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### OPEN-ENDED AD HOC INTERGOVERNMENTAL COMMITTEE FOR THE NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION

Second meeting

New Delhi, 2-6 July 2012

Item 4.4 of the provisional agenda\*

### **REPORT OF THE EXPERT MEETING ON COOPERATIVE PROCEDURES AND INSTITUTIONAL MECHANISMS TO PROMOTE COMPLIANCE WITH THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING AND TO ADDRESS CASES OF NON- COMPLIANCE**

#### **INTRODUCTION**

##### **A. *Background***

1. Pursuant to decision X/1, annex II, of the Conference of the Parties to the Convention on Biological Diversity, the first meeting of the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization (the “Intergovernmental Committee”), held in Montreal from 5 to 10 June 2011, addressed the issue of cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance, including procedures and mechanisms to offer advice or assistance, where appropriate.

2. Following its consideration of this issue, the Intergovernmental Committee in paragraph 1 of recommendation 1/4, invited Parties, other Governments, international organizations, indigenous and local communities and relevant stakeholders to communicate to the Executive Secretary by 1 September 2011 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.

3. Parties, other Governments, international organizations, indigenous and local communities, and relevant stakeholders were invited through notification SCBD/ABS/VN/SG/76984 (2011-135) dated 22 July 2011 to submit views to the Executive Secretary by 1 September 2011. All submissions were made available on-line at: <http://www.cbd.int/abs/submissions-compliance>.

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\* UNEP/CBD/ICNP/2/1/Rev.1.

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4. In paragraph 2 of the recommendation, the Intergovernmental Committee also requested the Executive Secretary to prepare a synthesis report and develop draft elements and options for cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance based on the views expressed.

5. In paragraph 3 of the same recommendation, the Executive Secretary was requested, in consultation with the Bureau of the Intergovernmental Committee and subject to the availability of funds, to convene an expert meeting to review the synthesis report and further refine the draft elements and options developed by the Executive Secretary for consideration by the Intergovernmental Committee at its second meeting.

6. With financial support provided by the European Commission and the Government of Switzerland, the expert meeting was held in Montreal from 28 February to 1 March 2012.

### **B. Attendance**

7. A maximum of five experts per region and five observers were eligible to attend the meeting. In line with usual practice, the experts were selected by the Secretariat of the Convention on Biological Diversity taking into account their expertise, the need to ensure equitable geographical distribution, and with due regard to gender balance. The list of selected experts for the meeting was approved by the Bureau of the Intergovernmental Committee.

8. The meeting was attended by experts nominated by Brazil, Cameroon, Canada, China, Costa Rica, Ethiopia, the European Union, Grenada, Hungary, India, Japan, Madagascar, Malaysia, Mexico, the Republic of Korea, the Republic of Moldova, South Africa, Sweden, Switzerland, Tajikistan, Uganda and United Kingdom. The expert from Argentina, who had been selected and invited, could not attend the meeting.

9. Experts from the following organizations participated in the meeting as observers: the Commission on Genetic Resources for Food and Agriculture of the United Nations Food and Agriculture Organization, the International Indigenous Forum on Biodiversity, the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), and the United Nations University-Institute of Advanced Studies. The expert from the Coordinator of Indigenous Organizations of the Amazon Basin (COICA) was invited to the meeting but was unable to attend.

10. In addition, the Co-Chairs of the Intergovernmental Committee, Mr. Fernando Casas (Colombia) and Ms. Janet Lowe (New Zealand), attended as *ex officio* observers.

11. A representative from the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) participated by videoconference on the first day of the meeting.

### **ITEM 1. OPENING OF THE MEETING**

12. The meeting was opened at 9 a.m. on Tuesday, 28 February 2012.

13. On behalf of the Executive Secretary, Mr. Olivier Jalbert, Officer in Charge of the Secretariat, welcomed the experts to Montreal. He thanked the European Union and the Government of Switzerland for providing financial support to convene the meeting. He reminded the experts that the first COP-MOP needed to consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance. Following the recommendation by the first meeting of the Intergovernmental Committee, the mandate of the experts at this meeting was to review a synthesis report and further refine the draft elements and options developed by the Executive Secretary for consideration by the second meeting of the Intergovernmental Committee. Mr. Jalbert emphasized the importance of providing effective guidance to the Intergovernmental Committee to advance their work and noted that the experts should not negotiate, but focus on providing their expertise on the issue. Further, he noted that the Co-Chairs to be elected would be allowed to

participate in their expert capacity. Finally, he acknowledged the presence of the Co-Chairs of the Intergovernmental Committee, Mr. Fernando Casas and Ms. Janet Lowe.

## **ITEM 2. ORGANIZATIONAL MATTERS**

### ***2.1. Officers***

14. The participants elected Ms. Anne Daniel (Canada) and Mr. Jorge Cabrera Medaglia (Costa Rica) as co-chairs of the meeting.

### ***2.2. Adoption of the agenda***

15. The Group adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/ABS/EM-COMP/1/1):

1. Opening of the meeting.
2. Organizational matters.
3. Synthesis report of views on elements and options for cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance.
4. Draft elements and options for cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance.
5. Adoption of the report.
6. Closure of the meeting.

### ***2.3. Organization of work***

16. In considering the issues, the Group had before it a note by the Executive Secretary containing a Synthesis of views and possible draft elements and options for cooperative procedures and institutional mechanisms to promote compliance with the protocol and address cases of non-compliance under Article 30 (UNEP/CBD/ABS/EM-COMP/1/2) and the views submitted on the issue by Parties, international organizations, indigenous and local community organizations and relevant stakeholders available online at <http://www.cbd.int/abs/submissions-compliance/>.

## **ITEM 3. SYNTHESIS REPORT OF VIEWS ON ELEMENTS AND OPTIONS FOR COOPERATIVE PROCEDURES AND INSTITUTIONAL MECHANISMS TO PROMOTE COMPLIANCE WITH THE PROTOCOL AND TO ADDRESS CASES OF NON-COMPLIANCE**

17. With a view to learning from the experiences in other relevant international forums, presentations were given by a number of representatives of other treaty secretariats. The presentations were made available on the Secretariat's website at: <http://www.cbd.int/doc/?meeting=ABSEM-COMP-01>.

18. A representative of the CITES Secretariat gave a presentation on compliance-related matters under this Convention. An overview of the framework for tracing trade of listed animal and plant species, such as the permit and certificate system established was explained, along with other measures to promote compliance, such as the national legislation project. The key international compliance procedures and mechanism as well as experiences and lessons learned on compliance matters were shared.

19. A representative of the Biosafety Division of the Secretariat of the Convention on Biological Diversity presented the key aspects of the compliance procedures and mechanisms adopted under the Protocol and the experience gained in this regard. The main functions and procedures of the Compliance Committee established under these procedures and mechanisms were outlined as well as the measures that could be taken by the Committee to promote compliance and address cases of non-compliance with the

Biosafety Protocol. Finally, the representative gave an overview of the experience acquired by the Committee so far.

20. A representative of the secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture gave a presentation on the experiences of ITPGRFA regarding its "Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-Compliance". The presentation highlighted the main features of the procedures and mechanisms, as well as their underlying principles. Attention was drawn to the fact that the procedures and mechanisms addressed only the obligations of Parties under the provisions of ITPGRFA. They did not address questions concerning the implementation of, or compliance with, the Treaty's Standard Material Transfer Agreement by parties to such SMTAs, as that involved private contract law subject to its own legal remedies.

21. Other experts briefly shared experiences with a number of established global and regional compliance procedures and mechanisms, including under the Basel Convention, the 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and the UNECE 1979 Convention on Long-Range Transboundary Air Pollution.

22. Following the presentations, the Secretariat then introduced the note by the Executive Secretary (UNEP/CBD/ABS/EM-COMP/1/2), and the experts considered the synthesis of views and experience from other international forums with a view to reviewing and refining the possible draft elements and options for cooperative procedures and mechanisms under the Nagoya Protocol.

23. The outcome of deliberations is contained in the annex to the present report.

24. Experts agreed that the synthesis of views would be considered in the context of the review of the draft elements and options for cooperative procedures and institutional mechanisms to promote compliance and to address cases of non-compliance with the Protocol.

#### **ITEM 4. DRAFT ELEMENTS AND OPTIONS FOR COOPERATIVE PROCEDURES AND INSTITUTIONAL MECHANISMS TO PROMOTE COMPLIANCE WITH THE PROTOCOL AND TO ADDRESS CASES OF NON-COMPLIANCE**

25. Under this agenda item, the group reviewed and considered the annex of the note prepared by the Executive Secretary (UNEP/CBD/ABS/EM-COMP/1/2) regarding possible draft elements and options for cooperative procedures and mechanisms under the Protocol with a view to further refining the draft elements and options for consideration by the second meeting of the Intergovernmental Committee.

26. It was stressed by the Co-Chairs that although this was not a negotiating meeting, the experts should strive towards reaching a common understanding of the issues addressed in the annex to the note, to the extent possible, as that would enhance the value of their expert advice. It was also recognized that alternative options could be reflected in the refined annex provided that they benefited from shared support from a number of experts. Issues which were the subject of in-depth discussions by experts would be reflected in footnotes and the meeting report as appropriate in order to explain the nature of the debate and capture the diversity of views expressed on these issues.

27. In light of the above and taking into account the discussions by the experts, the text included in the refined annex was intended to provide a full range of options for consideration by the Intergovernmental Committee. The use of brackets in the text was intended to denote options and did not imply that the rest of the text was agreed. In addition, footnotes were inserted throughout the text to help the Intergovernmental Committee in understanding the background to the discussions and the variety of views put forward on particular issues. Finally, when it was not possible to reflect all the information in the footnotes, additional information was provided in the text of the report of the meeting.

28. The Co-Chairs first invited the group to provide general comments on the annex.

29. Some experts suggested that complementary measures or approaches may be needed to support implementation with the Nagoya Protocol and that the annex did not address other measures which would complement the traditional compliance procedures and mechanisms. It was suggested that this may include educational and capacity-building aspects, establishing voluntary model legislation, peer review, provision of advice and assistance, and cooperation between Parties in promoting compliance and addressing cases of non-compliance.

30. Considering that the Nagoya Protocol goes beyond environmental issues, some suggested that compliance procedures and mechanisms under the Protocol could draw from other areas of international law.

31. It was stressed by a number of experts that Article 30 of the Protocol deals with compliance by Parties with the provisions of the Protocol.

32. Among subjects missing from the current annex were issues related to confidentiality, voting, quorum and openness of the compliance committee meetings.

33. The expert group was then invited to refine the annex by considering, *inter alia*, for each section: (a) completeness; (b) accuracy; (c) duplication; (d) the need for simplification; (e) the addition of options or alternatives; and (f) the order of the paragraphs.

#### ***Objectives, nature and underlying principles***

34. The experts considered the draft objectives, nature and underlying principles of the cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance.

35. When considering the issue of the nature of the compliance procedures and mechanisms, a number of experts supported reference to the legally non-binding nature of the compliance procedures and mechanisms in the text referring to past precedents under other international agreements such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the International Treaty. Others were rather of the opinion that it may be preferable not to include a specific reference to legally non-binding in order not to prejudice future developments.

36. When considering the issue of the principles of the compliance procedures and mechanisms, experts discussed reference to common but differentiated responsibilities of Parties in the text. Some were of the opinion that this reference was not appropriate because this expression was not found in the Nagoya Protocol nor were the obligations differentiated in the Protocol. It was suggested that the issue of the capacity of a Party could be addressed when considering measures to promote compliance and address cases of non-compliance.

37. While the paragraphs on principles addressed the need to pay particular attention to the special needs of developing country Parties in implementing the Protocol, an expert noted the importance of compliance by Parties with the Protocol's provisions related to indigenous and local communities.

#### ***Institutional mechanisms***

38. Under this section, the experts considered a number of issues related to institutional mechanisms for the promotion of compliance and addressing cases of non-compliance.

39. The experts focused on the establishment of a compliance committee as the institutional mechanism for promoting compliance and addressing cases of non-compliance, while recognizing that the Secretariat would have an important role in providing support to the committee.

40. Regarding the size of the committee, numbers ranging from 10 to 25 were discussed and retained as options, with the main considerations being about representativeness on the one hand, and effectiveness on the other. To avoid extensive debates in the future over whether members should be representatives of Parties or serving in their personal capacity, which has been the case in other forums, additional text on the members serving objectively and in the best interests of the Protocol was included.

41. There was a discussion about whether it was appropriate for indigenous and local communities to be able to nominate members to the committee, or serve on the committee and if so, whether as a full member or as an observer. The procedures for nominating representatives of indigenous and local communities were also discussed. A range of views were expressed, with some suggesting that given their prominence in the Protocol, indigenous and local communities should have representation on the committee, while others noted that current global precedents suggested that compliance of Parties with their obligations is appropriately assessed by nominations of such Parties, although a Party could choose to nominate a representative of indigenous and local communities.

42. There were also extensive discussions on the issue of replacement of committee members and two options were retained. In addition to the first option based on the views received, it was suggested by a number of experts to add a second option to reflect the possibility of designating alternates at the time of election of the members following the practice under the Biosafety Protocol.

### ***Functions of the institutional mechanisms***

43. In considering this issue, it was suggested that the committee would carry out the functions related to the promotion of compliance and addressing cases of non-compliance. Nonetheless, it was recognized that the Secretariat would have an important role in providing assistance to the Committee, including servicing meetings of the committee.

44. The group merged a number of functions into one option for a compliance committee, to provide a number of general functions that the committee would undertake in order to both promote compliance and address cases of non-compliance. In the course of this discussion, several experts suggested the idea of possible “complementary measures” to support the implementation of the Protocol in addition to traditional compliance procedures and mechanisms. Such mechanisms could consist of questions on implementation such as that provided by the ITPGRFA compliance procedures and mechanisms, voluntary model legislation, or programmes to support national legislation.

45. Some experts also suggested that the role of the Secretariat be specifically outlined and a placeholder provision was inserted in the text in paragraph 11, section B of the annex to the present report, for further consideration and elaboration by the second meeting of the Intergovernmental Committee.

### ***Monitoring and reporting under Article 29 of the Protocol***

46. The experts agreed to delete the section on monitoring and reporting included in the annex to the pre-session document recognizing that the issue of monitoring and reporting, including formats for reports, would be addressed by the COP-MOP in accordance with Article 29 of the Protocol.

### ***Procedures in relation to the Compliance Committee***

47. When considering who may trigger the compliance procedures for individual cases of Party non-compliance with Protocol obligations, the range of options were retained for consideration of the Intergovernmental Committee, including traditional triggers such as Parties and the Secretariat. Other triggers, such as the committee and the COP-MOP, were considered valuable as several multilateral environmental agreements had recently considered these options to increase the number of submissions for individual cases. There were in-depth discussions on whether and under which conditions members of the public, and indigenous and local communities could invoke the compliance procedures.

48. With respect to the possibility of submissions from members of the public, it was pointed out that care should be given to avoid the risk of over-burdening the system given the experience in one regional convention regarding submissions from the public. It was also noted that attention should be given to the fact that members of the public might submit issues concerning contract disputes between private parties, which was outside the scope and functions of the committee, rather than on compliance with the Protocol.

49. With regards to the possibility of submissions from indigenous and local communities, some considered that they should have the possibility to trigger the compliance procedures and mechanisms due

to their special role under the Protocol. However some experts expressed concern regarding the risk of over-burdening the system by allowing indigenous and local communities to make submissions.

50. Some experts suggested that qualifiers or criteria could help determine the conditions under which submissions from members of the public or indigenous and local communities may be considered.

***Information for and consultation by the Compliance Committee after the triggering of the procedures***

51. The experts proposed that information be considered by the committee from the Party whose compliance was in question and from any Party or entity triggering the procedures. However, some experts were of the opinion that the committee must also consider information from affected indigenous and local communities, regardless of whether they were allowed to trigger, or had triggered, the procedures. Others were of the opinion that reference to indigenous and local communities should rather be included as an option in the indicative list of sources from which the committee may seek or receive relevant information. There was an exchange of views on whether the list of possible sources of information should be an exhaustive or indicative list. The need to ensure the reliability of information was also highlighted.

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

52. With respect to measures to promote compliance and address cases of non-compliance, the experts discussed the need for an appropriate range of facilitative and stronger measures to be recommended or proposed by the committee. Some experts stressed the facilitative nature of the compliance procedures and mechanisms and their differences from dispute settlement, while others were rather of the opinion that the committee should also recommend or propose stronger measures, in particular for cases of persistent non-compliance. The experts also discussed whether it may be necessary to clarify which measures should be taken to promote compliance and which measures should be proposed for cases of non-compliance.

53. Regarding the list of measures to promote compliance and address cases of non-compliance, it was suggested that the Intergovernmental Committee may wish to consider which measures could be taken directly by the committee and which measures would be decided upon by the Parties to the Protocol based on the recommendation of the committee, as has been done in a number of compliance procedures and mechanisms under other multilateral environmental agreements. On this issue, it was noted that the committee could be given the authority to take facilitative measures with a view to promoting compliance and allowing action to be taken between meetings of the Parties.

54. Some experts raised the following issues in relation to specific measures listed under this heading:

(a) Under subparagraph (k), it was pointed out that there was already an obligation under Article 13 of the Protocol to designate a national focal point;

(b) Under subparagraph (l), it was highlighted that this subparagraph dealt with mutually agreed terms which went beyond the scope of Article 30; and

(c) With respect to sub-paragraphs (h) to (l), while some experts expressed concern regarding the legal basis for these measures in international law, other experts were of the view that strong/punitive measures needed to be considered by the Intergovernmental Committee to address cases of persistent non-compliance.

***Review of procedures and mechanisms***

55. It was pointed out that the review of procedures and mechanisms was covered by Article 31 of the Protocol and that the section in the revised annex on this issue was therefore not necessary. However, if the section was retained, it was noted that the procedures could be modified by the meeting of the Parties to the protocol regardless of whether a complete formal review had taken place.

**ITEM 5. ADOPTION OF THE REPORT**

56. The present report was adopted at the final session of the meeting.

**ITEM 6. CLOSURE OF THE MEETING**

57. Participants expressed their appreciation to the European Commission and the Government of Switzerland for providing financial support for the meeting.

58. Following the customary exchange of courtesies, the meeting was closed at 4 p.m. on Thursday, 1 March 2012.



*Annex*

**OUTCOME OF THE EXPERT MEETING ON COOPERATIVE PROCEDURES AND  
INSTITUTIONAL MECHANISMS TO PROMOTE COMPLIANCE WITH THE NAGOYA  
PROTOCOL<sup>2</sup>**

The following procedures and mechanisms are developed in accordance with Article 30 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization (the Protocol), and are separate from, and without prejudice to, the dispute settlement procedures and mechanisms established by Article 27 of the Convention on Biological Diversity (the Convention).

**A. *Objectives, nature and underlying principles***

1. The objective of the compliance procedures and mechanisms is to promote compliance with the provisions of the Protocol and to address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate. They shall be separate from, and without prejudice to, the dispute settlement procedures and mechanisms under Article 27 of the Convention.
2. The compliance procedures and mechanisms shall be non-adversarial, non-judicial, cooperative, simple, advisory, facilitative, flexible, preventive, cost-effective and legally non-binding<sup>3</sup> in nature.
3. The operation of the compliance procedures and mechanisms shall be guided by the principles of fairness, rule of law, flexibility, non-confrontation, reasonableness, transparency, accountability, predictability, consistency, good faith, supportiveness, cost-effectiveness, effectiveness and expeditiousness, [recognizing the common but differentiated responsibilities of Parties][recognizing that all obligations apply equally to all Parties].<sup>4</sup> It shall pay particular attention to the special needs of developing country Parties, in particular the least developed countries and small island developing States among them, and Parties with economies in transition,<sup>5</sup> and take into full consideration the difficulties they face in the implementation of the Protocol.
4. The application of the cooperative procedures and institutional mechanisms should, with the aim of mutual supportiveness, be coordinated with and/or build on other relevant procedures and mechanisms under the Convention, the Protocol and other relevant instruments.

**B. *Institutional mechanism***

1. A Compliance Committee, hereinafter referred to as “the Committee”, is hereby established pursuant to Article 30 of the Protocol to carry out the functions specified herein.

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<sup>2</sup>This text does not represent a consensus view. It is intended to provide the full range of views and options for consideration by the Intergovernmental Committee. Brackets are intended to denote options and do not imply that the rest of the text is agreed.

<sup>3</sup>A number of experts supported reference to the legally non-binding nature of the compliance procedures and mechanisms in the text referring to past precedents under other international agreements such as the Basel Convention and the ITPGRFA. Others were rather of the opinion that it may be preferable not to include a specific reference to legally non-binding in order not to prejudice future developments.

<sup>4</sup> See paragraph 36 of the report.

<sup>5</sup> It was suggested that particular attention should be paid to the special needs of indigenous and local communities. However, the relevance of this in the context of implementation by Parties was questioned.

2. The Committee shall consist of [10][15][25] members nominated by Parties, endorsed by the respective regional group of the United Nations [and could include representatives of indigenous and local communities organizations]<sup>6</sup> and elected by the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP-MOP) on the basis of [two][three][five] members from each of the five regional groups of the United Nations.

3.

**Option 1:** If a Committee member resigns or is unable to complete their term of office [the Party][the United Nations regional group] that originally nominated the member shall nominate a replacement to serve the remainder of that member's term.<sup>7</sup>

**Option 2:** Each regional group should provide one alternate member to be elected by the COP-MOP to replace a member who resigns or is unable to complete their term of office.<sup>8</sup>

4. Members of the Committee shall have recognized competence in the fields covered by the Protocol, such as genetic resources and traditional knowledge associated with genetic resources, including technical, legal and scientific expertise, and serve objectively [and in the best interests of the Protocol][and in their personal and individual capacity][as representatives of Parties].

5. Members shall be elected by the COP-MOP for a period of [four][two] years,<sup>9</sup> this being a full term. At its first meeting, the COP-MOP shall elect {...} members, {...} from each region, for half a term, and {...} members for a full term.<sup>10</sup> Each time thereafter, the COP-MOP shall elect, for a full term, new members to replace those whose term has expired. Members shall not serve for more than [two consecutive terms][one term], [unless the COP-MOP decides otherwise].

6. The Committee shall meet, at least [once][twice] in each intersessional period and may, as necessary, hold additional meetings, subject to the availability of financial resources. In determining the dates of the meetings due consideration should be given to the meetings scheduled of the COP-MOP and other relevant bodies under the Protocol, and cost-effective scheduling. Meetings should be held at least three months before the meetings of the COP-MOP.

7.

**Option 1:** The Committee shall develop and submit its rules of procedure, as well as any additional rules as necessary, including those on confidentiality and conflict of interest, to the COP-MOP for its consideration and approval.

**Option 2:** Bearing in mind the rules of procedures of the COP-MOP, the Committee shall develop and submit any further rules of procedure, as appropriate, including the rules on confidentiality and conflict of interest, to the COP-MOP for its consideration and approval.<sup>11</sup>

8. The Committee shall elect its Chair and a Vice-Chair, who will rotate amongst the five regional groups of the United Nations.<sup>12</sup>

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<sup>6</sup> Different views were expressed regarding the inclusion of indigenous and local communities in the Committee, and if so, the nomination process for representatives of indigenous and local communities, their number and regional representation, and whether they could be full-members or participate as observers.

<sup>7</sup> This paragraph is linked to paragraph 2 above.

<sup>8</sup> Some experts noted that the alternate could also attend meetings of the Committee in the event that a member from the same region is unable to attend, thus avoiding difficulties in reaching quorum.

<sup>9</sup> It was suggested that another option could be to define the length of the term as the period between two ordinary meetings of the COP-MOP, in order to avoid problems if the periodicity of the meetings of the COP-MOP changes.

<sup>10</sup> With the two year term, the initial staggering of members' terms would require further consideration.

<sup>11</sup> If option 2 is retained, the Intergovernmental Committee may wish to consider including provisions on confidentiality and conflict of interest in the compliance procedures and mechanisms.

<sup>12</sup> This paragraph is necessary due to Rule 26.3 of the rules of procedure for the meetings of the Conference of the Parties.

**Option 1:** The Committee shall reach agreement on all matters of substance by consensus.

**Option 2:** The Committee shall make every effort to reach agreement on all matters of substance by consensus. If all efforts to reach consensus have been exhausted and no agreement has been reached, any decision shall, as a last resort, be taken by a [two-thirds][three-quarters] majority of the members present and voting [or by {...} members, whichever is greater]. The report of any meeting of the Committee at which consensus is not reached shall reflect the views of all the Committee members.<sup>13</sup>

10. The meetings of the Committee shall be open to Parties and the public, unless the Committee decides otherwise. When the Committee is dealing with individual submissions, the meetings of the Committee shall be open to Parties and closed to the public, unless the Party whose compliance is in question agrees otherwise.<sup>14</sup>

11. The Secretariat shall service the meetings of the Committee and perform any additional functions assigned to it under these procedures.<sup>15</sup>

### *C. Functions*<sup>16</sup>

1. The Committee shall, with a view to promoting compliance with the provisions of the Protocol and addressing cases of non-compliance and under the overall guidance of the COP-MOP have the following functions:

(a) Consider information submitted to it regarding matters relating to compliance and cases of non-compliance related to the submissions;

(b) Identify the specific circumstances and possible causes of individual cases of non-compliance referred to it;

(c) Offer advice to the Parties concerned and/or facilitate assistance on matters relating to compliance;

(d) Assess the extent of implementation and compliance with the Protocol by Parties by reviewing the monitoring and reporting provided for under Article 29;

(e) Identify and review any general issues of compliance by the Parties with the obligations under the Protocol, including on the basis of information provided to the Access and Benefit-sharing Clearing-House;

(f) Prepare reports on compliance on the basis of, *inter alia*, information provided in the Party reports provided for in Article 29 of the Protocol;

(g) Recommend any appropriate measure directly or through the COP-MOP;

(h) Respond to requests submitted by Parties for assistance and administrative support in the establishment of cooperation between Parties in cases of alleged violation of domestic ABS legislation or regulatory requirements;<sup>17</sup>

<sup>13</sup> The two options provide for decision-making by consensus, or decision-making by qualified majority vote. The experts discussed the possibility of not having a provision on how decisions are made, in which case the Rule 26, paragraph 5 (c) of the rules of procedure for the meetings of the Conference of the Parties would apply, i.e. decision-making by a majority of the Parties present and voting.

<sup>14</sup> It should be noted that this paragraph only addresses the issue of attendance to the meeting, and not the nature of the participation of observers. The Intergovernmental Committee may wish to consider this issue further.

<sup>15</sup> See paragraph 45 of the report

<sup>16</sup> The experts noted that other functions could be added to this section, the execution of which could be assigned to the Committee or other bodies. In this regard, refer to paragraphs 29, 30 and 44 of the report.

<sup>17</sup> Some experts expressed the view that this should be a function of the Secretariat; other experts were of the opinion that it should be a function of the Committee; other experts thought that the cooperation pursuant to Article 15 paragraph 3 of the Protocol was not appropriate for either, but rather was a matter between Parties.

(i) Respond to requests submitted by Parties for assistance in legal training or advice and in the provision of capacity-building by recommending to COP-MOP that such assistance be provided to Parties;<sup>18</sup> and

(j) Carry out any other functions assigned to it by the COP-MOP.

2. The Committee shall submit its reports including recommendations with regard to the discharge of its functions to the next meeting of the COP-MOP for consideration and appropriate action.

#### ***D. Procedures***

1. The Committee shall receive any submissions relating to issues of non-compliance with the provisions of the Protocol from:

(a) Any Party with respect to itself;

(b) [Any Party with respect to another Party][Any Party affected or that may be affected by the alleged non-compliance of another Party][Any Party affected by the alleged non-compliance of another Party][Any Party over matters related to another Party including a non-Party];<sup>19</sup>

(c) The COP-MOP;

(d) The Compliance Committee [only for general issues of compliance];<sup>20</sup>

(e) The Secretariat;

(f) Members of the public;<sup>21</sup> or

(g) Indigenous and local communities.<sup>22</sup>

2. The Party in respect of which an issue has been raised is hereinafter referred to as “the Party concerned”.

3. Any submission is to be addressed in writing to the Secretariat and set out:

(a) The matter of concern;

(b) The relevant provisions of the Protocol; and

(c) Information substantiating the matter of concern.

4. The Secretariat shall forward any submission under paragraphs 1 (a) above to the Committee within [15][30][60]<sup>23</sup> calendar days of receipt.

5. The Secretariat shall forward any submission under paragraphs 1 (b) to 1 (g) above to the Party concerned within [15][30][60] calendar days of receipt.

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<sup>18</sup> Some experts thought that this could be a function of the Secretariat if a programme is established, thus precluding the need to invoke the procedures to obtain this assistance.

<sup>19</sup> A number of experts emphasized that non-Parties have no obligations under the Protocol, and therefore cannot be subject of submissions on issues of non-compliance. Nevertheless some expressed the desire to retain the option for consideration by the Intergovernmental Committee.

<sup>20</sup> There was a desire to retain the Committee as a trigger. Some drafting would be required to address the fact that the Committee is also referenced in the chapeau.

<sup>21</sup> There were different views expressed on this option. The proponents of this also recognised that a certain number of conditions or qualifiers may be necessary for this type of submissions.

<sup>22</sup> There were different views expressed on this option. The proponents of this also recognised that a certain number of conditions or qualifiers may be necessary for this type of submissions.

<sup>23</sup> The number of days would be dependent on the tasks to be undertaken by the Secretariat when receiving submissions. In this regard, the experts discussed whether the Secretariat would simply serve as a mailbox for receiving submissions and forwarding to the Committee or whether it would be assigned additional tasks for when submissions are received.

6. When the Party concerned has received a submission it should respond and, with recourse to the [Committee][Secretariat] for assistance if required, provide relevant information preferably within three months and in any event not later than six months. This period of time commences on the date of the receipt of the submission by the Party concerned as confirmed by the Secretariat.<sup>24</sup>

7. Once the Secretariat has received a response and any information from the Party concerned, the Secretariat shall transmit the submission, the response and such information to the Committee. In the case where the Secretariat has not received any response or information from the Party concerned within the six months as referred to in paragraph 6 above, the Secretariat shall forward the submission to the Committee forthwith.

8. The Committee may refuse to consider any submission made pursuant to paragraphs 1 (b) to 1 (g) above that is *de minimis* or ill-founded<sup>25</sup> bearing in mind the objectives of the Protocol.

9. The Party concerned may participate in the consideration of the submission and present responses or comments to the Committee. The Party concerned shall not take part in the elaboration and adoption of the recommendation of the Committee. The Committee shall make available the draft findings and recommendations, including measures, to the Party concerned and invite the Party to respond. Any such response is to be reflected in the report of the Committee.

***E. Information for and consultation by the Compliance Committee after the triggering of the procedures***

1. The Committee shall consider relevant information from:

- (a) The Party concerned;
- (b) The Party that has made the submission with respect to another Party in accordance with paragraph 1 (b) of section D above;
- (c) The entity that has made the submission with respect to a Party in accordance with paragraphs 1 (c) to 1 (g) of section D above; and
- (d) Affected indigenous and local communities.<sup>26</sup>

2.

**Option 1** The Committee may seek or receive, when necessary for its work, relevant information from sources, such as:

- (a) The Secretariat;
- (b) The Access and Benefit-sharing Clearing-House;
- (c) The Conference of the Parties to the Convention;
- (d) The COP-MOP;
- (e) Subsidiary bodies of the Convention and to the Protocol;
- (f) International organizations; and
- (g) Other relevant and reliable sources.

<sup>24</sup> The experts suggested that this issue may need to be considered by the second meeting of the Intergovernmental Committee, given difficulties in confirming receipt.

<sup>25</sup> Some experts considered appropriate to develop criteria to determine what *de minimis* or ill founded would be, while others indicated that the development of such criteria was not convenient or necessary.

<sup>26</sup> There were suggestions by some experts to merge subparagraphs (b), (c), and (d). However, other experts requested that subparagraph (d) should not be merged with the aforementioned paragraphs as they wanted information from indigenous and local communities to be considered by the Committee whether or not indigenous and local communities had invoked the procedures. Some experts considered that the reference to indigenous and local communities should be moved to option 1, paragraph 2 and others were of the view that it should be kept in both sections.

**Option 2:** The Committee may consider information from all possible sources. The reliability of the information should be ensured.

3. The Committee may seek expert advice.
4. The Committee may undertake, upon invitation of the Party concerned, information gathering in the territory of that Party.

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

1. In considering the measures specified below the Committee shall take into account:
  - (a) The capacity of the Party concerned to comply;
  - (b) The special needs of developing country Parties, in particular the least developed countries and small island developing States amongst them, and Parties with economies in transition; and
  - (c) Such factors as the cause, type, degree and frequency of non-compliance.
2. [The Committee][The COP-MOP upon the recommendations of the Committee]<sup>27</sup> with a view to promoting compliance and addressing cases of non-compliance, may:
  - (a) Offer advice or assistance to the Party concerned, as appropriate;
  - (b) [Recommend][Provide] financial and technical assistance, technology transfer, training and other capacity-building measures;
  - (c) Request or assist, as appropriate, the Party concerned to develop a compliance action plan to be submitted identifying appropriate steps, an agreed timeframe and indicators to assess satisfactory implementation;
  - (d) Invite the Party concerned to submit progress reports on its efforts to comply with its obligations under the Protocol;
  - (e) Issue a written [caution][statement of concern][declaration of non-compliance] to the Party concerned;
  - (f) Publish cases of non-compliance;
  - (g) Send a public notification of a compliance matter through the Secretariat to all Parties advising that a Party has been notified that it may be in non-compliance and that, up to that time, there has been no satisfactory response or action;
  - (h) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, specific rights and privileges;
  - (i) Apply financial penalties;
  - (j) Apply trade consequences;
  - (k) Require the appointment of a representative in the provider country for notification purposes to facilitate administrative and/or criminal procedures; and
  - (l) Give notification to the relevant judicial authorities of a Party subject to the obligation under Articles 15 to 18 of the Nagoya Protocol, that a specific Party or an indigenous or local community is entitled to benefit-sharing under a particular instance of mutually agreed terms involving a specific genetic resource and associated traditional knowledge.<sup>28</sup>

<sup>27</sup> The Intergovernmental Committee may wish to consider which measures could be taken directly by the Committee and which could be decided upon by the COP-MOP based on the recommendation of the Committee.

<sup>28</sup> A number of concerns were raised regarding subparagraphs (h)-(l), including whether they had a basis in international law and in the framework of the Nagoya Protocol. Others expressed the desire to keep these measures to address persistent cases of non-compliance as options for consideration by the Intergovernmental Committee.

***G. Review of procedures and mechanisms***

The COP-MOP shall undertake the review of the effectiveness of these procedures and mechanisms under the assessment and review provided for in Article 31 of the Protocol and take appropriate action. The Committee may identify the need for any additional review.

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