Joint Aarhus Convention/Cartagena Protocol on Biosafety
Round Table on access to information, public participation
and access to justice regarding living modified organisms/genetically modified organisms
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ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND ACCESS TO JUSTICE WITH REGARDS TO GENETICALLY MODIFIED ORGANISMS/LIVING MODIFIED ORGANISMS: KEY PROVISIONS OF THE AARHUS CONVENTION AND THE CARTAGENA PROTOCOL ON BIOSAFETY

Background paper
Prepared by the secretariat of the Aarhus Convention

This document has been prepared to support Mr Veit Koester's presentation on "Assisting in ratifying and implementing Aarhus Convention and Cartagena Protocol through clarifying some of their key provisions". The document contains a "cut and paste" compilation of relevant information extracted from the original texts of the Aarhus Convention and the Cartagena Protocol on Biosafety, as well as information from reports and documents prepared by the secretariat to the Aarhus Convention and the Secretariat of the Convention on Biological Diversity, which services the Cartagena Protocol on Biosafety.

Delegates are invited to consult this document in advance of the meeting in order to gain an overview of the relevant provisions of the Aarhus Convention and the Cartagena Protocol on Biosafety in the context of GMOs/LMOs.

Contents

I. Extract of the Implementation Guide

Synergies with the CBD and its Cartagena Protocol on Biosafety

In decision II/1 adopting the GMO amendment, the Parties to the Aarhus Convention recognized the need to cooperate with other international organizations and forums, in particular the Cartagena Protocol on Biosafety, with a view to maximizing synergies and avoiding duplication of efforts, including through encouraging the exchange of information and collaboration between the respective secretariats. The Riga Declaration, adopted at the third session of the Meeting of the Parties, recognized the value of further collaboration with bodies of the Cartagena Protocol in activities aimed at supporting the application of the Lucca Guidelines on GMOs and the implementation of the Almaty amendment on GMOs.

The Cartagena Protocol on Biosafety to the CBD was drafted by the Parties to the CBD in the same period as the Aarhus Convention was being negotiated. The Cartagena Protocol was adopted on 29 January 2000 after long and intense negotiations, and entered into force on 11 September 2003. The Conference of the Parties to the CBD serves as the Meeting of the Parties to the Protocol.

Like the CBD, the Cartagena Protocol does not use the term "genetically modified organism". Instead, it refers to "living modified organisms resulting from biotechnology". The extent of any difference in the scope of these two terms has not been settled in practice.

The objective of the Cartagena Protocol, in accordance with the precautionary approach, is "to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health, and specifically focusing on transboundary movements" (Protocol, article 1). According to article 23 of the Protocol, Parties are required to "promote and facilitate public awareness, education and participation", "to consult the public in the decision making process regarding living modified organisms", and to "make the results of such decisions publicly available". These provisions are kept rather general, supplemented by obligations concerning the exchange of information within the Biosafety Clearing-House mechanism.

At their fifth session (Nagoya, Japan, October 2010), the Parties to Cartagena Protocol adopted the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress. The objective of the Supplementary Protocol is to contribute to the conservation and sustainable use of biological diversity, taking also into account risks to human health, by providing international rules and procedures in the field of liability and redress relating to living modified organisms. Being a Supplementary Protocol, the provisions of the Cartagena Protocol on public awareness and participation, including article 23, apply to processes under the Supplementary Protocol.

While the objective of the Aarhus Convention is "to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being" (article 1), the CBD and the Cartagena Protocol focus more particularly on the protection of biological diversity for its own sake. However, despite their different foci, the provisions of the Cartagena Protocol and the GMO amendment to the Aarhus Convention overlap on the issue of public participation in decision-making. In this regard, the two instruments should not be seen as contradicting, but rather as complementing one another. In the light of the GMO amendment, the Aarhus Convention might be considered as the more elaborated instrument in respect of the modalities for public participation, for which it lays down detailed requirements;

whereas article 23 of the Cartagena Protocol on public participation is of a more framework nature (although at their fifth session the Parties to the Protocol adopted a Programme of Work on Public Awareness, Education and Participation Concerning the Safe Transfer, Handling and Use Of Living Modified Organisms which envisages activities addressing, inter alia, the issue of public participation). Conversely, regarding access to information, the Cartagena Protocol, in its article 20 establishing the Biosafety Clearing-House mechanism, defines more clearly than the Aarhus Convention what kind of scientific, technical, environmental and legal information and information has to be made publicly available.

In accordance with the recognition, in decision II/1 adopting the Aarhus Convention's GMO amendment, of the need to cooperate with the Cartagena Protocol, the two instruments have subsequently collaborated in a number of respects. This collaboration has included the convening of joint workshops on access to information and public participation with respect to GMOs back to back with the fourth and fifth sessions of the Meeting of the Parties to the Cartagena Protocol (Bonn, Germany, May 2008 and Nagoya, Japan, October 2010). The secretariats of the two instruments have also collaborated in the intersessional periods in various respects. For example, at the invitation of the Cartagena Protocol secretariat, the Aarhus Convention secretariat provided comments on the draft work programme on public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms prior to the finalization of its text.

II. Extract from Decision II/1 adopted by the Meeting of the Parties to the Aarhus Convention on Genetically Modified Organisms (ECE/MP.PP/2005/2/Add.2)

Article 6 bis

After article 6, insert a new article reading

Article 6 bis

PUBLIC PARTICIPATION IN DECISIONS ON THE DELIBERATE RELEASE INTO THE ENVIRONMENT AND PLACING ON THE MARKET OF GENETICALLY MODIFIED ORGANISMS

1. In accordance with the modalities laid down in annex I bis, each Party shall provide for early and effective information and public participation prior to making decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms.

2. The requirements made by Parties in accordance with the provisions of paragraph 1 of this article should be complementary and mutually supportive to the provisions of their national biosafety framework, consistent with the objectives of the Cartagena Protocol on Biosafety.

Annex I bis

After annex I, insert a new annex reading

Annex I bis

MODALITIES REFERRED TO IN ARTICLE 6 BIS

1. Each Party shall lay down, in its regulatory framework, arrangements for effective information and public participation for decisions subject to the provisions of article 6 bis, which shall include a reasonable time frame, in order to give the public an adequate opportunity to express an opinion on such proposed decisions.

2. In its regulatory framework, a Party may, if appropriate, provide for exceptions to the public participation procedure laid down in this annex:

(a) In the case of the deliberate release of a genetically modified organism (GMO) into the environment for any purpose other than its placing on the market, if:

(i) Such a release under comparable bio-geographical conditions has already been approved within the regulatory framework of the Party concerned; and

(ii) Sufficient experience has previously been gained with the release of the GMO in question in comparable ecosystems;

(b) In the case of the placing of a GMO on the market, if:

(i) It was already approved within the regulatory framework of the Party concerned; or

(ii) It is intended for research or for culture collections.

3. Without prejudice to the applicable legislation on confidentiality in accordance with the provisions of article 4, each Party shall make available to the public in an adequate, timely and effective manner a summary of the notification introduced to obtain an authorization for the deliberate release into the environment or the placing on the market of a GMO on its territory, as well as the assessment report where available and in accordance with its national biosafety framework.

4. Parties shall in no case consider the following information as confidential:

(a) A general description of the genetically modified organism or organisms concerned, the name and address of the applicant for the authorization of the deliberate release, the intended uses and, if appropriate, the location of the release;

(b) The methods and plans for monitoring the genetically modified organism or organisms concerned and for emergency response;

(c) The environmental risk assessment.

5. Each Party shall ensure transparency of decision-making procedures and provide access to the relevant procedural information to the public. This information could include for example:

(i) The nature of possible decisions;

(ii) The public authority responsible for making the decision;

(iii) Public participation arrangements laid down pursuant to paragraph 1;

(iv) An indication of the public authority from which relevant information can be obtained;

(v) An indication of the public authority to which comments can be submitted and of the time schedule for the transmittal of comments.

6. The provisions made pursuant to paragraph 1 shall allow the public to submit any comments, information, analyses or opinions that it considers relevant to the proposed deliberate release, including placing on the market, in any appropriate manner.

7. Each Party shall endeavour to ensure that, when decisions are taken on whether to permit the deliberate release of GMOs into the environment, including placing on the market, due account is taken of the outcome of the public participation procedure organized pursuant to paragraph 1.

8. Parties shall provide that when a decision subject to the provisions of this annex has been taken by a public authority, the text of the decision is made publicly available along with the reasons and considerations upon which it is based.

III. Extract from the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

Article 2, paragraph 3 (a)

3. "Environmental information" means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

Article 9 paragraph 3

"In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment".

IV. Extract from the Cartagena Protocol on Biosafety

Article 1

In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements".

Article 3

(g) "Living modified organism" means any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology;

(h) "Living organism" means any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids;

(i) "Modern biotechnology" means the application of:

a. In vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) and direct injection of nucleic acid into cells or organelles, or

b. Fusion of cells beyond the taxonomic family,

that overcome natural physiological reproductive or recombination barriers and that are not techniques used in traditional breeding and selection;

Article 20

Without prejudice to the protection of confidential information, each Party shall make available to the Biosafety Clearing-House any information required to be made available to the Biosafety Clearing-House under this Protocol, and:

(a) Any existing laws, regulations and guidelines for implementation of the Protocol, as well as information required by the Parties for the advance informed agreement procedure;

(b) Any bilateral, regional and multilateral agreements and arrangements;

(c) Summaries of its risk assessments or environmental reviews of living modified organisms generated by its regulatory process, and carried out in accordance with Article 15, including, where appropriate, relevant information regarding products thereof, namely, processed materials that are of living modified organism origin, containing detectable novel combinations of replicable genetic material obtained through the use of modern biotechnology;

(d) Its final decisions regarding the importation or release of living modified organisms; and

(e) Reports submitted by it pursuant to Article 33, including those on implementation of the advance informed agreement procedure.

Article 23

Public Awareness and Participation

1. The Parties shall:

(a) Promote and facilitate public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking also into account risks to human health. In doing so, the Parties shall cooperate, as appropriate, with other States and international bodies;

(b) Endeavour to ensure that public awareness and education encompass access to information on living modified organisms identified in accordance with this Protocol that may be imported.

2. The Parties shall, in accordance with their respective laws and regulations, consult the public in the decision-making process regarding living modified organisms and shall make the results of such decisions available to the public, while respecting confidential information in accordance with Article 21.

3. Each Party shall endeavour to inform its public about the means of public access to the Biosafety Clearing-House.

V. Extract from the Guidelines on access to information, public participation and access to justice with respect to genetically modified organisms (Lucca Guidelines, KIEV.CONF/2003/INF/7, Kiev, 21-23 May 2003)

1. Unless otherwise stated, the terms 'public authority', 'environmental information', 'public' and 'public concerned' shall have the meanings given to them in article 2 of the Convention.

2. For the purpose of these Guidelines, the following use of terms for activities with GMOs, which is based on existing international and regional documents, such as the Cartagena Protocol on Biosafety and the European Community Directives on the deliberate release (2001/18/EC) and contained use (90/219/EEC as amended by 98/81/EC) of GMOs, applies:

(a) 'Genetically modified organism' (GMO) means any organism with the exception of human beings that possesses a novel combination of genetic material obtained through the use of modern biotechnology;

(b) 'Modern biotechnology" means the application of:

(i) In vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) and direct injection of nucleic acid into cells or organelles; or

(ii) Fusion of cells beyond the taxonomic family,

that overcome natural physiological reproductive or recombination barriers and that are not techniques used in traditional breeding and selection;