



Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity

Submission of views on cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance by the International Union for Conservation of Nature (IUCN)

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Recommendation 1/3 of the first meeting of the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access and Benefit-sharing (ICNP-1), invited Parties, other Governments, international organizations, indigenous and local communities and relevant stakeholders to communicate to the Executive Secretary their views on elements and options for cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance under Article 30 of the Nagoya Protocol, taking into account the experience and lessons learned from other relevant multilateral agreements.

Introduction

Article 30 of the Nagoya Protocol – *Procedures and Mechanisms to Promote Compliance with this Protocol* – provides for the first meeting of the Conference of the Parties to the Protocol to consider and approve cooperative procedures and institutional mechanisms to promote compliance with the Protocol and address cases of non-compliance. It addresses the need to develop a mechanism to promote compliance of Parties with their obligations under the Protocol. Article 30 is thus a so-called “enabling provision”, which means that it does not yet establish a compliance mechanism, but provides a basis for its future development and establishment by the COP/MOP.

In general, IUCN considers the development and establishment of effective and efficient compliance mechanisms as critical in order to promote the successful implementation of multilateral environmental agreements (MEAs). The existence of a compliance mechanism can both perform a health-check on the general state of compliance of Parties with their obligations and commitments under a MEA, and address specific instances of non-compliance in a way that will bring Parties back into compliance and/or avoid future cases of non-compliance.

The discussions held during the first meeting of the Intergovernmental Committee of the Nagoya Protocol (ICNP) in June 2011 seem to have disclosed a controversy about the exact meaning and focus of Article 30 of the Nagoya Protocol. As a consequence, the following submission by IUCN shall first of all contribute to a better understanding of the specific scope of this provision. Furthermore, IUCN would like to take this opportunity to highlight a set of core elements and characteristics that a future compliance mechanism under the Nagoya Protocol should contain.

Clarifying the specific objective or Article 30 of the Nagoya Protocol

In order to understand the exact meaning and focus of Article 30, it is helpful to compare the term compliance as it is used in this and other provisions of the Nagoya Protocol, namely Articles 15, 16, 17 and 18. All these provisions have in common that the term compliance is used in their title and/or in their operative text.

Article 15 of the Nagoya Protocol refers to compliance of users of genetic resources with domestic access and benefit-sharing (ABS) legislation or regulatory requirements:

- According to Article 15.1, all Parties to the Nagoya Protocol are obliged to take measures to provide that genetic resources utilized within their jurisdiction have been accessed in accordance with prior informed consent (PIC), and that mutually agreed terms (MAT) have been established, if such PIC and MAT are required by the domestic access and benefit-sharing (ABS) legislation or regulatory requirements of the other Party. This provision therefore aims to 'defend' the integrity of domestic PIC and MAT requirements (if such requirements exist at the domestic level). In other words, it aims to 'ensure' compliance by individual users of genetic resources (whether they are natural or legal persons) with domestic ABS legal frameworks.
- According to Article 15.2, all Parties of the Nagoya Protocol are obliged to take measures to address situations of non-compliance with the measures taken under Article 15.1. Article 15.2 thus refers to non-compliance with user country measures under Article 15.1, while Article 15.1 refers to compliance with provider country measures (situations of so-called 'biopiracy').
- Article 15.3 again obliges all Parties to the Protocol to cooperate in cases of alleged 'biopiracy' which will be important for their detection.

Article 16 of the Nagoya Protocol 'mirrors' the obligations of Parties under Article 15 but with a specific focus on traditional knowledge associated with genetic resources (TK):

- According to Article 16.1, all Parties to the Nagoya Protocol are obliged to take measures to provide that TK associated with genetic resources utilized within their jurisdiction has been accessed in accordance with PIC or approval and involvement of indigenous and local communities (ILCs) and that MAT have been established, as required by the domestic ABS legislation or regulatory requirements of the other Party where such ILCs are located. This provision thus aims to 'ensure' compliance by individual users of TK associated with genetic resources (natural or legal persons) with domestic ABS legal frameworks related to TK.
- Thus, Article 16.1 refers to compliance with provider country measures (situations of so-called biopiracy) related to TK associated with genetic resources; Article 16.2 refers to non-compliance with user country measures under Article 16.1; and Article 16.3 obliges all Parties to the Protocol to cooperate in cases of alleged 'biopiracy' related to TK.

Article 17 of the Nagoya Protocol aims to support the implementation of Articles 15 and 16:

- Article 17.1 establishes obligations for all Parties to the Protocol to monitor and to enhance transparency about the utilization of genetic resources, in particular through the designation of one or more checkpoints.
- Articles 17.2 – 17.4 do not contain any obligations for Parties but define the internationally recognized certificate of compliance, its objective and minimum content.

Article 18 of the Nagoya Protocol refers to a different issue of compliance than Articles 15, 16 and 17. Its objective is specifically to promote the enforcement of MAT between individual users and providers of genetic resources and/or TK associated with genetic resources. In other words, it aims to support compliance with contractual obligations, but not with domestic ABS legislation or regulatory requirements.

In contrast, **Article 30** calls for an **international compliance mechanism** to promote **compliance of individual Parties with all their obligations under the Protocol**, including but not limited to those obligations stemming from Articles 15, 16, 17 and 18. This compliance mechanism may identify instances where Parties have not complied with their different obligations under the Protocol, and may foresee consequences (which depend upon the type of compliance mechanism finally created). Furthermore, the compliance mechanism will supplement the review of the collective implementation of the Protocol by its Parties, which is to be carried out by the COP/MOP according to Articles 26.4, 29 and 31.

The objective of the compliance mechanism to be adopted under Article 30 is therefore to provide procedures and an institutional framework to address questions and problems regarding compliance of individual Parties with their obligations under the Nagoya Protocol; it is not the objective of this provision to address situations of non-compliance of individual users of genetic resources and/or TK associated with genetic resources with domestic legal frameworks related to ABS. In other words, the compliance mechanism under Article 30 has to be distinguished from those procedures and institutional mechanisms that shall be set up by States according to Articles 15, 16, 17 and 18 of the Nagoya Protocol in order to address (or detect) situations of 'biopiracy', non-compliance with provider country measures, or to deal with disputes arising from MAT (enforcement of MAT).

Article 30 specifies that the procedures and mechanisms to promote compliance with the Protocol include provisions of advice and assistance and shall be separate from the dispute settlement mechanism established under Article 27 of the Convention. Similar language can be found in Article 34 of the Cartagena Protocol on Biosafety and it might be worth looking at how those provisions under the Biosafety Protocol have been carried forward, bearing in mind the uniqueness of the Nagoya Protocol on ABS.

Compliance procedures are thus to be distinguished from dispute settlement mechanisms. Compliance procedures deal with more general issues of compliance and non-compliance as explained above, including common interests, and do not need to be raised by a party to a

particular dispute. The dispute settlement procedure, on the contrary, is adversarial in nature and limited by the actual dispute between the two or more parties in dispute. This point about the non-adversarial nature of the compliance procedures and mechanisms under Article 30 is highlighted by the use of the term “cooperative”.

Elements and characteristics of a future compliance mechanism under the Nagoya Protocol

Finally, IUCN considers a compliance mechanism to be adopted under Article 30 as a highly important, facilitative instrument to assist Parties in meeting their obligations under the Nagoya Protocol. While it is important and useful to draw lessons from existing and emerging compliance mechanisms under other MEAs, it is unlikely that their cooperative procedures and institutional mechanisms could be translated in a ‘one-size-fits-all’ approach to the particular context of the Nagoya Protocol.

IUCN is of the opinion that the following elements and characteristics should be considered in the development of a future compliance mechanism under Article 30 of the Nagoya Protocol:

Objective: To promote compliance, to address cases of non-compliance, and to provide advice or assistance to Parties to help them comply.

Nature: A non-adversarial, non-judicial and cooperative process, the primary aim of which is to promote implementation and thus facilitate the effectiveness of the Nagoya Protocol. However, IUCN would also like to stress the great importance of considering and ultimately including both ‘carrots’ and ‘sticks’ in the compliance mechanism (see measures below).

Institutional structure: A body in the form of a small standing committee composed of ABS experts serving in their personal capacity, bringing in the views of different stakeholder groups (national ABS focal points, ILCs, private industries, scientific research and civil society), to be nominated and elected by the Parties in accordance with clear and transparent criteria (including in particular regional representation), to be further defined by the Parties. In order to facilitate its efficient and effective work, the standing committee should be able to vote on decisions in the absence of consensus.

Triggers: Different options for referral of a compliance problem to the mechanism should be foreseen, such as a Party self-trigger, a Party to Party trigger, a COP trigger, a Committee trigger, as well as a public/NGO trigger. Clear and transparent criteria for the process of referral need to be further defined by the Parties.

Review functions: To perform a health-check on the state of compliance in general without the need to address a particular complaint concerning a single Party; to examine cases of possible non-compliance of one or more Parties with their obligations under the Protocol. In both cases, the objective of the process should be to propose solutions, and to make recommendations for concrete responses to the Parties concerned, or to the COP/MOP.

Measures: Measures available under the compliance mechanisms should include both ‘carrots’ and ‘sticks’. Regarding the latter, compliance measures could be linked to trade measures¹ or funding for capacity building².

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¹ For example under CITES or the Kyoto Protocol.

² For example under the Montreal Protocol.