ELABORATING THE PARIS AGREEMENT: IMPLEMENTATION AND COMPLIANCE

C2ES CENTER FOR CLIMATE AND ENERGY SOLUTIONS

Lavanya Rajamani, Centre for Policy Research

Article 15 of the Paris Agreement establishes a mechanism to facilitate implementation of and promote compliance with the provisions of the Paris Agreement. Along with the global stocktake and the transparency framework, this mechanism provides a means of assessing and enhancing the effectiveness of parties' efforts toward the agreement's long-term goals. Article 15, and the decision adopting the Paris Agrement, provide some guidance on the mechanism's design and operation. But important aspects—including how the mechanism would be triggered and the outcomes it could produce—are among the issues to be addressed in 2018 when parties adopt detailed implementing guidance for the Paris Agreement. This brief identifies key overarching considerations, and explores the range of issues and options that have emerged with respect to specific elements of the mechanism's design and operation.

Article 15 of the Paris Agreement, and paragraphs 102-103 of decision 1/CP.21, provide skeletal but key guidance to parties on the design and operation of the mechanism established by the agreement to facilitate implementation and promote compliance. They provide that it shall:

- consist of a committee of 12 members that is expert-based and facilitative in nature, with its members elected by the CMA on the basis of equitable geographical representation
- operate under modalities and procedures to be adopted by the CMA, and report annually to the CMA
- function in a transparent, non-adversarial and non-punitive manner
- pay particular attention to the respective national capabilities and circumstances of parties.

This guidance settles some fundamental design and operational elements of the Article 15 mechanism, but leaves others for subsequent negotiation, among them:

- the committee's scope or purview
- its structure, composition and procedures
- how its proceedings are to be initiated
- the outputs and measures that may result.

In the negotiations since the Paris Agreement was adopted, agreement appears to be emerging on some fundamental characteristics of the mechanism, including that its design and operation cannot change—and must be tailored to—the nature, content and legal characer of the agreement's provisions.

The committee must not act as a dispute resolution or judicial system, and/or apply penalties or sanctions.

OVERARCHING ISSUES

Differences among parties on the outstanding design and operational elements can be traced in part to differences in relation to four overarching conceptual issues: (*1*) the functions of the Article 15 mechanism, (*2*) the proper balance between parties' autonomy and the committee's authority, (*3*) how "national capabilities and circumstances" are to be taken into account, and (*4*) linkages and relationships with other arrangements under the Paris Agreement.

Functions

The Paris Agreement contains a mix of obligations—soft and hard, procedural and substantive—and obligations of result and of conduct. An overarching issue is the functions the Article 15 mechanism is to perform in relation to this dynamic mix of obligations. Prior experience both under the UNFCCC and in other multilateral regimes suggests the broad functions the mechanism could serve:

- a "problem-solving" function, to help parties resolve their difficulties in meeting their obligations, either in a preventative fashion (before they fall out of compliance), or in a remedial fashion (after they are already out of compliance)
- an "accountability" function, to help demonstrate whether or not parties are delivering on their commitments
- a "deterrent" function, if the type of outcomes the mechanism could produce would help deter parties from non-compliance
- a mix of these functions.

In the specific context of the Paris Agreement, the choice among functions is framed by the two principle objectives of Article 15: facilitating implementation and promoting compliance. Are these distinct functions or a single integrated function?

If these are distinct functions, then the committee's mandate and process with respect to each may differ in the provisions they apply to, the methods of initiating the committee's proceedings, or the range of potential outputs. For instance, the committee could facilitate implementation with all provisions of the agreement but promote compliance only with those containing individual mandatory obligations. Similarly, a wider range of actors could be authorized to trigger the committee's proceedings with respect to facilitating implementation than with respect to promoting compliance.

Extent of Parties' Autonomy

In its "hybrid" nature, the Paris Agreement strikes a fine balance between international and national governance. For instance, it establishes common binding procedural commitments, while allowing parties wide latitude in determining their nationally determined contributions (NDCs). An overarching issue in determining the nature of the Article 15 mechanism is the extent of latitude or autonomy parties reserve for themselves. For instance, should parties alone be able to initiate the committee's proceedings with respect to themselves, or should other actors, including other parties, be able to? Similarly, should the committee have the mandate to render a judgment of non-compliance?

Reflecting 'national capabilities and circumstances'

Another overarching issue is how and to what extent the committee should pay attention to "national capabilities and circumstances," as required by Article 15(2). Does this requirement, for instance, suggest differential application to designated categories of countries (e.g., developing, least developed, small island) in some or all aspects of the committee's work? Or could it be interpreted as simply requiring a case-by-case exercise of discretion by the committe to take account of a party's capabilities and circumstances.

Linkages and relationships with other arrangements under the Paris Agreement

Parties also must consider the role that the Article 15 mechanism is to play in the overall architecture of the Paris Agreement, in particular its relationship to the transparency framework (Article 13), the global stocktake (Article 14), and support arrangements (Articles 9, 10 and 11). For instance, non-fulfilment of particular transparency obligations under Article 13 could automatically trigger the committee's proceedings. With respect to outputs, the committee could recommend the provision of targeted assistance through the agreement's support arrangements. Or, if the committee's scope includes systemic implementation and compliance issues, information it generates could feed into the global stocktake. The global stocktake may, in turn, reveal systemic difficulties that could inform the committee's work.

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DESIGN AND OPERATIONAL ELEMENTS

Parties' choices with respect to these four overarching issues will influence decisions on remaining design and operational elements.

Scope of the Mechanism

The central question in determining the scope of the Article 15 mechanism is whether it should encompass all the provisions of the Paris Agreement or only a limited set, and if only a limited set, which ones, and on what basis?

The options for coverage include:

- all provisions of the Paris Agreement (whether or not they contain mandatory elements; whether they relate to individual, collective or cooperative obligations; and whatever their level of specificity) as well as the accompanying decision and relevant decisions of the CMA
- all provisions of the agreement only
- provisions of the agreement that entail individual mandatory obligations on parties (e.g., Articles 4.8, 4.9, 4.13, 13.7 and 13.9)
- all provisions of the agreement in relation to the committee's function to "facilitate implementation," but only those provisions that entail individual mandatory obligations on parties in relation to its function to "promote compliance"
- all issues related to implementation and compliance across all provisions of the agreement, including systemic issues and challenges.

The resolution of this issue may involve a tradeoff between breadth of coverage and depth of response; the broader the coverage, the less targeted and sharp the interventions may be. It may also depend on the role that the Article 15 mechanism is to play in the broader architecture of the Paris Agreement; it could, for instance, be designed to plug gaps in the transparency framework and global stocktake.

Any determination of the committee's scope would in turn influence its structure and procedures. For instance, if the mechanism includes consideration of systemic issues and challenges, parties will need to decide if a distinct process and set of measures is needed, and whether the outputs of such a process could act as input to the global stocktake.

An additional option is for parties to sidestep an explicit decision on the mechanism's scope and to address it indirectly instead through the choice of the type of triggers that can be used to place a matter before the committee (see below).

Structure, Composition, and Procedures

Structure: There appears to be emerging agreement that the Article 15 mechanism should be a single committee, but it could have dual functions (facilitating implementation and promoting compliance), and/or recourse to expert panels.

Composition: As noted, the decision accompanying the Paris Agreement settled the size, expertise, election and representative balance of the committee's membership. Parties need to decide if the members will serve in their personal capacity, whether alternates will need to be nominated, and what the term of their membership should be.

Procedures: While the agreement specifies that the committee should function in a transparent manner, the extent of that transparency must be determined. For instance, should all proceedings of the committee be open and its documents made public, or should a party in question, at its request, be allowed the benefit of closed proceedings, and if so, under what conditions?

Also, while there appears to be emerging agreement that the party in question should be afforded an opportunity to participate in all stages of the proceedings, there is less clarity on whether it should be entitled to play a role in the elaboration and adoption of its conclusions.

Decisions: Should decisions of the committee be taken by consensus or through 2/3 (or other) majority vote?

Relationship to the CMA: Article 15(3) requires the committee to report annually to the CMA. Should these reports include recommendations for actions by the CMA? Should the CMA act as the appellate body of the committee or have the power to approve its reports? And, should the CMA periodically review the committee's work?

It is worth noting that the committee itself, once operationalized, can resolve many of these issues through its rules of procedure, and the resolution of all of these issues need not stand in the way of operationalizing the committee.

Initiation of Committee Activities

There are several ways in which the committee's activities could be initiated. An issue of implementation or compliance could be raised by:

- a party with respect to itself (self-trigger)
- a party with respect to another party (party-to-party trigger)
- the transparency framework (automatic trigger)
- the Committee (committee trigger)
- the Secretariat (Secretariat trigger)
- the CMA (CMA trigger).

There appears to be general agreement that a party should be able to raise an issue with respect to itself, but less agreement on which, if any, other triggers should be allowed. If the self-trigger is the only one available, the committee may never be operationalized, and even if it is, important linked issues (not raised by the party in question) may go unaddressed.

While a party-to-party trigger may be seen as inherently adversarial, and thus inconsistent with Article 15, it may be possible to establish safeguards to limit its abuse, such as a requirement for consent from the party concerned.

The transparency framework could automatically trigger a committee proceeding if, for instance, the expert review team finds that a party has not complied with its Article 4.2 obligation to submit an NDC, or its reporting requirements under Article 13. The output of the facilitative multilateral consideration of progress could also provide a trigger. However, such triggers would have to be carefully designed to ensure that they do not create perverse incentives for parties to be less forthcoming in the Article 13 process.

The power to initiate the committee's proceedings could rest soley with the committee, based, for instance, on its consideration of outputs from the Article 13 process. A committee or Secretariat trigger would vest discretion with these bodies, but the extent of that discretion could be limited through the inclusion of objective criteria, such as the outputs of the technical review teams, or a requirement to obtain the consent of the party in question.

A CMA trigger, depending on the nature of the committee's relationship with the CMA, could be restricted to systemic issues and challenges.

As noted above, the choice of triggers could indirectly determine the scope of the Article 15 mechanism—for instance, if an automatic trigger applies only to provisions under the Article 13 transparency framework, and a Secretariat trigger applies only when a party fails to submit an NDC.

OUTPUTS

As noted, the Article 15 Committee is facilitative in nature, and is required to function in a manner that is non-adversarial and non-punitive. It cannot, therefore, apply penalties or sanctions. There are nonetheless several options for the committee's outputs, which could be broadly categorized into those facilitating implementation and those promoting compliance.

The committee could generate the following outputs to facilitate implementation:

- advice, assistance and recommendations in improving implementation, for instance, through:
  - facilitating joint or cooperative approaches
  - providing access to expertise/expert groups
  - providing advice on strengthening domestic capacities, expertise, institutions or regulations
  - facilitating the sharing of information, best practices, relevant experiences.
- referral to relevant financial, technical and capacity building bodies and processes, such as the Green Climate Fund
- assistance with generating and implementing an action plan for implementation.

There is a risk that in assisting parties in implementation the committee will duplicate efforts under provisions related to support, or be used to 'fast track' access to support. To address this concern, the committee could limit itself to identifying gaps, and refer the party in question to the relevant arrangements or mechanisms, when necessary.

In relation to promoting compliance, the committee could generate the following outputs:

- advise and assistance in generating a compliance action plan
- cautionary statements or declarations of non-compliance
- ineligibility to participate in the mechanism under Article 6.4

A cautionary statement or a declaration of non-compliance could arguably be considered punitive, thus militating against the facilitative nature of the committee. However, these could also be seen as factual statements rather than punitive measures. Similarly, suspending a party from participating in the Article 6.4 mechanism could be perceived as punitive or, depending on the scope of the committee's work, as a means of ensuring the integrity of the Article 6.4 mechanism.

Finally, if the committee's scope is to include systemic challenges and barriers to implementation and compliance, its ouputs could include:

- reports to the CMA recommending actions to address such issues
- input to the global stocktake to assist its consideration of collective progress toward the Agreement's long-term goals.

Other C2ES Resources:

Elaborating the Paris Agreement: Information and Accounting, November 2017. https://www.c2es.org/document/elaborating-the-paris-agreement-information-and-accounting/

ICAO's CORSIA and the Paris Agreement: Cross-Cutting Issues, November 2017. https://www.c2es.org/document/icaos-corsia-and-the-paris-agreement-cross-cutting-issues/

Elaborating the Paris Agreement: Potential Linkages Between Articles 13, 14, and 15, November 2016. https://www.c2es.org/document/elaborating-the-paris-agreement-potential-linkages-between-articles-13-14-and-15/

Structuring the UNFCCC 2018 Facilitative Dialogue, May 2017. https://www.c2es.org/document/structuring-the-unfccc-2018-facilitative-dialogue/

Key Issues in Completing the Paris Climate Architecture, October 2016. https://www.c2es.org/document/key-issues-in-completing-the-paris-climate-architecture/

Paris Agreement Q&A, June 2017 https://www.c2es.org/content/paris-climate-agreement-qa/

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2101 WILSON BLVD. SUITE 550 ARLINGTON, VA 22201 703-516-4146 **C2ES.ORG**