

Submission by the Government of the Republic of Korea

Regarding the Compliance Regime under the Nagoya Protocol

Background

1. Upon receiving the invitation of the Intergovernmental Committee for the Nagoya Protocol (“ICNP”) (Doc: UNEP/CBD/ICNP/1/6), the Government of the Republic of Korea (“ROK”) hereby submits its views and comments on the cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol and to address cases of non-compliance (“compliance regime”).
2. This submission comprises of general comments followed by replies to the questionnaires posed by the Secretariat’s Note (UNEP/CBD/ICNP/1/6/Rev.1).

General Comments

3. The ROK shares the view that compliance mechanisms have become instrumental in enhancing the implementation of multilateral environmental agreements (MEAs). The task ahead of us is to lay the groundwork for a smooth commencement and effective operation of the compliance regime to be established under Article 30 of the Nagoya Protocol. With a careful and practical design, such a regime is expected to develop into a core and exemplar element of the Protocol.
4. With a view to fulfilling the given task, the proper starting point should be to consider the precedents of the existing MEAs and the lessons gained from them. Many MEAs since the adoption of the compliance regime under the Montreal Protocol in 1990 render valuable guidance on institutionalizing the compliance regime. Nonetheless, the ICNP ought to be guarded against the inclination of transcribing the previous examples uncritically. In order for the compliance regime under the Nagoya Protocol to be on solid footing, the precedents of the existing MEAs, particularly from the Cartagena Protocol under CBD and ITPGR, should be considered and weighed against the specific characteristics of the obligations under the Nagoya Protocol.

5. The ROK is under the impression that the main focus so far has been on the role of addressing cases of non-compliance in the compliance regime. Equal weight, however, should be put on its mandate of “promoting compliance” with the Nagoya Protocol. The newly established compliance regime under the Protocol is expected to play an active and even preventive role in safeguarding the integrity of the Protocol.

6. Lastly, the ICNP should be cautious from attempting to predetermine and micro-manage every detail in advance. The compliance regime will have to develop its own rules of procedures and practices in response to the submissions as well as any difficulties in relation to compliance. For the compliance regime to be responsive and relevant, some measure of flexibility must be built into the procedures and mechanisms.

Objectives, nature and underlying principles

Questions: Assuming Article 30 already specifies the objectives of the compliance procedure and mechanisms, what should be the nature of the compliance regime? What principles should underpin the operation of the compliance procedure? How can these objectives be achieved?

7. As is expressly provided for in Article 30 of the Nagoya Protocol, the compliance regime shall be distinct and separate from the dispute settlement mechanisms under Article 27 of the Biodiversity Convention. Also mindful of the fact that it is aimed at fostering cooperation and offering assistance, instead of resolving disputes or imposing sanctions, the ROK regards the compliance regime as non-adversarial and non-judicial.

8. In its procedural aspect, however, the ROK considers fairness as the guiding principle under which the compliance body shall conduct its deliberations. Any Party to be adversely affected must be properly informed and accorded an opportunity to respond. Any element of bias, whether real or potential, should be precluded. The legitimacy of the whole regime hinges upon this procedural fairness.

9. In addition to the built-in flexibility mentioned above, the ROK is of the opinion that

any measure taken by the compliance body shall be reasonable and tailor-made. Such a measure should take into account the specific exigencies of the targeted Party including its capacity. And, when necessary, the measure also needs to be adequately time-framed or planned in a step-by-step manner.

Institutional Mechanisms

Question: Should the compliance body be a standing or an ad hoc body? What should its size and composition be? In what capacity should members serve? What expertise should be represented in the membership of the body? What procedure should be used to select members? Should the procedure foresee a system for replacing members? How often should the compliance body meet?

10. Drawing upon the precedents of the existing MEAs' compliance bodies, the ROK supports the following institutional elements:

- i. To establish a standing body to administer the compliance regime;
- ii. To have up to 25 members for the compliance body with 5 persons from each region, considering geographical balance;
- iii. To have members with technical and legal expertise in order to share professional knowledge and experience of biotechnology.
- iv. For members to be recommended by Parties and then approved by the COP-MOP. In case of a vacancy, the Party that recommended the resigning member may notify a replacement who will serve the remaining term of the predecessor;
- v. For members to serve in their personal and individual capacity for the sake of integrity, and do not serve more than two consecutive terms;
- vi. For the compliance body to meet twice a year and also to hold additional meetings, when it deems necessary or by a request of the COP-MOP ; and
- vii. To delegate to the compliance body authorities to develop its own rules of procedure and additional rules as necessary.

- viii. To have two separate working groups for distinct roles in a body; one addressing cases of non-compliance and the other promoting compliance.

Functions of the compliance body

Questions: What functions should be assigned to the compliance body? Should this include the review of the monitoring and reporting of the implementation of the Nagoya Protocol under Article 29?

11. The compliance body shall be equipped with adequate mandates to handle any submission regarding compliance. This task will involve a series of actions which include receiving the submissions, seeking information related thereto (including information gathering in the territory, when necessary and only upon invitation), identifying the facts, offering advice and assistance, and recommending any appropriate measures directly or through the governing body.

12. In addition to the processing of the submissions, which primarily relates to “addressing cases of non-compliance,” the compliance body should focus on the tasks of “promoting compliance.” Drawing upon the expertise as well as experiences in dealing with specific cases of non-compliance, the compliance body may well identify and review any general issues of compliance by the Parties with the Nagoya Protocol. It can also consider the Parties’ implementation reports under Article 29 of the Nagoya Protocol and submit its general recommendation to the Conference of the Parties. As an entity which answers to the governing body, the compliance body is also supposed to prepare reports on compliance and to carry out any other functions assigned to it.

Procedures

Questions: Who should be able to trigger the compliance procedure under the Nagoya Protocol? Should entities other than Parties trigger the procedure? When a submission is made, what should be the process related to the consideration of the submissions?

13. In accordance with the reasonable approach taken by the precedent of the Cartagena Protocol, any Party with respect to itself or any Party directly affected or likely to be affected by the alleged non-compliance of any other Party should be able to trigger the procedure.

14. Self-submission should be encouraged as it indicates the readiness of the concerned Party to take corrective actions and thus will most likely achieve the desired results. The procedures regarding the self-submission may well differ from those of the submissions by any affected Party with respect to another Party. It is suggested that, in the case of self-submissions, the Party should even be allowed to indicate any difficulties regarding compliance without having to state specifically its own cases of non-compliance.

15. In a case of submission by a party regarding the compliance of another party, the initiation of the submission process should be pursued only by the Party affected by the alleged non-compliance of any other Party. Allowing any unrelated Party to make a submission would undermine the objective of fostering cooperation among the Parties.

Information and Consultation

Questions: Which sources of information should the compliance body rely upon? Should confidentiality be maintained?

16. The ROK believes that the compliance body may rely on relevant information provided by the concerned Parties, or when necessary, seek other sources of information such as the Secretariat and other international organizations. The confidentiality of the information provided by Parties and relevant organizations should be maintained.

Measures to promote compliance and address cases of non-compliance

Questions: What role should the compliance body and COP-MOP have in relation to the measures taken to promote compliance and to address non-compliance? What considerations should be taken into account during the procedure? 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?

17. As stated in Article 30 of the Nagoya Protocol, the role of the compliance body is to offer advice and assistance to the Party concerned. Making any binding decisions or taking any forcible measures could undermine the achievement of the underlying goal of fostering

cooperation and voluntary compliance, not to mention engendering the question of legality of the mechanism as a whole.

18. Procedurally, instead of issuing just final findings and measures, the compliance body is advised to have interactions with the Party concerned. The compliance body will make available to the targeted Party draft findings and recommendations (including measures). The Party can make commitments to follow the recommendations, or make comments which will then be reviewed by the compliance body.

Review of procedures and mechanisms

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

19. The ROK believes that the successful operation and development of the compliance regime requires a periodic review whereby feedbacks and inputs can give a sense of direction and ways to function better. Such a review should include an analysis as to how widely the compliance regime has been used and how the measures taken have helped the concerned Parties better comply with the Nagoya Protocol.

Additional suggestion

20. It is of the view of the ROK Government that a multilateral system for Genetic Resources for Food and Agriculture should be established when working on the implementation of the Nagoya Protocol, considering its important role in food security and sustainable agriculture.

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