
EU submission to the CBD notification 2011-135 on elements and options for compliance procedures and mechanisms under Article 30 of the Nagoya Protocol, taking into account the experience and lessons learned from other relevant multilateral agreements

The EU and its Member States are pleased to share their views on elements and options for compliance procedures and mechanisms under Article 30 of the Nagoya Protocol, taking into account the experience and lessons learned from other relevant multilateral agreements. We support the correct and full implementation of the Nagoya Protocol and believe that a well-conceived compliance mechanism would be an important element to promote this. Indeed, compliance mechanisms are major tools for ensuring the effectiveness of and improving compliance by Parties with Multilateral Environmental Agreements (MEAs).

The compliance mechanism should cover all obligations of Parties to the Nagoya Protocol. Its aim is to promote the fulfilment by the contracting Parties of their obligations under the Nagoya Protocol, as is the case for all compliance mechanisms under MEAs.

Any compliance mechanism for the Nagoya Protocol should promote compliance and address cases of non-compliance *inter alia* through the provision of advice and assistance, in a simple, facilitative, non-adversarial, non-judicial and cooperative manner. It should therefore cover those areas where Parties encounter difficulties with the implementation of the Protocol. Fairness, transparency, expedition, predictability and confidentiality should be ensured by a solution-oriented approach and procedural safeguards where relevant.

Furthermore, we believe that for the compliance mechanism to be meaningful and effective it must be tailored to the nature and characteristics of the Nagoya Protocol and proper links should be established with other relevant processes under the Protocol, such as monitoring and reporting, capacity building and the clearing house mechanism. Any compliance mechanism therefore needs to be balanced in terms of both facilitation and stronger measures.

The EU and its Member States consider the specific questions listed in document UNEP/CBD/ICNP/1/6/Rev.1 a good basis on which to provide comments. An additional question 2 has been added as it follows from the discussions during ICNP1.

Objectives, nature and underlying principles

1. Could either or both the experience and outcomes of the compliance procedures under the Biosafety Protocol and the International Treaty on Plant Genetic Resources for Food and Agriculture, if adapted to the circumstances of the Nagoya Protocol, provide a possible basis to begin developing draft elements and options to advance the ICNP's work?

Answer: The EU and its Member States believe that a combination of elements from compliance procedures of both the Biosafety Protocol and the International Treaty on

Plant Genetic Resources for Food and Agriculture could provide a useful basis/starting point for the development of draft elements and options for compliance procedures and mechanisms under Article 30 of the Nagoya Protocol. The EU and its Member States look forward to working with our negotiating partners on the development of a compliance mechanism for the Nagoya Protocol.

2. Could compliance procedures under other multilateral agreements provide a possible basis to begin developing draft elements and options to advance the ICNP's work?

Answer: In our opinion compliance mechanisms under other MEAs that are particularly relevant, such as the Montreal Protocol, CITES and LRTAP, could also provide draft elements and options for compliance procedures and mechanisms under Article 30 of the Nagoya Protocol.

At this stage, the EU and its Member States do not see relevant compliance mechanisms under other multilateral agreements from which expertise and/or experience could be drawn that relate to the nature and characteristics of the Nagoya Protocol and could therefore provide draft elements and options for compliance procedures and mechanisms under Article 30 of the Nagoya Protocol.

We are open to considering innovative elements and options for compliance procedures and mechanisms under Article 30 of the Nagoya Protocol, if conducive to the process.

3. Assuming Article 30 already specifies the objectives of the compliance procedure and mechanisms, what should be the nature of the compliance regime established?

Answer: We believe that the primary aim of the compliance mechanism is to improve implementation and promote compliance and thereby increase the effectiveness of the Nagoya Protocol. Therefore the compliance mechanism should be designed to assist Parties in meeting their obligations under the Nagoya Protocol and address cases of non-compliance. It should be a non-adversarial, non-judicial and cooperative process.

4. What principles should underpin the operation of the compliance procedure?

Answer: The operation of the compliance procedure should be underpinned by the following principles: rule of law, transparency, fairness/reasonableness, predictability/consistency, accountability, good faith, flexibility, supportiveness cost-effectiveness and effectiveness.

Moreover, it should cover all obligations of the Parties to the Nagoya Protocol and conform to the principle that all obligations apply equally to all Parties.

In applying the measures, the compliance body should take the capacity of Parties to effectively implement the Nagoya Protocol into consideration.

5. How can these objectives be achieved?

Answer: It will be important to establish a functional mechanism according to the principles outlined above.

Institutional mechanisms

6. Should the compliance body be a standing or an ad hoc body?

Answer: We believe it should be a standing body.

7. What should its size and composition be?

Answer: It should be small to ensure that it is effective, with regionally balanced representation. The EU and its Member States believe that two to three persons per region may be enough for the composition of the compliance body.

8. In what capacity should members serve?

Answer: Both personal capacity and state representatives have their pros and cons and it will be necessary to carefully consider what would be the best option for ABS. In any case, measures should be taken to ensure that members serve objectively and to avoid situations of conflict of interest, which could occur both under the option of members serving in their personal capacity and members serving as state representatives.

9. What expertise should be represented in the membership of the body?

Answer: Both technical and legal expertise in the fields covered by the Nagoya Protocol is needed.

10. What procedure should be used to select members?

Answer: Members should be nominated by the UN regions. These regions should decide internally who to put forward and these nominations should subsequently be endorsed by the ABS COP/MOP. To that effect the Secretariat should prepare and launch a call for proposals of candidates by each of the regions, with a description of the required profile/expertise.

11. Should the procedure foresee a system for replacing members?

Answer: In order to avoid over-burdening the process, this could be left to the regions. That way, regions which do not have the possibility to meet intersessionally, may wish to consider designating alternate members in advance.

12. How often should the compliance body meet?

Answer: The compliance body should meet as required and at least once in each intersessional period, with a degree of flexibility to increase frequency when required.

Functions of the compliance body

13. What functions should be assigned to the compliance body?

Answer: The compliance body should provide the following functions:

- Reviewing general issues of compliance by Parties with their obligations under the Protocol;
- Preparing reports on compliance, *inter alia* on the basis of information provided in the Party reports provided for in Article 29 of the Protocol;
- Receiving submissions regarding compliance;
- Seeking and considering information related to the submissions;
- Offering advice to the Parties concerned and/or facilitating technical assistance on matters relating to compliance;
- Making recommendations to the ABS COP/MOP;
- Identifying the facts and possible causes of non-compliance;
- Reporting to the ABS COP/MOP; and
- Carrying out any other functions as may be assigned by the ABS COP/MOP.

The function of reviewing general issues of compliance by Parties with their obligations under the Nagoya Protocol, is particularly important to provide a general ‘health-check’ on the general state of compliance and to allow the ABS COP/MOP to assess any needs to review or amend provisions, practices and procedures.

In performing the above functions, proper links should be established with other bodies and functions under the Convention and the Protocol and with those from other relevant instruments. As such, the compliance body could – on a case-by-case basis - seek advice of other relevant expert bodies, and it could also recommending and identifying technical assistance through already scheduled and budgeted capacity building activities to facilitate Parties to return to compliance. This could also take the form of recommendations for clearly identified capacity building activities, to be implemented through existing bilateral and multilateral mechanisms that have a proven track record in providing such assistance.

14. Should this include the review of the monitoring and reporting of the implementation of the Nagoya Protocol under Article 29?

Answer: We believe that this is an essential function for the compliance body to perform given that a primary source of information for the compliance body is likely to be reports under Article 29. In fact, regular reporting and review of it by the compliance body is an efficient and smooth mechanism for a continuous assessment of the conformity of each Party's legislation and practice to the Protocol's provisions. Experience gathered from

similar mechanisms existing under other MEAs may be used as a guiding principle to establish such a review procedure for the Nagoya Protocol.

Procedures

15. Who should be able to trigger the compliance procedure under the Nagoya Protocol?

Answer: According to the EU and its Member States adequate triggers should be provided to ensure an effective and workable compliance mechanism. We are of the opinion that a Party self-trigger, a Party-to-Party trigger and a Secretariat-trigger that is linked to reporting or information received, could provide for this.

16. Should entities other than Parties trigger the procedure?

Answer: Not directly, but information from for example ILCs or other stakeholders will be taken into account by the Secretariat as well as by Parties in their submissions.

17. When a submission is made, what should be the process related to the consideration of the submissions?

Answer: The process set out in the ITPGRFA procedures and mechanisms could be a good starting point.

Information and consultation

18. Which sources of information should the compliance body rely upon?

Answer: The information that the compliance body can consider should be as broad as possible, but the integrity of such information should be ensured.

19. Should confidentiality be maintained?

Answer: The confidentiality of information received in confidence (including information not in the public domain) should be maintained.

As regards the meetings of the compliance body, we believe that having open meetings will benefit the transparency of the procedure. The EU and its Member States accept that in case of consideration of individual cases of non-compliance, the compliance body could decide to hold closed meetings. This could be useful as Parties may be ready to have a more frank and open discussion if they know that the discussions are in confidence. This issue will also have to be addressed in the rules of procedure, for the establishment of minutes of the body etc.

Measures to promote compliance and address cases of non-compliance

20. What roles should the compliance body and the ABS COP/MOP have in relation to the measures taken to promote compliance and to address non-compliance?

Answer: The ABS COP/MOP should have the final decision on determinations of non-compliance. It is, however, important that the compliance body is able to recommend directly to Parties measures of a facilitative nature (advice and assistance) to address potential situations of non-compliance and thus seek to resolve issues and facilitate the provision of advice and assistance at the earliest possible stage.

21. What considerations should be taken into account during the procedure?

Answer: We believe type, cause, frequency and duration of the specific situation of non-compliance should be considered. Although obligations of the Nagoya Protocol apply equally to all Parties (*supra*, question 4), the capacity of Parties concerned may vary, and this should be taken into account in the consideration of measures to be recommended.

22. Article 30 of the Nagoya Protocol specifies that “these procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate...”. What other measures should be included in the procedure?

Answer: The EU and its Member States believe that the compliance body should have the mandate to recommend a range of measures. In the list of measures there needs to be a balance of both carrots (facilitative measures) and sticks (stronger measures).

Review of procedures and mechanisms

23. Should the review of the compliance procedures and mechanisms adopted for the Nagoya Protocol be explicitly provided for? Should it be scheduled?

Answer: We believe review should be scheduled, but sufficient time should be allowed for the compliance procedures and mechanisms to bed in and experience to be gained before the review takes place. The compliance body should also be able to identify a need for any additional review.