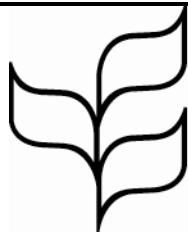




CBD



Convention on Biological Diversity

Distr.
GENERAL

UNEP/CBD/ICNP/REC/2/7
26 July 2012

ORIGINAL: ENGLISH

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*

RECOMMENDATION ADOPTED BY THE INTERGOVERNMENTAL COMMITTEE FOR THE NAGOYA PROTOCOL AT ITS SECOND MEETING

2/7. *Cooperative procedures and institutional mechanisms to promote compliance with the protocol and to address cases of non-compliance*

The Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization,

Having considered the report of the expert meeting on cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance and the outcomes annexed to that report (UNEP/CBD/ICNP/2/12),

1. *Decides* that the draft “Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Protocol and to Address Cases of Non-compliance”, as contained in the annex to the present recommendation, shall serve as the basis for future consideration of this issue;

2. *Recommends* that the Conference of the Parties at its eleventh meeting adopt a decision along the following lines:

The Conference of the Parties,

Decides to forward the draft “Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Protocol and to Address Cases of Non-compliance” as contained in the annex to this decision to a future meeting of the Intergovernmental Committee or the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol to enable the first meeting of the Parties to consider and approve them.

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

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Annex

**COOPERATIVE PROCEDURES AND INSTITUTIONAL MECHANISMS TO PROMOTE
COMPLIANCE WITH THE PROVISIONS OF THE NAGOYA PROTOCOL AND TO
ADDRESS CASES OF NON-COMPLIANCE**

The following procedures and mechanisms are developed in accordance with Article 30 [and related articles] of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization (the Protocol).

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 on Biological Diversity (the Convention).
2. The compliance procedures and mechanisms shall be non-adversarial, [non-judicial,] cooperative, simple, expeditious, advisory, facilitative, flexible,[preventive,] cost-effective, [voluntary,] [positive,] [and legally non-binding][and legally binding] in nature.
3. The operation of the compliance procedures and mechanisms shall be guided by the principles of fairness, due process, [rule of law], flexibility, [non-confrontation,] non-discrimination, transparency, accountability, predictability, [consistency,] good faith, [supportiveness,] [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 indigenous and local communities,] 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, whenever possible, 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 [and other international agreements] [, including compliance and other *sui generis* mechanisms of indigenous and local communities taking into account their customary laws, norms and practices in accordance with national legislation]].

B. Institutional mechanisms

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.
2. The Committee shall consist of 15 members nominated by Parties, endorsed by the respective regional group of the United Nations [and [could] include representatives of indigenous and local communities [as observers]] [as well as one representative of indigenous and local communities as a member of the Committee]-and elected by the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP-MOP) on the basis of three members from each of the five regional groups of the United Nations.

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3. Each regional group of the United Nations should provide one alternate member to be nominated by Parties and elected by the COP-MOP to replace a member who resigns or is unable to complete their term of office.

4. Members of the Committee shall have recognized competence, including technical, legal or scientific expertise in the fields covered by the Protocol, such as genetic resources and traditional knowledge associated with genetic resources, 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, this being a full term.][two intersessional periods of the COP-MOP, this being a full term. An intersessional period begins at the end of one ordinary meeting of the COP-MOP and expires at the end of the next ordinary meeting of the COP-MOP.] At its first meeting, the COP-MOP shall elect five members, one from each region, for half a term, and ten members, two from each region, 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][one term], [unless the COP-MOP decides otherwise].

6. The Committee shall meet, at least once in each intersessional period and may, as necessary [and subject to the availability of financial resources], hold additional meetings. In determining the dates of the meetings, due consideration should be given to the meetings schedule 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. The Committee shall develop and submit its rules of procedure, including those on confidentiality and conflict of interest, 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.

9.

Option 1: The Committee shall reach agreement on all matters of substance by consensus. The report of any meeting of the Committee at which consensus is not reached shall reflect the views of all the Committee members.

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. The report shall be made public once adopted. If it contains confidential parts, a public summary of such parts shall be made available to the public.

10. [The meetings of the Committee shall be open to Parties, signatories to the Protocol 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.] [Nevertheless, in such cases, oral hearings will be public. Only members of the Committee may participate in the business of the Committee.]]

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

C. Functions of the Committee

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][acquired through formal submission [or other sources]] regarding matters relating to compliance and cases of non-compliance related to the submissions and make its recommendations directly to the Parties concerned;]
- (b) Identify the specific circumstances and possible causes of individual cases of non-compliance referred to it;
- (c) Offer advice to the Part[y][ies] concerned and/or facilitate assistance on matters relating to compliance and cases of non-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 advice and assistance in the establishment of cooperation between Parties in cases of alleged violation of domestic ABS legislation or regulatory requirements;]
 - (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;]
 - (j) [Consult with the compliance committees of other agreements in order to share experience on compliance issues and options for their resolution; and]
 - (k) 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.][The Committee will submit a report of its activities to the COP-MOP, for its consideration.]

D. Procedures

1. The Committee shall receive any submissions relating to issues of compliance and 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];

(c) [The COP-MOP;]

(d) [The Compliance Committee members [only for general issues of compliance];]

(e) [The Secretariat[, for failure to file a report pursuant to Article 29, providing that the matter has not been resolved within ninety days by consultation with the Party concerned];]

(f) [Members of the public; or]

(g) [Indigenous and local communities [supported by the Party on whose national territory they are located].]

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]-calendar days of receipt.

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

6. When the Party concerned has received a submission it should respond and, with recourse to the [Committee][Secretariat][Committee and the Secretariat] for assistance if required, provide relevant information [preferably] within [three][two] months and in any event not later than [six][five] 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 or from other sources, 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][five] 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 bearing in mind the objectives of the Protocol][do not meet the requirements set out in paragraph D.3].

9. The Party concerned [and the Party that made the submission] may participate in the consideration of the submission and present responses or comments to the Committee [at all stages of the process]. [The Party concerned][The mentioned Parties] 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 Part[y][ies] to [respond][propose any adjustment on the accuracy of findings and facts]. [Any such response is to be reflected in the report of the Committee.]

10. [In addition to the procedures under this section, the Committee may decide to examine any question of compliance, including systemic issues of general non-compliance of interests to all Parties to the Protocol that come to its attention. It may consider such questions on the basis of national reports and reporting requirements under Article 29 of the Protocol or of any other relevant information that becomes available to the Committee, particularly by members of the public which have a legitimate specific interest in the question concerned, including indigenous and local communities as well as information generated under Articles 14 and 17 of the Protocol. If a question affects one Party more than others, the procedural rules shall apply *mutatis mutandis*.]

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

1. The Committee shall consider relevant information from:

- (a) The Party concerned [and from the Party or entity that has made the submission];
- (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.]
- (e) [Any other relevant source].

2.

Option 1 The Committee may seek or receive, when necessary for its work, relevant information from the following 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 [with a relevant mandate on genetic resources and access to genetic resources and benefit-sharing]; and
- (g) [Other relevant and reliable sources.]

Option 2: The Committee may [seek, receive and] consider information from all possible sources. The reliability of the information should be ensured.

3. The Committee may seek [expert advice, taking into account possible conflicts of interest][advice of independent experts].
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 [circumstances and] 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.

Option 1

2. [The Committee][The COP-MOP upon the recommendations of the Committee]-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][Facilitate] [financial and] technical assistance, [technology transfer,] training and other capacity-building measures, according to availability;]
 - (c) [Request or assist, as appropriate,][Assist, upon request,] 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 after consultation with COP-MOP;
 - (f) [Publish cases of non-compliance after consultation with COP-MOP;]

- (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) [In cases of [grave or] repeated non-compliance notify the COP-MOP for it to decide the appropriate measures, according to international law;]
- (i) [Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, specific rights and privileges;]

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- (j) [Apply financial penalties;]
- (k) [Apply trade consequences;]

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

(m) [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.]

(n) [Require the Party concerned to take action and, after appropriate procedures, apply sanctions against those who are non-compliant with Article 15(2) and 16(2) of the Protocol within their jurisdictions.]

Option 2

2. The Committee with a view to promoting compliance and addressing cases of non-compliance, may:

- (a) Offer advice or facilitate assistance to the Party concerned, as appropriate;
- (b) [Facilitate][Recommend] [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) [Recommend any other measure, for the consideration of the COP-MOP].

2 (bis) The COP-MOP upon the recommendations of the Committee may also, with a view to promoting compliance and addressing cases of non-compliance:

- (f) Take any of the measures set out in paragraph 2 (a)-(e) above;
- (g) Issue a written caution, statement of concern or a declaration of non-compliance to the Party concerned after consultation with COP-MOP;
- (h) [Publish cases of non-compliance after consultation with COP-MOP];
- (i) 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;
- (j) [[Recommend the suspension][Suspend], in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, specific rights and privileges.]

[F(bis). Ombudsman]

The Committee shall establish the office of an ABS ombudsman to provide assistance to developing countries and indigenous and local communities to identify instances of non-compliance and make submissions to the 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.]
