

Preliminary material in preparation for the first iteration of the informal note

APA 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

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*These draft elements have been prepared by the co-facilitators of the negotiations on this agenda item under their own responsibility, on the basis of the deliberations by Parties at this session and the views they have submitted. These elements are preliminary and should not be considered as final in any way; they are offered as a basis for work and do not prejudice further work or prevent Parties from expressing their views at any time. It is recognized that the outcome of deliberations on this item will form part of the overall outcome under the Paris Agreement Work Programme.*¹

I. Introduction / mandate / purpose

Article 15, paragraph 1, of the Paris Agreement established a mechanism to facilitate implementation and promote compliance with the provisions of the Agreement. In accordance with Article 15, paragraph 2, of the Agreement, this mechanism will consist of a committee (hereinafter ‘the Committee’) that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive, paying particular attention to the respective national capabilities and circumstances of Parties.

Article 15, paragraph 3, of the Agreement specifies that the Committee operate under the modalities and procedures to be adopted at CMA1 and is to report annually to the CMA.

Paragraph 102 of decision 1/CP.21 specifies that the Committee is to have 12 members to be elected on the basis of equitable geographical representation.

The COP, through paragraph 103 of the same decision, requested the APA to develop modalities and procedures for the effective operation of the Committee, with a view to the APA completing its work on such modalities and procedures for consideration and adoption at CMA1.

During the fourth part of the first session of the Ad-hoc Working Group on the Paris Agreement (APA 1.4), held in November 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.

II. Cross-cutting and overarching considerations / relevant context / general elements

National capabilities and circumstances

- The modalities and procedures for the Committee will need to operationalize the language in Article 15 that the Committee shall pay particular attention to the national capabilities and circumstances of Parties (NCCs). Some approaches to such operationalization include the design of the modalities and procedures reflecting different treatment of developed and developing

¹ Inputs that have been added based on the discussions in the informal consultations and from the submissions of Parties are highlighted. Narrative and commentary are displayed in *italics*.

Parties or inclusion of a specific mandate for the Committee to consider NCCs on a case-by-case basis at various stages of the procedure.

Interlinkages with other arrangements

- There may be possible interlinkages with other arrangements and bodies under the Agreement and the Convention, including the transparency arrangements under Article 13, the support arrangements and the global stocktake. Further linkages to other arrangements under the Paris Agreement may exist, such as the forum on response measures. Views on the appropriateness of such interlinkages vary. If any potential interlinkages are operationalized through a number of the elements under Section III below, some of the cross-cutting considerations in this regard include: the need to avoid duplication of effort with respect to all arrangements; the need to ensure independence of the various support arrangements and respective bodies; and the importance of the link to the support arrangements in the context of the facilitative role of the Article 15 Committee.

Discretion

- Consideration may have to be given as to the degree of discretion that the Committee should have in exercising its functions and the possible parameters for the use of discretion.

[Any further cross-cutting / overarching considerations...]

III. Elements of relevant guidance²

A. Underlying Principles (*previously Purpose and Nature*)

1. Established under the Paris Agreement;

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.

2. Identification and further elaboration of core principles:

Views:

- (1) Art 15 Mechanism must reflect equity and the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) in line with the Convention
 - o *The modalities need to respect and be informed by the core principles, including with regard to nature, scope, functions, commencement, measures/outputs, and procedures*
 - o *This includes differentiation between developed and developing countries*
- (2) The PA already addresses CBDR-RC in the light of different national circumstances
 - o *Differentiation is already embedded in the PA provisions, and is embedded in Article 15 in a particular way.*
 - o *Art 15 mechanism is applicable to all Parties*

B. Purpose and Nature (*previously Purpose and Nature*)

1. Purpose

- Facilitate implementation and promote compliance (Art 15.1)
- *Encourage, assist and enable Parties to implement provisions and comply with their obligations*

² Headings and subheadings are without prejudice to the eventual modalities and procedures, but a tool to collect and organize issues for the purposes of this document.

- *Prevent situations of non-implementation or non-compliance*
- *Thereby:*
 - *Enhance effectiveness and durability of the Agreement*
 - *Enhance credibility, confidence, consistency and effectiveness of actions, and trust among Parties*
 - *Complement other processes and mechanisms under the PA*

2. Nature

- Functioning in a facilitative, transparent, non-adversarial, non-punitive manner (Art 15.2)
- Expert-based and facilitative (Art 15.2)
- Paying particular attention to the respective national capabilities and circumstances of Parties (Art 15.2)
- *Transparent (see below: Procedural matters) (Art 15.2)*
- *Non-punitive (Art 15.2), i.e.:*
 - *No enforcement*
 - *No penalties or sanctions*
- *Non-adversarial, (Art 15.2), i.e.:*
 - *Not a mechanism to settle disputes*
 - *Respecting national sovereignty*
- *Consultative*

C. Institutional Arrangements (*previously Structure and composition*)

1. Structure: a single committee of 12 members

2. Composition and Membership:

- Expert-based (Art 15.1)
- Membership as agreed and specified in Decision 1/CP.21 para.102:³ (i) Due regard to the members' expertise and equitable geographic representation (ii) 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)

3. Election:

- Members to be elected by CMA (decision 1/CP.21 para 102)
- Resignation and replacement
- Timing of first election

³ 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.

4. Conflict of interest
 - Members to abstain from participation in deliberations and decision-making with respect to their own Party
5. Bureau
 - Consisting of a Chair, Vice-Chair and 3 Committee members (representation from 5 UN regional groups); Chair and Vice Chair elected from amongst Committee members with periodical rotation on a geographical basis; rules for replacement of Chair and Vice Chair.
6. **Frequency of meetings**

D. Conduct of meetings (*previously Procedural Matters*)

1. Transparency of proceedings
 - Presumption of openness of meetings and documents
 - Committee to deliberate and adopt decisions in a closed session
 2. Main decision-making rules
 - Decisions – *Views*:
 - o (1) by consensus only
 - o (2) by consensus or a 2/3 majority members present and voting as a last resort
 - o (3) by consensus or at least 3/4 majority members present and voting as a last resort
 - Quorum (3/4 of the members)
 - Procedures for intersessional (electronic) decision-making to enhance efficiency and reduce cost
 - Any decisions to be supported by reasoning
- Rules of procedure (could be developed by the Committee for consideration by the CMA)

E. Scope (*previously Scope and Functions*)

Views

- (1) Comprehensive scope (all provisions):
 - o *In principle, all provisions of the Agreement, without restricting scope from the outset*
 - o *Covering mandatory provisions and non-mandatory provisions*
- (2) Scope in light of function:
 - o Facilitation of implementation for all provisions and promotion of compliance for legally binding provisions
 - (3.1) *only individual*
 - (3.2) *also collective*
- (3) Obligations under Articles 4, 7, 9, 10, 11 and 13
 - o 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*

- Not possible to assess ‘compliance’ of an individual Party with a common or collective obligation
- (4) Legally binding provisions on individual obligations of Parties
 - *As the start/as a minimum*
 - *Should be prioritized (noting small size of Committee)*
 - *May be broadened if/as gaps are being identified*
- (5): Differentiation of scope in line with the differentiations in the PA provisions (e.g. Art 9.1, 9.3 and others)
- (6) One of the above (1-5) as well as relevant provisions of decisions by the CMA (e.g. modalities, procedures and guidelines (MPGs))

Provisions relating to domestic action, contributions made by Parties in their NDCs: Not appropriate under Art 15 due to the nationally-determined character of NDCs and sovereignty over their content

NCC to be taken into account with respect to scope.

Scope may depend on how the procedure was initiated.

F. Functions (previously Scope and Functions)

Facilitate implementation and promote compliance (Art 15.1):

Views

- (1) Two distinct functions:
 - *With differences based on scope, triggers, and/or measures;*
 - (1.1) *As a dual function; distinct but complementary; not mutually exclusive;*
 - (1.2) *Two distinct roles, reflecting differentiated approach throughout PA and national circumstances;*
- (2) Continuum within the spectrum of functions:
 - *With the difference being determined by what is the appropriate measure/output in each case;*
 - *Overall focus on facilitation and promotion, in line with the facilitative nature;*

NCC to be taken into account with respect to functions.

G. Initiation of consideration (previously Commencement of Committee activity (triggers/referral/initiation))

1. Self-referral only: Committee activity may be initiated 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 ↔⁴[Possible elements reflecting any linkages to transparency arrangements (could be further explored)]*
2. Self-referral and other means of initiation may include (views below are not necessarily mutually exclusive):
- Views:
- (1) 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.*
 - (2) By way of an automatic/objective initiation ↔
 - 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 ↔ [Possible elements reflecting any linkages to transparency (could be further explored)]*
 - *Body to initiate to be decided; e.g. could be Committee, or Secretariat, or expert review team*
 - (3) By the Committee itself:
 - 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*
 - For systemic issues
 - On the basis of information:
 - *Gathered and provided by the Secretariat*
 - *From transparency arrangements of Art 13 ↔ [Possible elements reflecting any linkages to transparency (could be further explored)]*
 - *Provided by other bodies, mechanisms and arrangements under PA ↔*
 - (4) 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*
 - (5) Differentiated approach: For developed countries also other referrals possible (e.g. automatic/objective trigger); for developing countries self-referral only.
3. Admissibility:
- *E.g. for self-referral, Party concerned to provide information on efforts made to use other arrangements and mechanism;*

NCC to be taken into account with respect to the initiation of Committee activities

⁴ The symbol ↔ 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.

H. Sources of information

1. Drawing on additional expertise
2. Safeguards for confidential information
3. Possible sources of information
 - Information provided by the Party concerned
 - Registries under the Paris Agreement
 - Information from the transparency framework, e.g. from the technical expert teams ↔ [Possible elements reflecting any linkages to transparency (could be further explored)]
 - Information from the support arrangements ↔ [Possible elements reflecting any linkages to support arrangements (could be further explored)]

I. Process

[Placeholder for any elements of the Committee's process for considering an issue (could be elaborated)]

- Participation of the Party concerned (can be operationalized through the elements of the process)
 - Participation in all stages of the process, including:
 - At the time of initiation
 - 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
 - NCC to be taken into account with respect to treatment of the Party concerned
- National capabilities and circumstances of Parties (NCC) (can be operationalized through the elements of the process):
 - To be taken into account in procedural and substantive matters, including with regard to the treatment and participation of the Party concerned.
- Areas and types of flexibilities that can be afforded to Parties might include (can be operationalized through the elements of the process):
 - Consultations/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.*
- *Process may depend on how the procedure was initiated.*

J. Measures and outputs

1. General considerations:

- Nature and principles of the mechanism to inform any measures and outputs
- Committee, when identifying appropriate measures/outputs, 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

Relationship between measures/outputs and the respective functions:

Views:

- *(1) Measures and outputs depending on the functions of facilitating implementation (e.g. advice and recommendations) and promoting compliance (e.g. compliance plan, statement of concern, findings of non-compliance)*
- *(2) Measures and outputs as incremental steps along a 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)*

Range of measures may depend on how the procedure was initiated.

2. Range of measures (views, not necessarily mutually exclusive):

- Sharing of information, experience and lessons learned;
- Identification of challenges faced by the Party concerned;
- Action plan/Implementation plan/Compliance plan
 - Initiation/request for elaboration of implementation/compliance plan – *Views:*
 - (1) Whether only upon request by the Party concerned
 - (2) Whether also by the Committee
 - ❖ (2.1) With consent of the Party concerned
 - ❖ (2.1) Without need for consent in case of non-compliance
 - Overall purpose of the plan
 - Facilitative
 - A roadmap to bring the Party concerned to improved implementation/ into compliance
 - 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)
 - 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 the NDCs
- Recommendations and suggestions (to the Party concerned)
- Information and advice
 - E.g. for non-binding elements
- Facilitating access to finance, technology and capacity-building support ↔ *[Possible elements reflecting any linkages to support arrangements (could be further explored)]*
 - Information on accessing support, e.g. types of support available promote compliance
 - Safeguards to avoid creating perverse incentive to be considered
 - Possible requirements to exhaust efforts under other arrangements
 - Access to/refer to/send technical experts to assist Party concerned
 - Recommendations/referral to relevant bodies related to support; focus on gaps in the provision of technology, finance and capacity-building
- Early warning:
 - Can be useful to preempt situations of non-compliance
 - Would be not be consistent with facilitative, non-punitive nature
- Statements of concern / Cautionary statements:
 - Can be useful to preempt situations of non-compliance
 - Would be not be consistent with facilitative, non-punitive nature
- Declarations/Findings/Communications in relation to compliance:
 - 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
 - Would not be consistent with facilitative and non-punitive nature
- Any measures related with Article 6 PA *[Possible elements reflecting any linkages to Article 6 (could be further explored)]*

K. Follow-up by the Committee

[Placeholder for any elements (could be elaborated)]

L. Identification of systemic Issues

- At the request of CMA
- Based on systemic challenges identified in the course of the Committee's work
- To be reflected in the reports to CMA

- Could serve as background information for Global Stocktake ↔ [Possible elements reflecting any linkages to the GST (could be further explored)]
- Could inform and/or be informed by support arrangements ↔ [Possible elements reflecting any linkages to support arrangements (could be further explored)]

Issuing advisory opinions on interpretation of provisions would not be appropriate in light of the non-judicial nature

M. Relationship with the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement

- Committee under the guidance of CMA
- Reports annually to CMA (Art 15.3)
- Content of reporting (*views not necessarily mutually exclusive*):
 - Views:*
 - (1) Reports on its work
 - (2) Reporting on findings/measures in individual cases:
 - (2.1) Reports on all to CMA
 - (2.2) Informs CMA only if requested by the Party concerned
 - (3) A summary of its activities and actions taken
 - (4) Reports to flag systemic issues
 - Recommendations to the CMA (*views not necessarily mutually exclusive*):
 - (1) If Committee considers the measures implicate important issues under the PA or the authority of other PA bodies
 - (2) In case of non-compliance of Party concerned: to provide technical assistance; capacity-building
 - (3) In cases of repeated non-compliance
 - (4) In cases of systemic issues regarding implementation and compliance
 - (5) On overcoming systemic barriers to implementation and compliance
 - (6) 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

N. Review of the modalities and procedures

- Built-in review based on the experience with the Article 15 Committee and other relevant arrangements
- Periodic review of the modalities and procedures by CMA

O. Secretariat

- Secretariat support