

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

Version 2 (11 November 2017, at 00:30)

*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 prejudge 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

Parties were of the view that national capabilities and circumstances (NCCs) will apply to the modalities and procedures of the Committee, in accordance with Article 15. Parties have different views on how NCCs can be operationalized by the modalities and procedures of the Committee. Some were of the view that NCCs will apply through guidance to the Committee in its modalities and

¹ Changes made to Version 1 (09 November 2017, at 15:00) are highlighted. Narrative and commentary are displayed in *italics* and include clarifications provided by Parties, they do not necessarily reflect the degree of support.

procedures, while others consider that the Committee will apply NCCs on a case-by-case basis. Some Parties consider that the modalities and procedures will differentiate between developed and developing country Parties, while others were of the view that this is not appropriate as the distinction is not made in the text of Article 15.

Interlinkages with other arrangements

Parties recognize that the Committee may have direct and indirect linkages with other arrangements under the Paris Agreement, and established under the Convention. Parties also recognize the relationship between the Committee and support arrangements. How this relation can be operationalized needs to be explored. Some Parties consider there to be strong linkages to arrangements under other Articles of the Paris Agreement – including, but not limited to, the enhanced transparency framework (Article 13), the global stocktake (Article 15) and under Article 6. Some Parties also consider there to be strong linkages to bodies that serve the Paris Agreement as provided by decision 1/CP.21, including but not limited to the Forum for Response Measures, the Standing Committee on Finance and the Technology Executive Committee. Parties recognize that further work is required to understand how these potential linkages can be operationalized through the modalities and procedures of the Committee, but some note that it was too early to consider this in detail.

Discretion and timing

Parties also consider what degree of discretion the Committee will have, and how this may be bounded through the modalities and procedures. Some Parties feel that the Committee should be given the mandate to keep its modalities and procedures under review, while others consider this to be a matter for the CMA alone. Some Parties consider that the modalities and procedures should prescribe the actions and processes of the Committee, for example that all stages of the process should flow from how action by the Committee was initiated.

Level of detail for CMA1

Parties consider whether the modalities and procedures to be considered and adopted by CMA1 will address all possible elements in a comprehensive way, or whether some questions would be best resolved after CMA1 and/or when the Committee begins to meet. Some Parties consider that full and comprehensive modalities and procedures must be adopted by CMA1, while others consider that these will continue to be developed as appropriate over time.

Principles

Some Parties are of the view that the modalities and procedures require a section on principles that should guide the Committee, including equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. Others consider that this section would not be required as differentiation is embedded in the provisions of the Paris Agreement, including in Article 15.

III. Elements of relevant guidance²

A. Principles, Purpose and Nature

A.1. Principles

1. Established under the Paris Agreement (PA)

- *Nothing in the design or operations of the Art 15 Mechanism can change the content or legal character of the PA's provisions.*

2. Paris Agreement 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 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 reflects CBDR-RC in the light of different national circumstances: no further reflection in the modalities
 - 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*
- (3) Reference to Articles 2 and 15

3. Additional operational principles: *e.g. non-duplication of effort, effectiveness, independence in relation to discretion, inclusiveness.*

A.2. Purpose

- Facilitate implementation and promote compliance (Art 15.1)
- *Encourage, assist and enable Parties to implement provisions and comply with their obligations*
- *Prevent situations of non-implementation or non-compliance*
 - o *Preventive role is inconsistent with the facilitative and non-adversarial nature of the Committee*
- *Thereby:*
 - o *Enhance effectiveness and durability of the Agreement*
 - o *Enhance credibility, confidence, consistency and effectiveness of actions, and trust among Parties*
 - o *Complement other processes and mechanisms under the PA*
 - o *Avoid politicization*

A.3. Nature

- Functioning in a facilitative, transparent, non-adversarial, non-punitive manner (Art 15.2)
- Expert-based and facilitative (Art 15.2)

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

- 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.:*
 - o *No enforcement*
 - o *No penalties or sanctions*
- *Non-adversarial, (Art 15.2), i.e.:*
 - o *Not a mechanism to settle disputes*
 - o *Respecting national sovereignty*
- *Consultative*
- *Advisory*

B. Institutional arrangements

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
 - o (i) Due regard to the members' expertise and equitable geographic representation
 - o (ii) Taking into account the goal of gender balance
 - **Composition to represent diversity of fields of expertise**
 - 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

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

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.

6. Meetings

- Frequency
- Attendance

7. Conduct of meetings

a. Transparency of proceedings

- Presumption of openness of meetings and documents
- Committee to deliberate and adopt decisions in a closed session

b. 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

8. Rules of procedure (could be developed by the Committee for consideration by the CMA)

C. Scope

Views

- (1) Comprehensive scope (all provisions):
 - o *All provisions of the Agreement, without restricting scope*
 - o *Covering mandatory provisions and non-mandatory provisions*
 - o *Covering individual and collective obligations*
- (2) Scope in light of function:
 - o Facilitation of implementation for all provisions
 - o and promotion of compliance for legally binding provisions
 - (2.1) *only individual*
 - (2.2) *also collective*
- (3) Obligations
 - (3.1) *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*
 - o *Not possible to assess ‘compliance’ of an individual Party with a common or collective obligation*
 - (3.2) *All “shall” provisions*
 - o *Including those within Article 6*

- (3.3) Legally binding provisions on individual obligations of Parties
 - *As the start/as a minimum*
 - *Objectively assessable obligations only*
 - *Should be prioritized (noting small size of Committee)*
 - *May be broadened if/as gaps are being identified*
- (4) Differentiation of scope in line with the differentiations in the PA provisions (e.g. Art 9.1, 9.3 and others)
- (5) One of the above (1-4) 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: Whether and how to operationalize this element under this section to be explored.

Scope may/will depend on how the procedure was initiated.

D. 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 the legal nature of the provision in question:*
 - *Facilitation and compliance for legally binding provisions; only facilitation for non-legally binding*
- (3) One function: with no difference in measures/outputs as its outcomes are advisory and non-binding

NCC to be taken into account with respect to functions.

E. Initiation of consideration

Views

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/by a 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 the Committee itself:
 - With respect to:
 - (2.1) All provisions of the PA
 - (2.2) 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)]
 - (2.3) For systemic issues:
 - Committee has discretion itself or
 - Committee has the mandate on certain areas or
 - Committee seeks the mandate from the CMA or
 - Committee starts work under request by large numbers of countries
 - (2.4) For recurrent inconsistencies with the guidelines developed under Art. 13 PA
 - On the basis of:
 - Objective verifiable 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 ↔ [Possible elements reflecting any linkages to support arrangements (could be further explored)]
 - Party consent
 - Ensuring the neutral, transparent, non-adversarial, non-punitive nature
 - As a preventive approach, to help a Party before getting in a situation of non-compliance
 - Preventative approach is inconsistent with the facilitative non-adversarial nature of the Committee
 - (3) By the CMA:
 - a. For systemic issues
 - b. CMA to retain competence to request an activity by the Committee
 - In such a decision by the CMA the Party should recuse itself

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.

- (4) Differentiated approach: For developed countries also other referrals possible (e.g. automatic/objective trigger); for developing countries self-referral only.

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

F. Sources of information

1. Drawing on additional expertise
2. Safeguards for confidential information
 - o In particular, for how to engage with Party concerned, and specific facilitative measures
3. Possible sources of information
 - o Information provided by the Party concerned
 - o Registries under the Paris Agreement
 - o Information from the transparency framework, e.g. from the technical expert teams \leftrightarrow [*Possible elements reflecting any linkages to transparency (could be further explored)*]
 - o Information from the support arrangements \leftrightarrow [*Possible elements reflecting any linkages to support arrangements (could be further explored)*]
 - o Information from other institutional arrangements \leftrightarrow [*Possible elements reflecting any linkages to support arrangements (could be further explored)*]
 - o Only validated sources of information, e.g. subsidiary bodies, bodies under UNFCCC, NDCs, Parties' communications
 - o Information from the forum on response measures

G. Process

- Steps/phases
 - o Determination of admissibility
 - *E.g. for self-referral, Party concerned to provide information on efforts made to use other arrangements and mechanism*
 - *Exhaustion of efforts not required*
 - o Invite Party to provide written inputs/comments
 - *Flexibility regarding timelines for response*
 - o Obtaining information from the relevant sources (*see section F*)
 - o Dialogue with Party concerned (face-to-face)
 - *Possibility of support to enable participation*
 - o Invitation of other bodies when needed
 - o Determination of measures/outputs
 - *Initial outputs; seek comments from Party; final outputs*
- *Consent of the Party concerned is required at every stage*
- Participation of the Party concerned (*can be operationalized through the elements of the process*)
 - o *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*
 - *Concepts similar to judicial hearings are inconsistent with the non-judicial, facilitative, non-adversarial nature of the Committee*
 - *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.*
 - *Special circumstances of LDCs and SIDS to be taken into account*
- **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*
 - *Flexibility with regard to substantive standards (e.g. by applying a lower burden in standard of action)*
 - *Need to balance proportionality, predictability and flexibility.*
- *Process may/will depend on how the procedure was initiated.*
- *[Placeholder for any additional elements of the Committee's process for considering an issue]*

H. Measures and outputs

1. General considerations:
 - *Nature and principles of the mechanism to inform any measures and outputs*
 - *Guidance to the Committee could be provided to inform its approach and its exercise of discretion in selecting measures*
 - *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
- Legal nature of the provision concerned, based on whether developing country or developed country

Relationship between measures/outputs and the respective functions:

Views:

- (1) Measures and outputs depending on the functions of facilitating implementation and promoting 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)
- (3) Measures and outputs are of a facilitative nature only
 - They are non-binding, advisory and are not of an incremental nature as this would be inconsistent with the nature of the Committee as non-adversarial and non-punitive.

Range of measures may/will 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 developed in collaboration with the Party concerned to assist the Party with implementation or compliance with the PA
 - 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

- Facilitating access to finance, technology and capacity-building support ↔ *[Possible elements reflecting any linkages to support arrangements (could be further explored)]*
 - o 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
 - No requirement to exhaust efforts or placing the burden on the Party. Party shall be able to initiate the facilitation by the Committee without prejudice to any other efforts
- Referring to appropriate bodies for finance, technology and capacity-building support ↔ *[Possible elements reflecting any linkages to support arrangements (could be further explored)]*
- 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 / Notification to the Party concerned:
 - o To preempt situations of non-compliance
 - o Inconsistent with facilitative, non-punitive nature
- Statements of concern / Cautionary statements:
 - o To preempt situations of non-compliance
 - o Inconsistent with facilitative, non-punitive nature
- Confidential letter
- Declarations/Findings/Communications in relation to compliance:
 - o 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
 - o Would not be consistent with facilitative and non-punitive nature
- Factual findings related to compliance without an affirmative statement of non-compliance
- Any measures related with Article 6 PA *[Possible elements reflecting any linkages to Article 6 (could be further explored)]*

3. Follow-up by the Committee

- *Should be facilitative in nature*
- *Discretion would be needed to allow Committee to decide on its working methods*
 - o *Additional guidelines would be necessary with some further steps and measures for the Committee*
- *May depend on measures taken*
- *May require consent by the Party concerned*

I. Identification of systemic Issues

Views:

- *Initiation: see G.2*

- Based on systemic challenges identified in the course of the Committee's work
- Systemic issues involving a number of Parties in aggregate form only
- Also recurring implementation/compliance issues of a Party or group of Parties
- *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)]*
- Possible outputs:
 - To be reflected in the reports to CMA
 - Recommendation to CMA
 - Recommendation to groups of Parties concerned
- *Issuing advisory opinions on interpretation of provisions would not be appropriate in light of the non-judicial nature*

J. 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
 - *Not individualizing*
 - (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
 - (4.1) Systemic issues involving a number of Parties
 - (4.2) Recurring implementation/compliance issues of a Party
 - 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

K. Review of the modalities and procedures

Views

- 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
- Review by the Committee itself, with recommendations subject to approval by the CMA

L. Secretariat

- Secretariat support