

Elaborating Article 15 of the Paris Agreement: Facilitating Implementation and Promoting Compliance

Susan Biniar (Associated Researcher, IDDRI)

Article 15 of the Paris Agreement establishes a mechanism to “facilitate implementation of and promote compliance with” the provisions of the Agreement. It further provides that the mechanism is to consist of a committee, which shall operate under the “modalities and procedures” adopted by the CMA.

In a sense, elaborating Article 15 should not be that difficult or controversial. Unlike many other agreements, the Agreement and Decision 1/CP.21 already decided several issues that would otherwise still be on the table. At the same time, there are Paris-specific challenges that affect Article 15’s elaboration.

This policy brief identifies and addresses outstanding issues, notes several challenges, and offers a potential path forward.

WHAT IS ALREADY DECIDED?

Article 15 and Decision 1/CP.21 decide:

- that a mechanism is established;
- that it will “facilitate implementation of and promote compliance with the provisions of” the Agreement;
- that the mechanism will consist of a committee, which is to operate under the modalities and procedures adopted by CMA 1;
- that the committee will be of a specified size and composition and will include members with recognized competence in relevant scientific, technical, socioeconomic, or legal fields;
- that the committee will be expert-based and facilitative in nature and will function in a transparent, non-adversarial, and non-punitive fashion;
- that the committee will pay particular attention to the respective national capabilities and circumstances of Parties; and
- that the committee will report annually to the CMA.

Beyond these elements, there is likely to be agreement on points such as:

- an NDC’s content is not subject to review;
- the Article 15 process cannot change the legal nature or content of the Agreement’s provisions;
- the committee is not a dispute resolution, judicial, or quasi-judicial body;
- committee members should serve in their expert capacities; and
- a Party’s participation will help the committee understand that Party’s particular issues, needs, and circumstances.

This article has received financial support from the French government in the framework of the programme “Investissements d’avenir”, managed by ANR (the French National Research Agency) under the reference ANR-10-LABX-01.

Institut du développement durable
et des relations internationales
27, rue Saint-Guillaume
75337 Paris cedex 07 France

WHAT IS STILL TO BE DECIDED?

The Agreement and 1/CP.21 leave open for future decision:

- the scope of what is covered (“what” the committee looks at);
- how the committee’s work is initiated (“how” an issue gets before the committee);
- the committee’s role and output (“what” the committee does with an issue); and
- modalities/procedures for how it will operate.

Decisions regarding Article 15 are expected to be taken in 2018. The CMA will likely wish to take the necessary decisions to enable the committee to be up and running. However, this does not necessarily mean that the CMA must decide every issue in 2018. It might decide that certain issues can be postponed, decided in part, decided on an interim basis (to be revisited later), and/or decided by the committee itself once its members have been selected.

PARIS-SPECIFIC CHALLENGES

There are at least two ways in which Article 15’s elaboration poses challenges that may not arise under other agreements.

First, there are other mechanisms/processes involved in the review of, and assistance with, Parties’ efforts. In addition to support related to finance and technology:

- Article 13’s transparency framework will review each Party’s reports on inventories and on progress in implementing and achieving its nationally determined contribution (NDC), as well as reports from developed country Parties on support provided. The “technical expert review” includes assistance for some developing countries in identifying capacity-building needs.
- Article 14’s global stocktake will assess, every five years, the collective progress towards achieving the Agreement’s purpose and long-term goals.

Second, the Agreement’s provisions are quite varied:

- Some are legally binding (e.g., communicating an NDC under Article 4.9), while others are not (submitting an adaptation communication under Article 7.10).
- Some provisions are precise enough to enable objective assessment (e.g., whether information has been provided under Article 13.7), while others are not (e.g., provisions such as Article 7.9, which include the phrase “as appropriate”). Provisions such as Article 9.5 raise challenges, because it may be debatable whether the obligation to communicate certain finance-related

information “as available” is to be judged solely by the Party in question or is also amenable to outside assessment.

- Some provisions apply to individual Parties (e.g., Article 13.7 on the provision of information), while others are collective (e.g., Article 9.1 with respect to developed country Parties and Article 9.2 with respect to other Parties).

Both of these features are relevant to the elaboration of Article 15:

- The existence of other mechanisms/processes requires Parties to consider Article 15’s particular “value added.”
- The wide variety of Agreement provisions requires Parties to consider how to tailor appropriately the application of Article 15.

In addition, the negotiation over Article 15 was somewhat more controversial than under other agreements; underlying differences may continue to play out in terms of its elaboration.

ARTICLE 15’s “VALUE ADDED”

There are various ways to think about Article 15’s value added. For example:

- It may be the committee’s ability to address the situation where a Party has not submitted an NDC or a report at all. While the transparency framework will look at a Party’s submitted information in light of the relevant guidelines, as well as the implementation/achievement of its NDC, that process may not see cases where there is no NDC or reporting.
- Its value may lie in the committee’s standing nature. Thus, it may be in a better position than, for example, a temporary Article 13 technical expert review to work with a Party to improve its implementation/compliance.
- It may be the only process that can lead to a statement regarding a Party’s compliance/non-compliance with an obligation, such as submitting an NDC or preparing an inventory report using agreed IPCC methodologies. Such a statement is seemingly not within the transparency framework’s mandate, and the global stocktake addresses only collective implementation, not individual Parties.
- In light of its mandate to “facilitate implementation,” the committee may be viewed as having a “help desk” function or at least a “residual” help desk function, i.e., available for assistance to the extent that this would not cause overlap/duplication with respect to other processes.
- The committee may be in a good position to look at certain “systemic issues,” such as, hypothetically, why many Parties have encountered

a particular issue with respect to reporting, or why no Party has submitted an adaptation communication.

A BRIEF DISCUSSION OF SCOPE, INITIATION, AND ROLE/OUTPUT

Scope: Per Article 15, the committee is to facilitate implementation of and promote compliance with “the provisions of this Agreement.” If one reads “the provisions” as meaning “all provisions,” then the issue of scope has already been decided—although there may still be issues concerning initiation and role/output with respect to various provisions.

If one considers the scope open, then the CMA must decide on its breadth, taking into account the committee’s “value added” and other factors. For example, if the committee is to function as a “help desk,” its scope would likely be broad. If, however, its focus is to be on compliance, its scope might be limited to a sub-set of legally binding obligations. Or its scope might be left broad, with limitations built into initiation and role/output.

Initiation: There are several ways in which an issue might, theoretically, come before the committee:

- by a Party with respect to itself,
- by a Party with respect to another Party,
- by the committee itself,
- through information conveyed by the transparency process or the Secretariat, and/or
- by the CMA.

There is likely to be agreement that, whatever the committee’s scope, a Party should be able to raise an issue with respect to itself. The harder question is who else should be able to initiate an issue.

On the one hand, there may be concern that, if an issue can be raised only through self-initiation, important issues could go unaddressed. Parties are unlikely to raise their own non-compliance. This could leave Parties unaccountable for failure to meet key legally binding obligations, such as submitting an NDC. Such an accountability lacuna could make Article 15 insufficiently operational.

On the other hand:

- Party-Party initiation may be viewed as not in keeping with the committee’s “non-adversarial” nature.
- It may be considered inappropriate for anyone other than a Party itself to invoke the committee regarding a provision that is non-legally binding or binding but not precise/not capable of objective verification.
- There may be concerns that initiation other than self-initiation may be politicized or too

discretionary; the Secretariat itself is likely to want to avoid having such discretion.

There may be ways to address both sets of concerns through the inclusion of certain “safeguards” regarding initiation beyond self-initiation:

- Such initiation might be allowed for certain obligations, e.g., those that are binding, precise, and capable of objective verification.
- It might be allowed for certain types of review, e.g., the CMA might initiate “systemic issue” reviews.
- There might be an objective standard for initiation (e.g., the Secretariat might inform the committee where an NDC or a report had not been received by a mandatory deadline, or the transparency process might inform the committee where certain objective criteria were met). In such cases, the committee itself would actually “initiate” its work, based on input from elsewhere.

Alternatively, initiation might be more liberal, but safeguards could be built into the committee’s role/output.

Role/Output: This element concerns what the committee is authorized to do and produce:

- If it is given a “help desk” function, it might offer the requesting Party advice, access to experts, a referral to another mechanism, or help in formulating a plan for improving its implementation/compliance. Care could be taken to avoid duplicating other processes.
- If its functions include addressing issues relating to non-compliance, it could have additional tools at its disposal, to be dispensed progressively. These could include a cautionary statement and, further along the continuum, a statement relating to “compliance” or “non-compliance.”
- It is relatively easy to imagine the “compliance” function above applying to obligations that are binding, precise, and objectively assessable, e.g., whether a report arrived by a mandatory deadline.
- It is harder to determine what the committee should be able to do with respect to provisions that are not legally binding, precise, and objectively assessable.
- Regarding non-legally binding provisions, it would not appear that there is an appropriate role for the committee, except if a Party self-initiates or perhaps if the CMA requests a “systemic issue” review relating to Parties’ implementation of such provision.
- With respect to provisions that are binding but not precise or amenable to objective assessment, there is an issue whether these should be excluded from the committee entirely (unless

self-initiated or part of a “systemic issue” review) or the committee should be able to take them up but exercise its discretion to avoid outputs at the “compliance” end of the spectrum.

- The Agreement calls for the committee to “pay particular attention to the respective national capabilities and circumstances of Parties.” The committee could consider each Party’s individual context in determining tailored advice and other outputs. A Party’s participation would be helpful in this regard. There might be particular reference in the modalities/procedures to the particular circumstances of LDCs and SIDS.

A POTENTIAL WAY FORWARD

A potential way forward might include the following elements:

- The scope of the committee’s work would not be limited in terms of identifying various provisions to be included or excluded. Rather, appropriate limitations on the committee’s work would be built in through various safeguards regarding initiation and role/output.
- Any Party could seek the committee’s assistance to promote its own compliance/facilitate its own implementation of any provision of the Agreement. However, both the Party and the committee would need to pay due regard to not duplicating other mechanisms/processes.
- The committee could itself raise/address an issue of a Party’s compliance:
 - related to binding, precise, objectively assessable provisions;
 - based on factual information conveyed by Article 13 (e.g., that a report did not follow mandatory guidelines) and/or the Secretariat (e.g., that an NDC or a report did not meet a mandatory deadline).

- In such cases, the committee could progressively apply a series of outputs, including, as appropriate, consultation, assistance, an action plan, and/or a statement of a “non-punitive” nature relating to the Party’s compliance.
- A Party could participate at each stage, recognizing the need for the committee to meet, on occasion, in closed session.
- The committee could review “systemic issues” (e.g., recurring difficulties faced by many Parties), as may be requested by the CMA from time to time. Such reviews would not focus on individual Parties and, depending upon the topic, might usefully feed into global stocktakes.
- Further consideration should be given to how legally binding obligations that are imprecise or not objectively assessable should be handled, e.g., whether they should be outside the committee’s scope (other than through self-initiation or as the subject of a “systemic issue”), whether the committee should be able to consider them based on information from the transparency framework/Secretariat but should not be able to apply tools at the “compliance” end of the continuum, or another approach.
- The committee could develop its own rules of procedure, for adoption by the CMA, which might include consideration of confidentiality issues.
- For added assurance, the decision could reaffirm that the substantive content of NDCs is not subject to review, that the Article 15 process cannot change the legal nature or content of the Agreement’s provisions, and that the committee is not a dispute resolution, judicial, or quasi-judicial body. ■