

Government of Canada Submission to the Secretariat of the Convention on Biological Diversity on Compliance under Article 30 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization.

Canada supports an effective compliance mechanism for the Nagoya Protocol. To provide for the ultimate goal of protecting biological diversity, compliance promotion should be the focus of the procedures. As set out in Article 30, much non-compliance will be a result of a lack of capacity, which needs to be addressed constructively. The provision of advice and assistance will be important components in these procedures. As such, Canada believes that the compliance procedures should be facilitative, non-confrontational, and cooperative. The compliance body should be regionally balanced and, should have expertise with respect to the subject matter of the Protocol, balanced with respect to providers and users. Canada does not support compliance measures with punitive or trade related sanctions, including measures that could lead to the revocation of a patent, copyright, trademark or other intellectual property right, as this is not legally within the framework of the Protocol.

Canada considers that in the context of Article 30 of the Nagoya Protocol, compliance relates to the obligation of a state Party to meet its obligations and implement, that is put in place, measures or actions required by the Protocol and excludes assessments of compliance by a user with domestic legislation (for example under Articles 15 and 16 of Nagoya Protocol the legal requirement for a user of a genetic resource to have obtained the genetic resource in accordance with PIC and established MAT, or for a user to be in compliance with mutually agreed terms (Article 18)).

For ease of reference, the rest of this letter substantially follows the outline and subject-headings of document UNEP/CBD/ICNP/1/6/Rev.1.

A. Objectives, nature and underlying principles

Objectives: Canada supports objectives that are facilitative and promote assistance. The Secretariat paper points out that the Kyoto Protocol mechanism has two branches, a facilitative branch and an enforcement branch. Canada does not support the two branch approach in the context of the Nagoya Protocol.

Nature: If the nature of the mechanism is to be described, following Canada's approach on the objectives, acceptable terms from the Secretariat paper include: "facilitative", "non-adversarial", "cooperative", "cost-effective", "non-judicial", "preventive", and "legally non-binding".

Principles: Canada is of the view that a separate section on principles is not necessary, but if maintained, should reflect those principles identified in the section above on "Nature"

B. Institutional mechanisms

In Canada's view, the compliance body should be small in number, i.e. 10-15 members, represent governments, and be representative of the five regions of the UN. It should also be a standing body, rather than an ad hoc body, to ensure that expertise is developed and retained; members should be rotated in alternate years (e.g. of two or three year terms) to ensure that not all expertise is lost in a given year.

Establishment of a standing or ad hoc body: Canada supports a standing body as it is better situated to review and address systemic issues of compliance and non-compliance. This would ensure that expertise is developed and retained.

Size: Compliance bodies in other Multilateral Environmental Agreements range from 8 to 15 members. Canada supports a small sized compliance body that reflects regional balance from the five UN regions.

Nomination of members: Canada supports nominations by Parties and elections by the Conference of the Parties meeting as the Meeting of the Parties (COP-MOP).

Status of members: Canada supports nomination of compliance body members nominated by Parties who shall act objectively and in the best interest of the Protocol. They would be elected by the COP-MOP.

Selection criteria: Canada supports nominations that are based on competence in the relevant fields and on legal, scientific and/or technical expertise, as appropriate.

Selection procedure: Canada supports Members being rotated in alternate years (e.g. of two or three year terms) to ensure that not all expertise is lost in a given year.

Periodicity of meetings: Canada supports the compliance body meeting once a year, if required and subject to the availability of financial resources, unless otherwise decided by the COP-MOP. Meetings should as much as possible take place on the margins of other Protocol meetings.

Reporting: Canada supports the compliance body submitting reports and recommendations to the COP-MOP for consideration.

Rules of procedure: Canada supports an approach in which the compliance body, once established, would develop its own rules of procedure and additional decisions that may be needed to ensure efficient and effective operation (such as rules on confidentiality, decision-making conflict of interest, etc.). These would then be recommended to the COP-MOP for consideration and adoption.

C. Functions of the compliance body

In Canada's view, the functions of the compliance body should flow from its objectives. The compliance body should be able to examine specific cases of non-compliance referred to it in accordance with one of the specified triggers, and make recommendations

to the COP-MOP. It should also be able to consider systemic problems of compliance (e.g. challenges faced by a number of Parties). Canada is open to further consideration of facilitative actions the compliance body might be authorized by the COP-MOP to take on its own, provided they are not condemnatory or punitive measures, and should in general consist of promoting compliance through recommending to the COP-MOP advice and assistance.

D. Procedures

1. Triggering the procedure

In Canada's view, this should be clearly tied to the review of national reports under Article 29 and to information submitted by Parties themselves through national reports. Canada can therefore support the following triggers outlined in the Secretariat paper: (i) a party with respect to itself; (ii) a party regarding the compliance of another party; (iii) the compliance body itself, but only with respect to the identification of systemic compliance issues, or (iv) the governing body of the MEA. Canada can not support (v) members of the public or other stakeholders, nor (vi) experts, as triggering the compliance mechanism.

2. Processing the submissions

Canada can support processes that ensure the submission is sent to the Party concerned, who is then given an opportunity to respond in advance of the consideration of the admissibility of the submission. Canada supports the compliance body then considering the admissibility of the submission based on the submission itself and the response of the Party concerned. Canada does not support the compliance body gathering further information on its own regarding allegations of non-compliance in the submission.

3. Participation of the party concerned in the process

Canada agrees with the statement in the Secretariat paper that "Consultation through the entire process with the Party that is the subject of a submission is essential to guarantee due process." In addition, participation in the compliance procedures will itself facilitate compliance by Parties.

E. Information and consultation

The compliance body's powers with respect to gathering information and consultation should be delineated, such as the extent of its ability to obtain information on its own initiative from various sources. Canada supports information-gathering upon request of the Party concerned. Regarding the treatment of the information, Canada can support information being made public, except information considered confidential. Criteria for determining whether information is confidential would need to be identified in the compliance body's Rules of Procedure.

Canada believes that consultations should be confidential unless the Party agrees to public consultations.

F. Measures to promote compliance and address cases of non-compliance

Competent bodies: Canada can support the compliance body making recommendations to the COP-MOP. Canada is also open to further consideration of measures or actions the compliance body might be authorized by the COP-MOP to take on its own, provided they are not condemnatory or punitive measures, such as measures that would lead to the revocation of a patent, copyright, trademark or other intellectual property rights.

Considerations: Canada can support the consideration of factors such as the capacity of the Party concerned, the cause, type, degree and frequency of non-compliance, and calls for such recommended measures to be consistent with the objectives of the Nagoya Protocol. Canada can agree that the recommended measures to promote compliance and address cases of non-compliance shall pay particular attention to the special needs of Parties that are developing countries and Parties with economies in transition.

Consequences: Canada can support the compliance body making recommendations to the COP-MOP to take decisions on facilitative and assistance measures, in particular through capacity-building, and an approach which includes development of a “compliance plan”. If the compliance body is to have the ability to take its own, limited facilitative and assistance measures, these should be expressly authorized by the procedures.

Regarding cases of repeated non-compliance, Canada cannot support measures which at any point could lead to punitive measures or trade sanctions as this is not legally possible within the framework of the Protocol.

G. Review of procedures and mechanisms

Canada does not support the compliance body reviewing its own procedures and mechanisms. However, the compliance mechanism itself should be a component of the overall review of the Protocol under Article 31 to be undertaken by the COP-MOP.