amendment procedures; settlement of disputes; right to vote; depositary; reservations; withdrawal; and authentic texts. Final clauses should be clear and enable the effective operation of the agreement. For many of these clauses, the provisions in the Kyoto Protocol could provide a starting point for Parties' consideration.

Entry into force: some Parties have made specific proposals with respect to entry into force, for example by noting that the clause should not be under- or over-inclusive or that the clause should have a double threshold, such as a minimum number of ratifications and a percentage of the total carbon dioxide emissions covered by the ratifying Parties. However, any conditions should be objectively verifiable and achievable.

Noting that paragraph 4 of decision 1/CP.17 envisages that the agreement shall come into effect and be implemented from 2020, Parties may wish to pay particular attention to the provisions on its entry into force. Taking into account precedents from other multilateral treaties, the options include:

- Specifying a specific number of instruments of ratification to be deposited (e.g. UNFCCC Article 23);
- Specifying a specific number of instruments of ratification to be deposited plus additional conditions, for example a percentage of total carbon dioxide emissions for a specific period (e.g. Kyoto Protocol Article 25);
- Specifying a date plus a minimum number of instruments of ratification to be deposited (e.g. Montreal Protocol Article 16).

Amendment procedures: Parties have underlined the need for the 2015 agreement to be flexible and durable. In this regard, Parties may also wish to pay particular attention to the amendment procedure(s) for the 2015 agreement, including whether different procedures are needed for specific elements of the agreement, such as for amending the 2015 agreement itself or any annexes that may be adopted, or for adjusting national contributions should Parties decide that they will be an integral part of the 2015 agreement.

Options for amendment procedures include:

- Opt-in procedures: an amendment only comes into force for a Party if it submits an instrument of ratification/acceptance (e.g. UNFCCC Article 15, and Kyoto Protocol Article 20);
- Opt-out procedures: an amendment comes into force for all Parties after a specific time period has elapsed, unless a Party has communicated its desire not to be so bound (e.g. UNFCCC Article 16, and the Gothenburg Protocol to Abate Acidification, Eutrophication

and Ground-level Ozone to the Convention on Long-range Transboundary Air Pollution Article 13bis, paras. 4 and 5);

- Simplified procedures: for example, decisions on adjustments adopted by the Meeting of the Parties to the Montreal Protocol are binding and enter into force upon the expiry of six months from the date of circulation of the decision by the Depositary (see Montreal Protocol Article 2(9)). See also Gothenburg Protocol Article 13, paragraph 5.

## V. Transitional arrangements

Question: What issues need to be considered in relation to the work to be undertaken after the adoption of the agreement in 2015, noting that decision 1/CP.17, paragraph 4, provides for the agreement to come into effect and be implemented from 2020, and through which bodies?

Considerations and options:

- (a) Parties have proposed options for interim and/or transitional arrangements and work that could be continued after the adoption of the 2015 agreement and before its entry into force;
- (b) Whereas governance arrangements, institutional issues and final clauses are only consistent with a protocol outcome, further work may still be required even if the 2015 agreement does not take the form of a protocol.

In this regard, Parties may wish to consider:

- Preparatory work on the operational and technical details of the agreement that may be required to prepare for its entry into force and implementation from 2020 (e.g. the ‘rule book’ similar to the Marrakesh Accords on the Kyoto Protocol adopted at CMP 1);
- Options regarding the bodies that could undertake such work under the guidance of the COP include:
  - Utilizing the SBSTA/SBI (the Kyoto Protocol preparatory model);
  - Extending the ADP (the UNFCCC or Minamata Convention Intergovernmental Negotiation Committee models);
  - Establishing a new ad hoc committee (the Intergovernmental Committee for the Nagoya Protocol or the Intergovernmental Committee for the Cartagena Protocol on Biosafety models);
  - A combination of some of the above.
- How the ‘constituted bodies’ under the Convention, such as the Adaptation Committee, Standing Committee on Finance, Technology Executive Committee, etc., could provide input into such work.

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