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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

Montreal, 28 February-1 March 2012

Item 3 of the provisional agenda**

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 OF THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING

Note by the Executive Secretary

I. INTRODUCTION

1. Article 30 of the 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 (Nagoya Protocol) states that “the Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this 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. In line with the mandate given by the Conference of the Parties at its tenth meeting in October 2010 (decision X/1, annex II, section A, item 4), the Intergovernmental Committee for the Nagoya Protocol (the Intergovernmental Committee) considered this issue at its first meeting, held in Montreal from 5 to 10 June 2011.

3. At that meeting the Intergovernmental Committee, in its recommendation 1/4, paragraph 1,¹ 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.

* Reissued to adjust the numbering of paragraphs in the annex.

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¹ See the annex to the report of the first meeting of the Intergovernmental Committee for the Nagoya Protocol (UNEP/CBD/ICNP/1/8-UNEP/CBD/COP/11/5).

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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 response to notification 2011-135 (SCBD/ABS/VN/SG/76984) of 22 July 2011, the Executive Secretary received, as of 25 November 2011, submissions from the African Group, Canada, China, the European Union, Honduras, India, Japan, the Philippines, the Republic of Korea, Switzerland, Thailand, the Assembly of First Nations (AFN), the Russian Association of Indigenous Peoples of the North, Siberia and Far East (RAIPON), and IUCN, International Union for Conservation of Nature. All submissions were made available online at: <http://www.cbd.int/abs/submissions-compliance/>.

6. In preparation for its second meeting, to be held in New Delhi from 9 to 13 April 2012, the Intergovernmental Committee in recommendation 1/4, paragraph 3, requested the Executive Secretary 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.

7. Section II of the present note contains a synthesis of the views received on possible elements for cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance; section III synthesizes views on the process to develop the compliance procedures and mechanisms; section IV and the annex suggest possible draft elements and options based on the views expressed for review and consideration by the expert meeting, with a view to further refining the draft elements and options for consideration by the second meeting of the Intergovernmental Committee.

II. SYNTHESIS 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

8. From the submissions received, views expressed the importance of well-conceived cooperative procedures and institutional mechanisms to promote the fulfilment by Parties of all their obligations under the Nagoya Protocol, thereby improving its implementation and thus facilitating the Nagoya Protocol's overall effectiveness, keeping in mind that in accordance with Article 30 of the Nagoya Protocol, procedures and mechanisms on compliance are separate from, and without prejudice to, the dispute settlement procedures and mechanisms under Article 27 of the Convention on Biological Diversity.

9. One submission expressed the view that promoting compliance with the Nagoya Protocol should be done by setting new norms for all actors concerned, and therefore impacting the behavior of both users and providers of genetic resources in a way that goes beyond mere compliance with the national instruments. It also emphasized that in addition to promoting general compliance with all provisions of the Protocol, the compliance regime should promote the implementation of key provisions of the Protocol, namely: (i) Article 5 (Fair and equitable benefit-sharing); (ii) Article 6 (Access to genetic resources); (iii) Article 7 (Access to traditional knowledge associated with genetic resources); (iv) Article 15 (Compliance with domestic legislation or regulatory requirements on access and benefit-sharing); (v) Article 16 (Compliance with domestic legislation or regulatory requirements on access and benefit-sharing for traditional knowledge associated with genetic resources); (vi) Article 17 (Monitoring the utilization of genetic resources); and (vii) Article 18 (Compliance with mutually agreed terms).

10. Among the views expressed, there was some recognition that the compliance procedures and mechanisms developed under the Cartagena Protocol on Biosafety² and the International Treaty on Plant

² Annex to decision BS-I/7 of the Conference of the Parties the Parties to Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety (UNEP/CBD/BS/COP-MOP/1/15, annex I).

Genetic Resources for Food and Agriculture (ITPGRFA),³ if tailored to the nature and characteristics of the Nagoya Protocol could serve as a basis to develop the compliance procedures and mechanisms.

11. The compliance procedures and mechanisms developed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁴ were also identified as an example to inform the on-going process to develop a compliance regime under the Nagoya Protocol.

12. Other compliance regimes developed under other multilateral environmental agreements, such as the Montreal Protocol on Substances that Deplete the Ozone Layer,⁵ and the United Nations Economic Commission for Europe (UNECE) Convention on Long-Range Transboundary Air Pollution (LRTAP)⁶ were also mentioned as possible additional sources of draft elements and options for the compliance procedures and mechanisms under the Nagoya Protocol.

13. Overall, the submissions received varied in the ideas expressed and the level of detail provided. Views submitted revealed many commonalities. In some cases the views expressed reflected contrasting options, while others reflected alternative approaches within an option.

14. The majority of views expressed support for developing procedures and mechanisms on compliance which balance both facilitative and stronger measures. Nevertheless, some submissions preferred an exclusively supportive and facilitative compliance regime.

15. A key difference related to the institutional mechanisms involved and their related functions. In this regard, two alternative approaches seemed to be emerging from the submissions:

(a) The establishment of a compliance unit within the Secretariat that would respond to requests from Parties and recommend to the meeting of the Parties to the Protocol measures to promote compliance, address violations of domestic legislation and address cases of non-compliance and severe or recurrent non-compliance; and

(b) The establishment of a regionally-balanced standing body on compliance which would promote compliance and consider and address cases of non-compliance, and would have the ability to recommend measures directly to the Parties concerned or the meeting of the Parties.

16. Both approaches have been reflected in the synthesis that follows, keeping in mind that the majority of submissions supported the approach broadly summarized in paragraph 15 (b) above. The greater level of detail in these submissions was reflected in the synthesis.

A. *Objectives, nature and underlying principles*

17. *Objectives.* Views received did not specifically address or provide details on the objective of the compliance procedures and mechanisms. However Article 30 of the Nagoya Protocol could provide the basis for an objective. A similar approach was taken for the compliance procedures and mechanisms developed for the Cartagena Protocol and the ITPGRFA.

18. *Nature.* Submissions received described the nature of the compliance procedures and mechanisms as non-adversarial, non-judicial, cooperative, simple, advisory, facilitative, flexible, preventive, cost-effective and legally non-binding.

19. *Principles.* The following principles were proposed to guide the operation of the compliance procedures and mechanisms: fairness; rule of law; flexibility; reasonableness; transparency; accountability; predictability; consistency; good faith; supportiveness; cost-effectiveness; effectiveness and expeditiousness.

³ ITPGRFA Governing Body resolution 2/2011, adopted at its fourth session, held in Bali, Indonesia, in March 2011.

⁴ As reflected in COP resolution Conf. 14.3. "Guide to CITES Compliance Procedures", annex, (2007).

⁵ Report of the Tenth Meeting of the Parties, annex II. Document UNEP/OzL.Pro.10/9 (1998), and in the report of the Fourth Meeting of the Parties, annex V. Document UNEP/OzL.Pro.4/15 (1992).

⁶ As amended by decision 2006/2 of the Executive Body for the Convention on Long-Range Transboundary Air Pollution at its twenty-fourth session, held in Geneva from 11 to 14 December 2006 (ECE/EB.AIR/89/Add.1).

20. In addition, a submission suggested that the principle of common but differentiated responsibilities should guide the operation of the compliance regime. Another proposed that the compliance procedures and mechanisms should conform to the principle that all obligations apply equally to all Parties, but that in applying the measures, the compliance body should take into consideration the capacity of Parties to effectively implement the Nagoya Protocol.

21. One submission suggested that attention should be paid 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. Also, the difficulties they face in the implementation of the Protocol should be fully taken into consideration.

22. Another submission also suggested that a separate section on principles was not necessary.

B. Institutional mechanisms

23. As mentioned in paragraph 15 above, two alternative approaches seemed to be emerging from the views submitted in relation to possible institutional mechanisms: (a) the establishment of a compliance unit within the Secretariat; and (b) the establishment of a standing body on compliance.

1. Establishment of a compliance unit within the Secretariat

24. A submission suggested the establishment of a compliance unit to the Nagoya Protocol within the Secretariat.

2. Establishment of a standing body on compliance

25. The majority of views suggested the establishment of a standing body as a component of the compliance regime.

26. In addition, two proposals were made regarding the creation of smaller bodies subsidiary to the standing body:

(a) Establishing two separate working groups: one addressing cases of non-compliance and the other promoting compliance; and

(b) Establishing regional ad hoc subcommittees to perform regionally oriented functions of regional origin and significance.

27. One submission suggested that an Access and Benefit-sharing Standing Committee could be set up on a provisional basis to determine its effectiveness after which it would be formalized, with a more specific mandate, as a Subsidiary Body for Compliance to the Protocol after the review period of the Protocol as provided by Article 31.

28. *Size.* The following proposals were received regarding the number of members in a compliance body: 10, 15 or 25 members.

29. *Nominations of members.* Several submissions suggested that members should be nominated by Parties, while one submission proposed nomination by United Nations regional groups. A number of views converged on members being subsequently elected by the meeting of the Parties.

30. An indigenous and local community organization was of the view that given that the subject matter of the Protocol is relevant for indigenous rights, the compliance procedures should include indigenous experts drawing from Party nominations and from indigenous nominations.

31. *Status of members.* A number of views received expressed support for having members of a compliance body serving in their personal and individual capacity, while one submission considered that members should serve as government representatives.

32. *Selection criteria.* There was general agreement that the members elected should have technical, legal and scientific qualifications and expertise in the fields covered by the Nagoya Protocol and that membership should be geographically balanced according to the five United Nations regional groups.

33. Two indigenous and local community organizations were of the view that a compliance body should include indigenous experts with expertise in indigenous rights.
34. *Selection procedure.* One submission addressed the issue of members being rotated in alternate years to ensure that not all expertise is lost in a given year. One submission suggested that members should serve for a full period of four years. At the first meeting of the Parties, half of the members would be elected for two years and the other half of the members for a period of four years. Then, at the second and the following meetings of the Parties, new members would be elected for the full term of four years.
35. Two submissions suggested that members should not serve more than two consecutive terms.
36. Some submissions addressed the replacement of members of a compliance body. Several were of the view that in the case of a vacancy, the Party that recommended the resigning member should notify a replacement who will serve the remaining term of the predecessor. Another suggested that the system to replace members should be left to the five United Nations regional groups.
37. *Periodicity of meetings.* There was general understanding that a certain degree of flexibility for convening meetings would be required. Some submissions proposed a given periodicity for holding the meetings of the compliance body, ranging from twice a year to once a year, if required, to once in each inter-sessional period. One submission suggested giving a compliance body the flexibility to hold meetings, as necessary, preferably in conjunction with other related meetings and subject to the availability of financial resources.
38. Several submissions favoured flexibility in convening meetings based on the availability of financial resources. Some of the views submitted also supported giving a compliance body, or the meeting of the Parties, the possibility to decide on holding additional meetings as required.
39. Some of the views also suggested that meetings of a compliance body should, as far as possible, take place on the margins of other Protocol meetings. Another submission proposed that the meetings of the compliance body should be held three months before the meeting of the Parties.
40. *Reporting.* Three submissions addressed reporting and suggested that a compliance body should submit reports and recommendations to the meeting of the Parties.
41. *Rules of procedure.* It was suggested that in order to ensure flexibility a compliance body should develop its own rules of procedures as well as any additional rules as necessary (such as rules of confidentiality, decision-making, conflict of interest, etc.). The rules of procedure would then be recommended to the meeting of the Parties for consideration and approval.
42. Two submissions suggested some of the issues to be addressed in the rules of procedure, namely:
- (a) Attendance to the meetings of a compliance body;
 - (b) Voting: An international non-governmental organization suggested that a compliance body should be able to vote on decisions in the absence of consensus.

C. Functions of the institutional mechanism

1. Functions of a compliance unit within the Secretariat

43. One submission suggesting establishing a compliance unit to the Nagoya Protocol within the Secretariat proposed the following functions for the unit:
- (a) Respond to requests submitted by Parties for assistance and administrative support in the establishment of cooperation between Parties in the investigation of alleged non-compliance and subsequent enforcement measures;
 - (b) Respond to requests submitted by Parties for assistance in legal training or advice and in the provision of capacity-building by recommending to the meeting of the Parties Parties that such assistance be provided to Parties;

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

(d) On the basis of information included in the Party reports provided for in Article 29 of the Protocol, identify:

- (i) Weaknesses in the implementation of the Protocol by Parties;
- (ii) Violations of domestic legislation; and
- (iii) Cases of non-compliance;

(e) Recommend appropriate measures to meeting of the Parties to:

- (i) Assist a Party to meet its obligation under the Nagoya Protocol;
- (ii) Address violations of domestic legislation;
- (iii) Address cases of non-compliance; and
- (iv) Address cases of severe or recurrent non-compliance through punitive remedies and sanctions.

2. *Functions of a standing body on compliance*

44. With a view to promoting compliance with the provisions of the Protocol and addressing cases of non-compliance, submissions identified the following functions of a compliance body:

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

(b) Identify the facts and possible causes of non-compliance;

(c) Seek information, including by information gathering in the territory of the Party concerned, when necessary and only upon invitation;

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

(e) Review Parties' monitoring and reporting of their implementation of the Protocol under Article 29;

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

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

(h) Recommend any appropriate measure(s) directly or through the meeting of the Parties;

(i) Report and make recommendations to the meeting of the Parties, as appropriate; and

(j) Carry out any other functions assigned to it by the meeting of the Parties.

45. The important role of the Access and Benefit-sharing Clearing-House established in Article 14 of the Nagoya Protocol in ensuring compliance with the Protocol was also emphasized in several submissions.

D. *Monitoring and reporting under Article 29 of the Nagoya Protocol*

46. Most of the submissions linked the functions of the institutional mechanism with the monitoring and reporting under Article 29 of the Nagoya Protocol.

47. However, three submissions went a step further describing some aspects related to the implementation of this article. These submissions are summarized in paragraphs below.

48. *Reporting by Parties.* Two submissions considered that reports could be written with the direct participation of relevant stakeholders and indigenous and local communities, who also would be able to submit relevant information both officially and unofficially in the form of alternative reports.

49. *Reporting by non-Parties.* One of the submissions referred to Article 24 of the Nagoya Protocol. Non-Parties would be urged, and a communication to this effect would be transmitted to them, to make voluntary submissions on their adherence to the Protocol and their contribution of appropriate information to the Access and Benefit-sharing (ABS) Clearing-House. Their non-response or refusal to comply with the request, or any interpretative statement that they will make on the request, would be circulated to the Parties to the Protocol for their information.

50. *Content of the report.* The following content for reporting under Article 29 of the Nagoya Protocol was suggested:

(a) The state of the utilization of genetic resources and associated traditional knowledge within a Party's jurisdiction, including kinds of utilization, institutions, actors and channels engaged and declaration of inadequate institutional mechanisms for monitoring the utilization of genetic resources and associated traditional knowledge and proposed steps to improve institutional set-up;

(b) A Party's compliance with Articles 15, 16, 17 and 18 of the Protocol;

(c) A Party's compliance with Article 30 of the Protocol;

(d) Violation by other Parties of domestic legislation; and

(e) Implementation of measures related to indigenous and local communities, namely of measures to strengthen the capacity of women to access genetic resources and/or traditional knowledge associated with genetic resources.

E. Procedures in relation to a compliance body

51. A number of submissions referred to establishing procedures for the operation of a compliance regime in relation to a compliance body being established. These include: (i) how the procedure is initiated or triggered; (ii) how the submission triggering the procedure is subsequently processed; and (iii) the extent to which the Party that is the subject of a submission (the Party concerned) may participate in the deliberations of a compliance body.

52. *Triggering of the compliance procedure.* Views submitted included a range of triggers to initiate the process. The majority of views agreed on allowing submissions by a Party with respect to itself (self-trigger) and by a Party regarding the compliance of another Party to trigger the process (Party-to-Party trigger).

53. Regarding the Party-to-Party trigger, one submission suggested limiting the possibility of invoking the procedures to Parties affected by the alleged non-compliance of another Party. Another referred to allowing the triggering of the procedure to Parties that may be affected by the non-compliance of another Party.

54. There was also a proposal to allow a Party to make submissions regarding non-compliance by non-Parties.

55. In addition to the self-trigger and Party-to-Party trigger, views indicated that additional triggers may be desirable. Submissions expressed some support for including referrals by the Secretariat, by a compliance body or by the meeting of the Parties to trigger the process, subject to specific criteria and rules.

56. Some submissions also reflected on the possibility of incorporating a trigger by members of the public, including by indigenous and local communities, in accordance with some defined criteria. Alternatively, a suggestion was made for Parties and others to take into account information from indigenous and local communities and other stakeholders in their submissions.

57. There was one proposal supporting a trigger by an expert review team.
58. In addition, one submission expressed opposition to having members of the public or experts triggering the compliance procedures.
59. *Processing the submissions to a compliance body.* A number of views referred to the processing of the submissions made by a Party regarding the compliance of another Party, describing the steps of the process as follows: Submissions should be sent to the Secretariat who would forward them to the Party concerned. The Secretariat then would send the submission, together with the response and information received from the Party concerned, to a compliance body that would then consider the submission's admissibility and collect relevant information. It was suggested that the process set out in the compliance procedures and mechanisms developed under ITPGRFA could be a starting point for discussing the processing of the submissions.
60. One submission noted that the process regarding self-submissions could differ from other types of submissions.
61. *Participation in the process by the Party concerned.* There was a convergence of views that the Party concerned should be fully informed and accorded an opportunity to respond.
62. A proposal was made that the compliance body should make available to the Party concerned draft findings and recommendations, and that the Party should have the possibility to make comments which would then be reviewed by the compliance body.

F. Information for and consultation by a compliance body after the triggering of the procedures

63. Several submissions expressed the view that a compliance body should consider relevant information from the Party concerned. There were divergent views on the sources of information that a compliance body could consider. One submission suggested that the ability of a compliance body to consider other sources of information should be as broad as possible. Another proposed that the extent of a compliance body's ability to obtain information on its own initiative from various sources should be clearly delineated.
64. Some views reflected on the possibility of information gathering by a compliance body in the territory of the Party concerned upon invitation.
65. Views converged on the importance of maintaining the confidentiality of information that is received in confidence. In this regard, it was suggested that a compliance body could develop criteria on confidentiality in the rules of procedure for meetings of the compliance body.

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

66. *Competent bodies to take measures.* There was a range of views on the appropriate competent body to take measures to promote compliance and address cases of non-compliance.
67. Some were of the view that the meeting of the Parties should enable a compliance body to take all the measures regarding compliance. Others considered that the meeting of the Parties should have the final decision on determinations of non-compliance, but a compliance body could make direct recommendations to Parties on facilitative measures.
68. A submission suggesting the establishment of a compliance unit within the Secretariat proposed that the unit would recommend appropriate measures to the meeting of the Parties to assist a Party to meet its obligation under the Nagoya Protocol, address violations of domestic legislation, and address cases of non-compliance and severe or recurrent non-compliance.
69. An indigenous and local-community organization was of the view that if an assertion of non-compliance is validated, affected indigenous peoples should be involved in the development of measures to address cases of non-compliance.

70. *Considerations in determining measures.* Some of the views suggested that the capacity of the Party concerned should be taken into account by a compliance body when deciding on measures. In addition, submissions proposed that when considering measures a compliance body should take into account the following factors: cause, type, degree, frequency and duration of non-compliance.

71. Several submissions mentioned that particular attention should be given to the special needs of developing country Parties and Parties with economies in transition.

72. A view submitted pointed out that measures to be taken by a compliance body should encourage self-submissions as this would indicate the readiness of the concerned Party to take corrective actions.

73. *Measures.* A wide range of facilitative and other measures was proposed in the submissions in order to promote compliance and to address cases of non-compliance:

- (a) Provide advice or assistance to the Party concerned, as appropriate;
- (b) Provide in-country assistance, technical assessment and a verification mission, upon the invitation of the Party concerned;
- (c) Provide financial and technical assistance, technology transfer, training and other capacity-building measures to the Party concerned;
- (d) Provide assistance in legal training or advice and provision of capacity-building;
- (e) Recommend specific capacity-building actions to be undertaken by the Party concerned;
- (f) 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;
- (g) Invite the Party concerned to submit progress reports on its efforts to comply with its obligations under the Protocol;
- (h) Call for explanations when the timeframe agreed in accordance with a given compliance measure is not met;
- (i) Issue a written caution, requesting a response and offering assistance;
- (j) Issue a warning to the Party concerned that is in non-compliance with one or several provisions of the Protocol;
- (k) Issue a statement of concern regarding the non-compliance of a Party who is in non-compliance;
- (l) Issue declarations of non-compliance to the Party concerned;
- (m) Publish cases of non-compliance;
- (n) 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;
- (o) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, specific rights and privileges (e.g., ineligibility of a non-compliant Party to serve as a member of the bureau or any committee set up under the Protocol, loss of the right of the Party concerned to receive documents for meetings);
- (p) Apply financial penalties (e.g., ineligibility of a non-compliant Party to receive funding for its participation in meetings and ineligibility of the Party to receive other financial assistance from the Protocol or its funding body, including transfer of technology);
- (q) Apply trade consequences;

(r) Require the appointment of a representative in the provider country for notification purposes to facilitate administrative and/or criminal procedures; and

(s) 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.

74. Some submissions showed opposition to including punitive measures or sanctions in the compliance regime.

H. Review of procedures and mechanisms

75. Several views submitted favoured the review of the compliance procedures and mechanisms once enough experience had been gained. Of these views, some were of the opinion that the review should be explicitly scheduled, while others thought that scheduling the review was not needed. It was suggested that the need for additional review of the compliance procedures and mechanisms could be determined by a compliance body.

76. Otherwise, one submission suggested that the compliance procedures and mechanisms themselves should be a component of the overall review of the Protocol to be undertaken by the meeting of the Parties pursuant to Article 31.

77. One submission suggested that the review should include an analysis as to how widely the compliance regime has been used and how the measures taken have helped the Parties concerned to better comply with the Nagoya Protocol.

I. Other suggestions

78. Other suggestions received in relation to cooperative procedures and institutional mechanisms to promote compliance and to address cases of non-compliance are as follows:

(a) Establishing a multilateral system for genetic resources for food and agriculture when working on the implementation of the Nagoya Protocol, considering its important role in food security and sustainable agriculture;

(b) Enhancing cooperation, including institutional, technical and financial support, at the regional and the global levels in order to promote national compliance with the Protocol;

(c) Developing and defining an international mechanism to register intellectual property rights relating specifically to biodiversity, as a section of the World Trade Organization regulations, which would record not only the resources and processes involved but also local knowledge about the use of these resources;

(d) Setting up an international legal body in which bilateral or multilateral agreements between countries would be registered, as an international legal support for compliance with these agreements under the Protocol. This body could serve as an arbitrator in cases of disputes;

(e) Submitting to an honour court or arbitral tribunal under the Convention on Biological Diversity, which would judge the case impartially and, after hearing the arguments of the Parties, come to a decision and determine the appropriate sanctions;

(f) Establishing a financial compensation procedure in cases where an international organization or institution acts without going through the relevant national approval procedures; and

(g) Tasking the Secretariat of the Protocol to use available information tools and mechanisms to validate or explore trends in the utilization of genetic resources and associated traditional knowledge such as genome and patent databases, etc.

III. SYNTHESIS OF VIEWS ON THE PROCESS TO DEVELOP THE COOPERATIVE PROCEDURES AND INSTITUTIONAL

MECHANISMS TO PROMOTE COMPLIANCE WITH THE PROTOCOL AND TO ADDRESS CASES OF NON- COMPLIANCE

79. Two submissions received provided views on the process to develop the compliance procedures and mechanisms under the Nagoya Protocol. These are summarized below:

(a) The Intergovernmental Committee could consider establishing a working group of experts or an ad hoc committee on compliance, with broad representation from across the regions. This working group or ad hoc committee would be tasked with negotiating the compliance regime, undertaking the drafting and reporting and would make recommendations on progress in the development of the regime to the Intergovernmental Committee or the meeting of the Parties, as appropriate. Furthermore, this working group or ad hoc committee would be given a deadline for completion of the negotiations of a compliance regime;

(b) A working group of experts or an ad hoc committee on compliance should consider, discuss and agree, *inter alia*, on the circumstances that will trigger severe sanctions in cases of severe or recurrent non-compliance and the form that these sanctions might take;

(c) The Intergovernmental Committee could recommend the establishment of a Compliance Unit to the Nagoya Protocol by the first meeting of the Parties, with role and functions to be determined by a working group of experts or an ad hoc committee on compliance;

(d) The Secretariat could prepare a tabulated matrix listing the mandatory provisions of the Nagoya Protocol that would help to identify what would constitute non-compliance.

IV. POSSIBLE DRAFT ELEMENTS AND OPTIONS FOR COOPERATIVE PROCEDURES AND INSTITUTIONAL MECHANISMS TO PROMOTE COMPLIANCE WITH THE PROTOCOL AND TO ADDRESS CASES OF NON-COMPLIANCE

80. In paragraph 2 of recommendation 1/4, the Intergovernmental Committee requested the Executive Secretary to 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.

81. As mentioned in paragraph 13 above, the submissions received varied in the ideas expressed and the level of detail provided. Views submitted also revealed many commonalities. In some cases the views expressed reflected contrasting options, while others reflected alternative approaches within an option. In particular, a key difference related to the institutional mechanisms involved and their related functions. In this regard, two alternative approaches seemed to be emerging from the submissions:

(a) The establishment of a compliance unit within the Secretariat that would respond to requests from Parties and recommend to the meeting of the Parties measures to promote compliance, address violations of domestic legislation and address cases of non-compliance and severe or recurrent non-compliance; and

(b) The establishment of a regionally balanced standing body on compliance which would promote compliance and consider and address cases of non-compliance, and would have the ability to recommend measures directly to the Parties concerned or through the meeting of the Parties.

82. Both approaches have been reflected in the possible draft elements and options provided in the annex, keeping in mind that the majority of submissions supported the approach broadly summarized in paragraph 81 (b) above. The greater level of detail in these submissions was reflected in the possible draft elements and options.

83. Some proposals, such as those specified in section II, subsection I, above on “other suggestions” either were not detailed enough, or were so significantly different from the balance of views expressed that their incorporation as a draft element or option was difficult to reconcile.

84. The possible draft elements and options for compliance procedures and mechanisms in the attached annex aim to reflect the different views expressed in an integrated manner. They are provided to facilitate discussion, and are neither meant nor intended to preclude the consideration of alternative approaches or the inclusion of new elements and options.

85. The methodology adopted to reflect the views submitted was as follows:

- (a) The format coincides with the structure used in the majority of the views expressed;
- (b) The compliance procedures and mechanisms under the Cartagena Protocol and ITPGRFA informed the drafting of some of the elements and options as suggested by some of the views submitted;
- (c) Elements are suggested with the aim of integrating all proposals made in the submissions;
- (d) Options are provided where there are different views or approaches regarding the same element;
- (e) Underlined text separated by slashes (/) indicates different alternatives within the same option; and
- (f) Some additional elements not raised or developed in the views submitted have been suggested in light of experience gained on compliance procedures and mechanisms within the Cartagena Protocol and ITPGRFA. These suggestions are indicated in *italics* with the source identified in footnotes.

Annex

**POSSIBLE DRAFT COOPERATIVE PROCEDURES AND INSTITUTIONAL MECHANISMS
TO PROMOTE COMPLIANCE WITH AND TO ADDRESS CASES OF NON-COMPLIANCE
UNDER THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING BASED ON THE
SYNTHESIS OF VIEWS⁷**

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 shall be to promote compliance with the provisions of the Protocol, to address cases of non-compliance, and to provide advice or assistance, where appropriate.
2. The compliance procedures and mechanisms shall be non-adversarial, non-judicial, cooperative, simple, advisory, facilitative, flexible, preventive, cost-effective and legally non-binding in nature.
3. The operation of the compliance procedures and mechanisms shall be guided by the principles of fairness, rule of law, flexibility, 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. 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, and take into full consideration the difficulties they face in the implementation of the Protocol.

B. Institutional mechanisms

1. **Option 1** A Compliance Unit within the Secretariat is hereby established.

Option 2

Option 2.1 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.

Option 2.2 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.

Sub-option 2.2.1 Two working groups shall be established one dealing with cases of non-compliance and the other promoting compliance.

Sub-option 2.2.2 Regional ad hoc subcommittees shall be established to perform functions of regional origin and significance.

⁷ The methodology adopted to reflect the views submitted was as follows: (a) The format coincides with the structure used in the majority of the views expressed; (b) The compliance procedures and mechanisms under the Cartagena Protocol and ITPGRFA informed the drafting of some of the elements and options as suggested by some of the views submitted; (c) Elements are suggested with the aim of integrating all proposals made in the submissions; (d) Options are provided where there are different views or approaches regarding the same element; (e) Underlined text separated by slashes (/) indicates different alternatives within the same option; and (f) Some additional elements not raised or developed in the views submitted have been suggested in light of experience gained on compliance procedures and mechanisms within the Cartagena Protocol and the ITPGRFA. These suggestions are indicated in italics with the source identified in footnotes.

Option 2.3 An Access and Benefit-sharing Standing Committee is hereby established on a provisional basis to carry out the functions specified herein. The Conference of the Parties serving as the meeting of the Parties to the Protocol shall review the effectiveness of the Access and Benefit-sharing Standing Committee under the assessment and review provided for in Article 31 of the Protocol, after which it will be formalized as a subsidiary body of the Protocol.

2. The Committee shall consist of 10/15/25 members nominated by Parties/the five regional groups of the United Nations and indigenous and local communities organizations 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. Members of the Committee shall have recognized competence in the fields covered by the Protocol, such as traditional knowledge associated with genetic resources, including technical, legal and scientific expertise, and serve objectively and in their personal and individual capacity/as representatives of Parties.

4. Members shall be elected by the COP-MOP for a period of four years, 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. 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.

5. 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 of office.

6. **Option 1** The Committee shall meet, subject to the availability of financial resources, twice a year/once a year/once in each intersessional period, if required, unless the Committee decides otherwise/unless the COP-MOP decides otherwise,/and hold additional meetings, when it deems necessary or by request of the COP-MOP. Meetings should as much as possible take place on the margins of other Protocol meetings/meetings should be held three months before the meetings of the COP-MOP. The Secretariat shall service the meetings of the Committee.⁸

Option 2 The Committee shall hold meetings as necessary, preferably in conjunction with other related meetings of the Protocol, subject to the availability of financial resources. *The Secretariat shall service the meetings of the Committee.*⁹

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

8. *The Committee shall elect its Chair and a Vice-Chair, who will rotate amongst the five regional groups of the United Nations.*¹⁰

C. Functions of the institutional mechanisms

Option 1

The Compliance Unit shall, with a view to promoting compliance and addressing cases of non-compliance, have the following functions:

(a) Respond to requests submitted by Parties for assistance and administrative support in the establishment of cooperation between Parties in the investigation of alleged non-compliance and subsequent enforcement measures;

⁸ Text drawn from the compliance procedures and mechanisms developed under the Cartagena Protocol and ITPGRFA.

⁹ Text drawn from the compliance procedures and mechanisms developed under the Cartagena Protocol and ITPGRFA.

¹⁰ Text drawn from the compliance procedures and mechanisms developed under ITPGRFA.

- (b) 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;
- (c) Assess the extent of implementation and compliance with the Protocol by Parties by reviewing the monitoring and reporting provided for under Article 29;
- (d) On the basis of information included in the Party reports provided for in Article 29 of the Protocol, identify:
 - (i) Weaknesses in the implementation of the Protocol by Parties;
 - (ii) Violations of domestic legislation; and
 - (iii) Cases of non-compliance.
- (e) Recommend appropriate measures to COP-MOP to:
 - (i) Assist a Party to meet its obligation under the Nagoya Protocol;
 - (ii) Address violations of domestic legislation;
 - (iii) Address cases of non-compliance; and
 - (iv) Address cases of severe or recurrent non-compliance through punitive remedies and sanctions.

Option 2

1. The Committee shall, with a view to promoting compliance and addressing cases of non-compliance *and under the overall guidance of the COP-MOP*¹¹ 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 facts and possible causes of non-compliance;
- (c) Seek information, including information gathered in the territory of a Party when necessary and only upon invitation;
- (d) Offer advice to the Parties concerned and/or facilitate assistance on matters relating to compliance;
- (e) Review the monitoring and reporting of the implementation of the Protocol by the Parties under Article 29;
- (f) 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;
- (g) Prepare reports on compliance on the basis of, *inter alia*, information provided in the Party reports provided for in Article 29 of the Protocol;
- (h) Recommend any appropriate measure directly or through the COP-MOP; and
- (i) 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.

¹¹ Text drawn from the compliance procedures and mechanisms developed under the Cartagena Protocol and ITPGRFA.

D. Monitoring and reporting under Article 29 of the Protocol

1. The Committee/The Compliance Unit shall consider the reports submitted by each Party and non-Party.
2. The report shall have the following content:
 - (a) The state of the utilization of genetic resources and associated traditional knowledge within a Party's jurisdiction, including:
 - (i) Kinds of utilization;
 - (ii) Institutions, actors and channels engaged; and
 - (iii) Declaration of inadequate institutional mechanisms for monitoring the utilization of genetic resources and associated traditional knowledge and proposed steps to improve institutional set-up;
 - (b) A Party's compliance with Articles 15, 16, 17 and 18 of the Protocol;
 - (c) A Party's compliance with Article 30 of the Protocol;
 - (d) Violation by other Parties of domestic legislation; and
 - (e) Implementation of measures related to indigenous and local communities, namely of measures to strengthen the capacity of women to access genetic resources and/or traditional knowledge associated with genetic resources.

E. Procedures in relation to the Compliance Committee

1. **Option 1** The Committee shall receive, through the Secretariat, any submissions relating to issues of non-compliance 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;
 - (c) The COP-MOP;
 - (d) The Compliance Committee;
 - (e) The Secretariat;
 - (f) An expert review team; or
 - (g) Members of the public.
- Option 2** The Committee shall receive, through the Secretariat, any submissions relating to issues of non-compliance from:
 - (a) Any Party with respect to itself;
 - (b) Any Party with respect to 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;
 - (c) The COP-MOP;
 - (d) The Compliance Committee only for general issues of compliance; and
 - (e) The Secretariat.

2. *The Party in respect of which an issue has been raised is hereinafter referred to as “the Party concerned”.*¹²
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.*¹³
4. The Secretariat shall forward any submission under paragraphs 1 (a) above to the Committee within 30 calendar days of receipt.
5. The Secretariat shall forward any submission under paragraphs 1 (b) to 1 (g)/1 (e) above to the Party concerned within 30 calendar days of receipt.
6. When the Party concerned has received a submission it should respond and, with recourse to the Committee 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.
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 above, the Secretariat shall forward the submission to the Committee forthwith.
8. The Committee may reject to consider any submission made pursuant to paragraphs 1 (b) to 1 (g)/1 (e) above that is *de minimis* or ill-founded, bearing in mind the objectives of the Protocol.¹⁴
9. The Party concerned may participate in the consideration of the submission and present responses or comments to the Committee. The Committee shall make available the draft findings and recommendations, including measures, to the Party concerned and give the Party the possibility to respond.

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

Option 1

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 E;*¹⁵
 - (c) The entity that has made the submission with respect to a Party in accordance with paragraphs 1 (c) to 1 (g)/1 (e) of section E; and
 - (d) Affected indigenous and local communities.
2. The Committee may seek or receive, when necessary for its work, relevant information from sources, such as:
 - (a) The Secretariat;

¹² Text drawn from the compliance procedures and mechanisms developed under ITPGRFA.

¹³ Text drawn from the compliance procedures and mechanisms developed under ITPGRFA.

¹⁴ Paragraphs 4 to 8 draw from the compliance procedures and mechanisms under ITPGRFA as specifically proposed in the submission by one Party.

¹⁵ Text drawn from the compliance procedures and mechanisms developed under the Cartagena Protocol. A similar provision is found in the compliance procedures and mechanisms of ITPGRFA.

- (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 sources.
3. The Committee may seek expert advice.
 4. The Committee may undertake, with the consent of the Party concerned, information gathering in the territory of that Party.

Option 2

The Committee may consider information from all possible sources. The integrity of the information should be ensured.

Option 3

The Committee shall consider on a case-by-case basis the sources of information to rely upon.

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

1. The Committee/The COP-MOP upon the recommendations of the Committee/The COP-MOP upon recommendation of the Compliance Unit with a view to promoting compliance and addressing cases of non-compliance, may:

- (a) Provide advice or assistance to the Party concerned, as appropriate;
- (b) Provide in-country assistance, technical assessment and a verification mission, upon the invitation of the Party concerned;
- (c) Provide financial and technical assistance, technology transfer, training and other capacity-building measures to the Party concerned;
- (d) Provide assistance in legal training or advice and provision of capacity-building;
- (e) Recommend specific capacity-building actions to be undertaken by the Party concerned;
- (f) 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;
- (g) Invite the Party concerned to submit progress reports on its efforts to comply with its obligations under the Protocol;
- (h) Call for explanations when the timeframe agreed in accordance with a given compliance measure is not met;
- (i) Issue a written caution requesting a response and offering assistance;
- (j) Issue a warning to the Party concerned that it is in non-compliance with one or several provisions of the Protocol;
- (k) Issue a statement of concern or warning regarding the non-compliance of a Party who is in non-compliance;
- (l) Issue declarations of non-compliance to the Party concerned;
- (m) Publish cases of non-compliance;

(n) 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;

(o) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, specific rights and privileges;

(p) Apply financial penalties;

(q) Apply trade consequences;

(r) Require the appointment of a representative in the provider country for notification purposes to facilitate administrative and/or criminal procedures; and

(s) 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.

2. In considering the measures specified above 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.

H. Review of procedures and mechanisms

Option 1 Within { ... } years of approval of these procedures and mechanisms and periodically thereafter, the COP-MOP shall review their effectiveness and take appropriate action. The Committee may identify the need for any additional review.

Option 2 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.

Option 3 A review of the effectiveness of these procedures and mechanisms shall be undertaken as soon as experience justifies it.
