African Group views on Elements and Options for Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Nagoya Protocol and to Address Cases of Non-Compliance

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Introduction

This document responds to the request for submissions contained in recommendation 1/4 of the first meeting of the Intergovernmental Committee for the Nagoya Protocol (ICNP-1), held in Montreal from 05 to 10 June 2011.

At ICNP-1 the African Group repeated its well-known view that an effective and legally binding compliance system lies at the very heart of the Nagoya Protocol and is indispensible for the successful implementation of the third objective of the CBD. The current submission seeks to further explain this position by:

- Discussing the scope of the compliance regime under the Nagoya Protocol
- Reviewing the compliance regimes of other multilateral treaties which could help to inform the process underway within the ICNP
- Outlining key considerations that need to be taken into account in developing the Nagoya Protocol compliance regime.

Scope of "compliance" under the Nagoya Protocol

The African Group considers that the Nagoya Protocol should address compliance in a comprehensive manner. In addition to the Party-to-Party dispute settlement provisions laid down in Article 27 of the CBD and the Provider-to-User measures outlined in Article 18 of the Nagoya Protocol regarding compliance with mutually agreed terms and access to justice, it is the view of the African Group that the Nagoya Protocol must promote compliance by setting new norms for all actors concerned. In other words, compliance with the Nagoya Protocol should impact the behaviour of both providers and users of genetic resources in a way that goes beyond mere compliance with the national instruments - laws, policies or administrative measures - regulating access and use of genetic resources in the respective jurisdictions of Parties. The African Group recognises that Article 21 on awareness-raising, Article 22 on capacity and Article 25 on financial mechanism and resources can play an important role in translating such norm-setting into modification of behaviour, by making all actors aware of their roles and responsibilities, and by increasing monitoring and enforcement capacity, thereby improving the probability that non-compliance will be detected at the outset / early on and then effectively addressed, remedied and/or prosecuted.

However, given Africa's historical experiences of misappropriation and inappropriate exploitation of its valuable resources, the African Group considers that voluntary measures without more punitive remedies and sanctions for non-compliance are unlikely to be sufficient.. The very existence of clear rules and regulations established through national measures within the ambit of an internationally agreed framework like the Nagoya Protocol may well make most providers and users more accountable for their decisions and actions, provided the rules and regulations are backed up by significant adverse consequences in cases of non-compliance.

In light of the above, and in addition to promoting general compliance with all provisions of the Nagoya Protocol, it is the view of the African Group that the compliance regime should in particular promote implementation of key provisions, as follows:

- Article 5 on Fair and Equitable Benefit-Sharing: to ensure that Parties comply with their obligations under 5.2, 5.3 and 5.5 to take measures to share benefits in a fair and equitable way, based on mutually agreed terms.The compliance regime shall encourage all applicants for access to present documentary evidence at the time of application that they are domiciled in and subject to the jurisdiction of a Party that has indeed taken measures to share in benefits in a fair and equitable way, and access shall be granted only if the providing Party considers such measures to be adequate and effective.
- Article 6 on Access to Genetic Resources: the compliance regime shall affirm that all Parties require PIC unless otherwise determined by that Party; advice, technical support and funding as appropriate shall be provided to assist Parties to take the measures envisaged in 6.2 and 6.3; the absence of such measures shall not be interpreted as permitting free access without PIC unless it is pro-actively and deliberately so determined by a Party and made known through the Clearing House Mechanism; any inadequacy in such access measures may be considered or taken into account, as appropriate, by competent legal authorities when adjudicating allegations of misappropriation or non-compliance, subject to the rules of procedural fairness and natural justice as they normally apply in the relevant jurisdiction where the legal action is brought.
- Article 7 on Access to Traditional Knowledge associated with Genetic Resources: Parties with holders of traditional knowledge (ILCs) under their jurisdiction shall be provided with advice, technical support and funding as appropriate to discharge their obligations under this Article; PIC to access TK shall only be granted to users domiciled within the jurisdiction of Parties that have taken or will establish such measures, upon presentation of documentary evidence of such measures in the application for access.

  Ensuring and monitoring compliance of research on GR and TK should be incorporated in the national legislative provisions. Hence, the compliance regime should incorporate the provisions of Article 8 with Articles 5,6 &7.
- Article 15 on Compliance with Domestic Legislation or Regulatory Requirements on Access and Benefit Sharing: to ensure that Parties discharge their obligations under this Article, all access shall be conditional on the applicant submitting documentary evidence at the time of application that it is domiciled in and subject to the jurisdiction of a Party that has indeed taken or will develop “appropriate, effective and proportionate ... measures” as envisaged; in the event that one Party alleges and submits evidence that another Party has failed to take such measures, or that the measures taken are ineffective or inadequate, all other Parties shall consider to withhold PIC for access from all users domiciled in the jurisdiction of the offending Party until the situation has been rectified.
- Article 16 on Compliance with Domestic Legislation or Regulatory requirements on Access and Benefit Sharing for Traditional Knowledge associated with Genetic Resources: compliance measures as envisaged for Article 15 above.
- Articles 15 & 16: The most important provision is the establishment of cooperation mechanisms between Parties to address alleged violation of domestic legislation or regulatory frameworks.
- Article 17 on Monitoring the Utilization of Genetic Resources: access shall only be granted for specific uses and in specific jurisdictions where the Party providing PIC considers that an adequate system of checkpoints has been established / or will be established to effectively cover the permitted uses in that/those jurisdictions; such sectoral and geographic restrictions on use shall be included in MAT, clearly

indicated on the access permit and communicated to the Clearing House Mechanism. To further ease compliance monitoring amongst and between Parties, the Secretariat should consider the development of a template for the issuing of permits as envisaged in Article 17(2). The names of Parties, and in particular, user entities that do not comply with the provisions of the Nagoya Protocol will be made available through the ABS Clearing-House.

- Article 18 on Compliance with Mutually Agreed Terms: in the event that one Party alleges and submits evidence that another Party has failed to discharge its obligations under 18.2 and 18.3, all other Parties shall consider to withhold PIC for access from all users domiciled in the jurisdiction of the offending Party until the situation has been rectified.

It is a truism that the Nagoya Protocol should be taken as a whole and thus devising a strategy for its implementation and compliance by actors should recognize that fact. In recognition of its wholeness, its various provisions are linked and mutually supportive. Thus, while the African Group stresses the above mentioned articles around which a compliance system to the protocol should be constructed, other parts of the protocol should also be taken into account in strengthening the effectiveness of the compliance regime and helping Parties and relevant bodies to address cases of non-compliance.

Learning from others: brief overview of other compliance systems

In contemplating the establishment of a compliance regime for the Nagoya Protocol the African Group has assessed the compliance regimes of other international environmental treaties, especially those treaties pertaining to biodiversity issues. The on-going process of development of a compliance system in respect of the Nagoya Protocol can benefit significantly from other processes. Most Multilateral Environmental Treaties have considered or established a regime of compliance and measures to address situations of non-compliance. For the sake of brevity the African Group has opted to assess the compliance regimes of two treaties which have a direct focus on biodiversity resources:

- The compliance and enforcement regime of the 1972 Washington Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- The recently adopted 2011 compliance regime of the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) of the FAO

The compliance and enforcement regime of CITES has as main objectives to aid the conservation of, regulate legal trade in, and detect and deter illegal trade of listed species. These objectives are pursued in a bid to achieve the overall goal of improving the implementation and effectiveness of CITES. In order to facilitate the pursuit of these objectives, the convention implements a number of projects which are complemented by certain specific measures. The projects implemented by CITES within the framework of its compliance and enforcement regime include:

(i) a National Legislation Project, which is basically aimed at gearing parties towards the development and implementation of CITES oriented national legislation at the domestic level;
(ii) A permit configuration project
(iii) An annual and biennial reports project
(iv) The review of significant trade project and
(v) A project which deals with reporting on enforcement matters

At the heart of these projects is the national legislation project, on which the other projects are strongly dependent for their success. Central to the implementation of CITES at the national level is the establishment of national legislation, which can accommodate provisions on the issuance of permits as well as provisions on reporting and reviews of trade and matters relating to other CITES implementation projects. It therefore appears that compliance with CITES by Parties starts with the development of national legislative provisions and continues with its implementation at the national level. To support compliance with and enforcement of CITES, there are additional measures which are very helpful in monitoring compliance and detecting and addressing cases of non-compliance, including but not limited to: the setting of export quotas, record keeping on the status of trade in listed and non-listed species at the national level, monitoring of trade, intelligence and targeting investigations, specialized units, personnel and funds, positive response to offer assistance, communication, meetings and training, integration of CITES in standard curricula for customs, police and other law enforcement officers.

In order to provide for coordination and management of all compliance and enforcement related issues within the secretariat of CITES a special unit called: 'Legislation and Compliance Unit' was created in 2000. The role of this Unit is chiefly to address compliance and enforcement issues within the Convention and to provide relevant advice and assistance when a compliance and enforcement issue arise. One of the extreme measures that the Convention can take is to temporarily suspend trade in species by a Party in the event of non-compliance. This is an extreme option that CITES applies in addressing cases of non-compliance. Because this kind of decision by the CITES COP is only taken in extreme cases of severe non-compliance to the convention which threatens a specific species, in CITES practice, it is interpreted as a 'precautionary measure' in order to bring back the party on the track of compliance. During the temporary period of suspension, advice and assistance is indeed provided to the party so that it can correct its wrongdoing practices. But the fact that the convention is able to reach the extreme point of trade suspension while being ready to assist countries in their implementation of the convention is an important element in the CITES compliance and enforcement regime.

Another compliance regime worth learning from is the recently adopted 2011 compliance regime under the International Treaty on Plant Genetic Resources for Food and Agriculture of the FAO. The process for the development of a compliance regime to the plant treaty started in 2002 under the auspices of the FAO Commission on Genetic Resources for Food and Agriculture acting as interim committee to the plant treaty, with a request to it in the form of resolution 3/2001 of the 31st session of the FAO conference, to prepare the compliance related issues for the governing body. Key stages of the process include the request by the interim committee to the director general of the FAO in October 2002 to collect countries' views on compliance through the collection of submissions by countries on compliance with the treaty and in addressing cases of non-compliance. In its 2006 resolution 3/2006, the governing body decided upon the creation of a compliance committee pursuant to Articles 19.3(e) and 21 of the plant treaty. Through resolution 2/2009, the governing body established an *ad hoc* working group to negotiate and finalize the procedures and operational mechanisms to promote compliance and to address issues of non-compliance, with a view to their approval at the fourth session of the governing body. The fourth session of the governing body of the plant treaty which was held in Bali, Indonesia, 14-18 March 2011, approved through resolution 2/2011, 'Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-Compliance'.

The objective of the compliance regime of the plant treaty is to promote compliance with all the provisions of the International Treaty and to address cases of non-compliance. It is further emphasized that the procedures and mechanisms of this regime shall include

monitoring, offering advice or assistance, including legal advice or legal assistance, when needed and requested, in particular to developing countries and countries with economies in transition. As it springs from its objective, the compliance regime has stressed a great deal on a soft approach in ensuring compliance and addressing issues of non-compliance with all provisions of the treaty, as it focuses on mechanisms such as legal advice and legal assistance when requested by a party. Indeed this is obvious in the principles underpinning the plant treaty compliance regime which include among others the principle of simplicity, non-adversariality, non-legal binding and the principle of cooperation. Further principles of the compliance regime that should guide the relevant mechanisms include the principles of transparency, accountability, fairness, expeditiousness, predictability, good faith, and reasonableness. At the core the implementation of the compliance regime of the plant treaty, is the compliance committee which is serviced by the secretariat of the governing body and is composed of 14 representatives sourced in a fairly balanced manner from all FAO regions of the world. An examination of the functions of the compliance committee that works under the guidance of the governing body suggests that its functions focus in providing assistance and advice to the contracting parties on how to improve compliance with the treaty, as there is no indication for a request or recommendation to be made by the compliance committee to the governing body to take actions in respect of a severe sanction to a party in a situation of non-compliance.

It is the view of the African Group that these two examples can inform the on-going process of development of a compliance regime to the Nagoya Protocol considering that the above mentioned processes/treaties have a focus on biodiversity resources, their access and acquisition and possible exploitation.

Brief proposal for the on-going process from the perspective of the African Group.

It is the view of the African Group that the scope of the compliance regimes described above are strong pillars for the cooperative procedures and institutional mechanisms to promote compliance with the provisions of the Protocol and to address cases of non-compliance. With this in mind, the African Group makes the following initial propositions for the on-going process and suggestions on the options that should be taken into consideration in respect of developing measures addressing cases non-compliance:

- The ICNP should consider the setting up of a working group of experts or an *ad hoc* committee on compliance, with broad representations from across the various regions. This working group or *ad hoc* committee will be tasked with negotiating the compliance regime, undertaking the drafting and reporting to and make recommendations to the ICNP (or COP/MOP) on progress in the development of the regime. It is further recommended that this working group or ad hoc committee be given a deadline for completion of negotiations of a compliance regime. It should be noted that, in the view of the African Group, the assignments to be prescribed to this working group of expert or *ad hoc* committee on compliance distinguish this group from the expert group announced in recommendation 1/4 of ICNP1.
- The ICNP should consider the establishment of a Compliance Unit to the Nagoya protocol. A resolution should be prepared by the ICNP for approval by the first COP/MOP. The working group of experts, during the negotiations of the regime, should also address the role of the Compliance Unit in detail
- To promote compliance with and effectiveness in the implementation of the Nagoya Protocol, the African Group proposes that the monitoring and reporting provided for under Article 29 of the protocol be used by the Compliance Unit to assess the extent of implementation and compliance with the Nagoya Protocol by Parties. Parties will

be encouraged to report on their own implementation progress and on violation by other Parties of their domestic legislations, allowing the Compliance Unit to make recommendation to the COP/MOP on ways to address violations and cases of non-compliance.

- The Compliance Unit will respond to requests submitted by Parties of assistance for administrative support in the establishment of cooperation between Parties in the investigation of alleged non-compliance and subsequent enforcement procedures.
- Furthermore, to promote compliance and address cases of non-compliance, the Compliance Unit will respond to requests submitted by Parties for assistance in legal training or advice and in the provision of capacity building with regards to the implementation of the Nagoya Protocol, by recommending to COP/MOP that such assistance be provided to Parties. In its assessment of the reports submitted by parties pursuant to Article 29 the Compliance Unit should be able to detect weaknesses in the implementation of the protocol by parties and cases of non-compliance. In such cases the Compliance Unit should be able to recommend to COP/MOP that action be taken in order to assist a Party to meet its obligations under the protocol.
- To address cases of severe or recurrent non-compliance, the African Group proposes that the compliance regime under the Nagoya Protocol be a CITES-style compliance regime in providing for punitive remedies and sanctions. In this respect, the Compliance Unit should be able to recommend to COP/MOP appropriate sanctions to be imposed on non-compliant Parties. The working group or *ad-hoc* committee suggested above should consider, discuss and agree on the circumstances that will trigger severe sanctions and the form that these sanctions might take.