

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

10 November 2016@2300h

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.

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

Nature of the mechanism: 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 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 challenges could prevent non-compliance. At the same time, some also saw measures with a deterrent effect, such as declarations of non-compliance, as effective in promoting compliance.

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 facilitation; only legally binding, Party-specific (“each Party shall” or “Parties shall”) provisions that can be assessed and measured – in relation to 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 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.

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 a single body with two functions: facilitation and compliance, whereas others saw it as one body with 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.

In relation to the *facilitative function*, some of the options noted included: provision of a facilitative forum for discussions 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.

In relation to the *compliance function*, some of the measures noted 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. The importance of differentiation across the entire agreement was highlighted as providing the overall context for Article 15 and how the committee’s work 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.

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 also saw it as a reflection of the non-adversarial nature of the mechanism and also as allowing for a proper reflection of national circumstances.

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 triggers (like Party-to Party ones) 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 as possibly feasible (with some noting that it could also be linked to the transparency arrangements under Article 13 and /or in cases of systemic implementation challenges or issues, and would need strong and clear procedural requirements). Some also proposed 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 has been noted. 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 under the Convention and the Paris Agreement: The importance of avoiding duplication of effort with other mechanisms, particularly those related to support was noted. On the other hand, the complementarity of effort between the Article 15 mechanism and those arrangements and the need to establish close links between them were also highlighted. The importance of interlinkages with the arrangements for finance, technology development and transfer and capacity-building was seen particularly relevant, 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 such gaps or difficulties experienced by Parties in accessing assistance.

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 would 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: 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, the report of the Committee could also serve as 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.

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

This 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 APA 1.2.

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 (Art 15.2):

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

Structure and composition – Possible elements to consider:

Basic structure: Single committee

Composition and membership

- Expert-based
- Membership as agreed and specified in Decision 1/CP.21 para 102¹

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
- Identify and address systemic challenges and general implementation and compliance questions

¹ 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.

- Consulting, diagnostic, distributive and advisory functions

Triggers (initiation of Committee procedures)

Possible elements to consider

Initiation of procedures by:

- Party concerned (Party self-trigger)
- 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
 - o Identification of measures
 - o Development of action plans
 - o Consideration of national capabilities and circumstances
 - o 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:*

- Share information, experience and lessons learned
- Identification of challenges faced by the Party concerned
- Assist 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
- Statement of concern / Cautionary statements
- Declaration/Communication/Findings in relation to compliance
- Report 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
 - o 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 Article 6 mechanism to ensure environmental integrity

Relationship to CMA

- Annual report to CMA
- Recommendations to CMA for action