

An Explanatory Guide to the Cartagena Protocol on Biosafety

Ruth Mackenzie, Françoise Burhenne-Guilmin,
Antonio G.M. La Viña and Jacob D. Werksman
in cooperation with Alfonso Ascencio,
Julian Kinderlerer, Katharina Kummer
and Richard Tapper

IUCN Environmental Policy and Law Paper No. 46

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Foreword

The Cartagena Protocol on Biosafety is one of the most important international treaties recently adopted. It marks the commitment of the international community to ensure the safe transfer, handling and use of living modified organisms. It is an historic commitment as it is the first binding international agreement dealing with biosafety, thereby addressing novel and controversial issues.

To conclude the negotiation of a treaty marks an end, but also a beginning: the beginning of an implementation process which will determine whether the results of the negotiation will, in reality, achieve the objective which originally set the negotiation process in motion. One prerequisite for the successful implementation of a treaty is an understanding of the text itself, and of its implications. In this regard, the Cartagena Protocol is a text that may well not be readily accessible to all those who will need to become involved, in one way or the other, with its implementation. We hope that this Explanatory Guide will both make the Protocol more readily accessible and prove useful as a reference work for those who are involved in its implementation.

IUCN and FIELD are pleased to present the results of a two year process of cooperation and consultation, during which they were joined by WRI. The partnership forged during the preparation of the Guide has been fruitful, constructive, and harmonious. We therefore look forward to continuing our joint efforts in this and related fields, and express our gratitude to those who made this collaboration possible.

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The Guide is the product of a process which started early in 2001. It is the result of the collaboration of IUCN Environmental Law Centre and the Foundation for International Environmental Law and Development (FIELD), later joined by the World Resources Institute. It is also the result of a consultation process over nearly two years.

The initial draft of the Guide, prepared by a small group of authors, was the starting point for an extensive consultation process, producing at each step a refined version. The cornerstones of this consultation process were three workshops, held in September 2001, October 2001, and February 2002.

The participants in the first workshop were all familiar with the Protocol text, and had all participated in its negotiation, either as governmental delegate, or as representative of the non-governmental sector. The purpose of this first workshop was to elicit comments on the content of the Guide, in particular its accuracy, and to identify gaps and deficiencies, as well as to obtain information on some of the negotiating history.

The second workshop was aimed at obtaining comments on the content of the Guide from the perspective of its future users, and feedback on whether the text, in substance and format, facilitated the understanding of the Protocol for those who will work with it in the future. Participants were all from the Central and Eastern European region, and included individuals working in government, non-governmental organizations, and the private sector.

The final workshop considered a completed, revised and edited draft of the Guide. Emphasis was on participation from all parts of the world, in particular developing countries, and from NGOs. In order to maintain continuity, a number of participants who had participated in the first or second workshops were also invited. The workshop reviewed the draft first in plenary, then went through clusters of issues and the corresponding commentaries in working groups, with results reviewed again in plenary to complete the process.

Participants to all workshops attended in a personal capacity, and many of them continued to follow the progress of the Guide throughout the process, commenting on interim stages of the Guide by e-mail.

The “pre-final” draft of the Guide, which resulted from the comments received at the third workshop, was made available to participants at the third meeting of the Intergovernmental Committee for the Cartagena Protocol in the Hague in April 2002. It was also posted on the web sites of IUCN-ELC and FIELD in order to generate further review and comments before the text was finalized.

As a result of this process, many people have assisted in the preparation of the Guide, not only by participating in the workshops described above, but also by providing thoughtful verbal or written comments. All of the comments received were carefully considered by the authors in the preparation of the final text.

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Françoise Burhenne-Guilmin, IUCN ELC, Bonn
Antonio La Viña, World Resources Institute, Washington DC
October 2002

List of abbreviations

| | |
|---------------|--|
| AIA | Advanced Informed Agreement |
| BCH | Biosafety Clearing-House |
| BSWG | Ad Hoc Working Group on Biosafety |
| CBD | Convention on Biological Diversity |
| CHM | Clearing-House Mechanism – established under Article 18(3) CBD |
| CITES | Convention on International Trade in Endangered Species of Wild Fauna and Flora |
| COP | Conference of the Parties to the Convention on Biological Diversity |
| COP/MOP | Conference of the Parties serving as the meeting of the Parties to the Protocol |
| DNA | Deoxyribonucleic acid |
| EU | European Union |
| ExCOP | First extraordinary meeting of the Conference of the Parties |
| FAO | Food and Agriculture Organization of the United Nations |
| GATT | General Agreement on Tariffs and Trade |
| GEF | Global Environment Facility |
| GMO | Genetically Modified Organism |
| ICCP | Intergovernmental Committee for the Cartagena Protocol |
| ILC | International Law Commission |
| LMO | Living Modified Organism |
| LMO-FFPs | Living Modified Organisms Intended for Direct Use as Food or Feed, or for Processing |
| MEA | Multilateral Environmental Agreement |
| REIO | Regional Economic Integration Organization |
| RNA | Ribonucleic acid |
| SBSTTA | Subsidiary Body on Scientific, Technical and Technological Advice (of the CBD) |
| SPS Agreement | Agreement on the Application of Sanitary and Phytosanitary Measures |
| TBM | Transboundary Movement |
| TBT Agreement | Agreement on Technical Barriers to Trade |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNCTAD | United Nations Conference on Trade and Development |
| UNEP | United Nations Environment Programme |
| WHO | World Health Organization |
| WTO | World Trade Organization |

List of short titles of international instruments

| | |
|---------------------------|--|
| Aarhus Convention | Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, ECE/CEP/43 |
| Agenda 21 | UN Conference on Environment and Development, UN Doc. A/CONF.151/26/Rev.1 (1992) |
| Basel Convention | Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, UNTS vol. 1673 p. 57 |
| Biodiversity Convention | Convention on Biological Diversity, 5 June 1992, UNTS vol. 1760 p.79 |
| Climate Change Convention | United Nations Framework Convention on Climate Change, 9 May 1992, UNTS vol. 1771 p. 107 |
| Kyoto Protocol | Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, Decision 1/CP.3 of the Conference of the Parties to the Convention |
| Montreal Protocol | Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, UNTS 1522 |
| Rio Declaration | UN Declaration on Environment and Development, June 14, 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 ILM. 876 (1992) |
| Rotterdam Convention | Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 September 1998, UNEP/FAO/PIC/CONF/5 |
| Stockholm Convention | Convention on Persistent Organic Pollutants, 22 May 2001, Depository Notification C.N.531.2001, Treaties-96 of 19 June 2001 |
| Stockholm Declaration | Declaration of the UN Conference on the Human Environment, June 16, 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), reprinted in 11 ILM 1416 (1972) |
| Vienna Convention | Convention on the Law of Treaties, 23 May 1969, UNTS vol. 1155 p. 331 |

Structure and purpose of this Guide

The main goal of the Guide is to facilitate the understanding of the legal obligations of the Parties under the Cartagena Protocol on Biosafety. It is an explanatory guide, which attempts to provide an information base on the content and origin of the provisions of the Protocol. While it is hoped that the Guide will contribute to the implementation of the Protocol, it is not intended as a detailed guide on how to implement the Protocol at the national level. Rather it attempts to provide an accessible explanation of the Protocol's provisions and to identify issues which Parties may want to consider as they decide how to implement the Protocol.

The Guide begins with a brief Introduction which addresses the subject matter of the Protocol. This section provides general information on the issue the Protocol was intended to address, and the negotiation process. It also provides an overview of the Protocol's provisions, including certain cross-cutting issues. Finally, it identifies certain other international agreements and guidelines of relevance to biosafety. It may be noted here that the "Implementation Tool kit" reproduced in the Supplementary Materials at the end of the Guide also provides a useful overview or checklist of the provisions of the Protocol from an implementation perspective. This "Tool kit" was adopted as part of a recommendation on capacity-building by the Intergovernmental Committee for the Cartagena Protocol (ICCP), the body which was established to undertake preparatory work for the first meeting of the Parties to the Protocol after it enters into effect.

The main section of the Guide provides a "commentary" to each of the Protocol's provisions. This section addresses each Article and Annex of the Protocol in turn and analyzes and explains its provisions. The emphasis here is on outlining the main provisions of the Protocol, as well as highlighting ambiguities or issues which are left unresolved in the text, providing information on possible interpretations, and identifying issues that Parties may want to consider as they develop national implementation measures. Where there are ambiguities in the text, we have tried to provide some guidance as to possible interpretation based upon the provisions of the Protocol, in particular its objective as set out in Article 1. In addition, in a number of instances we have made reference to the negotiating history of the Protocol, and in this regard we were able to draw on advice and inputs from many of those who were closely involved in the negotiations. Of course, a Guide of this type does not purport to provide an authoritative interpretation of the text of the Protocol, and other interpretations are possible. In addition, specific interpretations may be agreed and adopted by the Parties to the Protocol in the future as they consider its provisions further.

When the Protocol was negotiated, States agreed that work on some issues should be left to further negotiation and agreement after the Protocol comes into effect. These include, for example, Article 18(2)(a), Article 27 and Article 34. In these cases, we have given an indication of the work undertaken on these issues by the ICCP. Of course, there are other provisions of the Protocol which the meeting of the Parties may address and provide further guidance on in due course.

The Appendix to the Guide addresses the relationship between the Cartagena Protocol and relevant World Trade Organization Agreements. It was decided to analyze this relationship in detail in an Appendix given the range and complexity of questions that it raises. The potential relationship between the Protocol and relevant WTO Agreements was a contentious issue in the negotiations. The analysis in the Appendix is intended to give a more detailed overview of the types of issues that may arise in assessing this inter-relationship. It does not attempt to, and can not, prejudge the outcome of any particular question or dispute that may arise as to trade measures that a State may impose in relation to LMOs.

The bibliography provides a list of selected writings on the Protocol, largely from academic books and journals.

Finally, we have provided certain supplementary materials for ease of reference at the end of the Guide. These include:

- 2000 Cartagena Protocol on Biosafety – The provisions of the Protocol are reproduced throughout the Guide, but the full text is provided here for ease of reference.
- 1992 Convention on Biological Diversity – As explained in the Introduction, the 1992 Convention is the parent Convention of the Protocol and contains a number of provisions which remain directly applicable or relevant to its implementation.

- Decision II/5 of the Conference of the Parties to the Convention on Biological Diversity – This decision provided the mandate for the negotiation of the Protocol.
- Decision EM-I/3 of the Conference of the Parties to the Convention on Biological Diversity – In this decision the Conference of the Parties to the Convention on Biological Diversity adopted the Cartagena Protocol on Biosafety. The decision also makes provision for interim arrangements, including preparatory work by the ICCP and the establishment of a roster of experts to aid capacity-building.
- ICCP recommendation 3/5, Annex III Implementation tool kit – As noted above, this tool kit, adopted as part of an ICCP recommendation, provides a useful checklist of obligations of Parties to the Protocol.