



NEW ZEALAND

Submission to the APA on the Article 15 mechanism April 2017

Context

1. New Zealand welcomes the opportunity to submit its views on the modalities and procedures required for the effective operation of the committee to facilitate implementation and promote compliance, established by Article 15, paragraph 2, of the Paris Agreement and proposals on how to take the work further.
2. At the APA 1-2 meeting at COP23 (November 2016), Parties were invited to submit their views and proposals, as follows:
 - a. Specify the modalities and procedures required for the effective operation of the committee referred to in Article 15, paragraph 2, of the Paris Agreement;
 - b. Elaborate elements that could be addressed through such modalities and procedures; and
 - c. Share their views on how to take the work further under this agenda item in order to ensure that the APA can fulfil its mandate in accordance with Decision 1/CP.21, paragraph 103.
3. The purpose of the mechanism established by Article 15 is to facilitate implementation of and promote compliance with the provisions of the Agreement. New Zealand considers that the operation of the mechanism must respect the provisions of the Agreement and should facilitate Parties' implementation of the Agreement.
4. The characteristics of the committee that makes up the Article 15 mechanism have been set out in Article 15; it is to be "expert based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive". The function of the Committee is to assist and encourage individual Parties to contribute to the overall outcomes Parties have all agreed to aim for. The Committee should help Parties to meet the obligations and expectations set out in the Agreement by coming up with solutions to impediments to compliance and implementation drawing on the expertise of its members. The Committee may be able to assist Parties in need of help by facilitating access to support from other

UNFCCC mechanisms mandated to serve the Agreement, if required, though the modalities and procedures of the Committee should ensure that such access does not incentivise non-compliance.

The modalities and procedures required for the effective operation of the committee referred to in Article 15, paragraph 2, of the Paris Agreement

The Committee

5. The make-up of the Committee, as decided by paragraph 102 of Decision 1/CP.21, will be “12 members with recognized competence in relevant scientific, technical, socioeconomic or legal fields”, elected by the CMA “on the basis of equitable geographical representation”.

6. While each Committee member should act in their personal capacity, New Zealand believes that to avoid any actual or perceived conflict of interests, an alternate member should be elected alongside each Committee member. This will allow members with a conflict of interest (e.g. being a national of a Party referred to the Committee) to stand down for consideration of a specific Party’s implementation or compliance matters.

7. The Committee should work by consensus decision making, to align with general decision making under the UNFCCC.

Scope of the mechanism

8. The mechanism is mandated to “facilitate **implementation** and promote **compliance** with the **provisions of the Agreement**” by individual Parties. The **scope** of the mechanism should be understood to be the set of provisions that fall within the ambit of the Committee’s consideration. The scope of the Committee’s work must cover the actions of individual Parties that directly relate to legally binding provisions of the Agreement.

9. As collective obligations do not fall within scope of the Committee’s consideration they will be considered elsewhere. For example, Parties have established the global stocktake to periodically take stock of the implementation of the Agreement by assessing collective progress towards achieving the purpose of the Agreement and its long-term goals. New Zealand does not see any formal link between the global stocktake and the compliance mechanism.

10. Some of the work of the Committee will naturally be ex-post in nature, with members considering issues of past implementation or compliance. However, in providing for self-referral (described below), the Committee’s modalities should recognise the potential demand for pre-emptive assistance to avoid compliance or implementation failure.

Triggers

11. Parties have explicitly agreed the mechanism is **non-adversarial** in nature. New Zealand understands this to mean that the Committee will not operate to provide dispute settlement between Parties. The set of specific actions that would trigger the

Committee's consideration of a Party's compliance or implementation challenges (the 'triggers') need to be designed in a way that ensures the mechanism cannot be misused, e.g. in an antagonistic manner. New Zealand believes that there should not be Party-Party referrals.

12. New Zealand advocates for a set of triggers, as follows:

- a. **Objective automatic** trigger: applicable to the legally binding obligations on individual Parties, as set out in the Agreement.
- b. **Self-referral** trigger: applicable to all legally binding provisions related to individual Party action, as set out in the Agreement.
- c. **Committee** trigger: allows for the Committee to trigger a Party to come before it, following review of all reports generated by the ERTs under the transparency framework.

13. The **objective automatic trigger** would mean that if any legal obligation was not met by an individual Party, the Party in question would be automatically referred to the Committee. This would allow for efficiency for referrals in respect of the most clearly delineated and important obligations of the Agreement, e.g. the communication of subsequent NDCs, etc. In developing the modalities, Parties will need to agree which entity makes this referral and how it is made clear to the relevant Party that the referral has taken place.

14. The **self-referral trigger** would allow for Parties to seek assistance from the Committee if a risk of non-compliance has been identified. This would enable Parties to take advantage of the expertise of the members of the Committee and proactively address any issues of implementation or compliance before a formal failure to implement or comply occurred. In developing modalities Parties will need to agree parameters for self-reference to ensure Committee resourcing is not misappropriated.

15. The final trigger would be **Committee** request following consideration of the reports generated by the expert review teams (ERTs) under the Article 13 framework. New Zealand firmly believes that a clear linkage with the transparency framework is valuable; the framework will produce nationally contributed and verified information. The ERTs will not refer individual Parties, but rather send all reports through to the Committee. This will enable the Committee to offer assistance to individual Parties on matters regarding compliance with legally binding obligations. In developing modalities Parties will need to consider how the Committee could offer assistance in the implementation of non-legally binding provisions.

Measures and Outputs

16. Parties have agreed explicitly the mechanism is **non-punitive**. New Zealand understands this to mean that the Committee will not have an ability to impose a sanction or penalty. The Committee can make a finding a Party has failed to comply with or implement

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the Agreement and to recommend any remedial action appropriate but it cannot impose a penalty as a consequence of such a finding.

17. New Zealand believes it will be essential for the Committee to consult on any recommended remedial action with the Party in question.

18. In determining the remedial action, the Committee will be required to take into account the Party's **national capabilities and circumstances**, and exercise its **discretion** to ensure the recommended remedial action was commensurate with the materiality of the compliance or implementation failure found by the Committee.

19. New Zealand believes the following measures are good examples of possible non-punitive remedial actions or recommendations:

- a. Assistance to identify issues leading to the implementation or compliance matter
- b. Advice on how to remedy an issue
- c. Requirement for the Party to produce an action plan to remedy the referred issue
- d. Declaration of a finding of failure to comply with a specific legally binding obligation

20. The Committee may also choose to recommend no remedial measure.

Relationship with the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement

21. The Committee should be independent of the CMA. This means that the CMA should not have formal oversight of the Committee and the Committee should be able to decide its own timelines and manage its workload. There should be no need for CMA confirmation of reports and recommendations made by the Committee. However, the annual report by the Committee to the CMA (under Article 15, paragraph 3) will allow for effective communication and could serve to flag systemic issues of implementation or compliance.

Crosscutting elements across the modalities and procedures

Applicability to all

22. The mechanism should function uniformly in respect of **all Parties** as is clear from the text of the Paris Agreement, and consistent with the majority of other multilateral environmental agreements.

23. The principle of common but differentiated responsibilities and respective national capabilities, in light of different national circumstances is reflected in the design of the overall Agreement, including in Parties' respective NDCs. This means that the obligations the Committee will support already fully accommodate Parties' respective national circumstances

and capabilities. Consequently variations within the modalities and procedures of the Committee are not required or appropriate. Parties will already have benefitted from the alignment of their obligations and expectations with their national circumstances and capabilities, built in through the structure of the Agreement, before they get to a point of being before the Committee. All Parties should be equally accountable for implementing their respective commitments.

24. Article 15, paragraph 2 states that the committee “shall pay particular attention to the respective national capabilities and circumstances of Parties”. Therefore, the modalities and procedures and remedial measures should allow the space for the Committee to apply discretion when applying the general uniform set of modalities and procedures. Such discretion will allow for the modalities and procedures to be applied in a way appropriate to the Party before it, and its respective national capabilities and circumstances and the resources it has available. For example, timelines could be extended to accommodate a Party’s limited capacity to respond, or alternatively shortened if the Party is well-resourced, while the steps proposed to facilitate implementation measures may be more active if a Party’s circumstances mean its needs more ‘hands on’ assistance.

Transparency

25. Article 15 clearly states that the Committee shall be “facilitative in nature and function in a manner that is **transparent**, non-adversarial and non-punitive.”

26. In order to operationalise Article 15 fully, the Committee will need to apply the principles of transparency, due process and natural justice. This means that a Party referred to the Committee would have the right to participate throughout the Committee’s work and be consulted on any proposed recommendations, remedial actions and reports. Effective communication in a transparent manner between the Committee and a referred Party will enable that Party to better implement and comply with the Agreement’s provisions. Furthermore, the proceedings of the Committee should be public to ensure a transparent process.

Furthering the work programme

27. All decisions on the design of modalities and procedures should be completed by the end of COP24, as part of the package of guidance being concurrently developed in accordance with decision 1/CP.21, for adoption at the end of CMA1-3 in 2018.

28. New Zealand sees value in the APA convening an expert technical workshop in the second half of 2017 prior to COP23, in order to develop thinking on key issues, for example the scope of the mechanism, its triggers, and the Committee’s output. New Zealand’s submission on the mode of work of the APA will further address New Zealand’s thoughts on the work programme.