



**CONVENTION ON  
BIOLOGICAL  
DIVERSITY**

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INTERGOVERNMENTAL COMMITTEE FOR THE  
CARTAGENA PROTOCOL ON BIOSAFETY  
Second meeting  
Nairobi, 1-5 October 2001

**Legal Analysis of the Relationship between the Conference of the Parties to the Convention on  
Biological Diversity and the Conference of the Parties serving as the meeting of the Parties to  
the Cartagena Protocol on Biosafety.**

**Note by the Executive Secretary**

**I. INTRODUCTION**

1. A number of Parties have requested the Executive Secretary to prepare a note explaining the relationship between the Conference of the Parties of the Convention and the Conference of the Parties serving as the meeting of the Parties to the Protocol. Consequently, the Executive Secretary has prepared this Information Note in an attempt to clarify that relationship. The Note should be read in conjunction with relevant Working Documents prepared for this meeting.

**II. “Conference of the Parties serving as the meeting of the Parties to the Protocol”**

2. During the negotiation of the Protocol, the Parties were determined to avoid the creation of new institutions within the framework of the Convention. The justification was three-fold: first, there was the desire to minimize the operational costs that would be associated with the new treaty; secondly, there was a felt need to avoid the proliferation of legally-independent entities that has become the bane of negotiating multilateral environmental agreements; and, lastly, there was the need to ensure cross-fertilization, linkages and synergies between various work programmes under the Convention, including biosafety which is a cross-cutting issue. This thinking crystallized in the decision to utilize the Conference of the Parties to the Convention to serve both the Convention and the Protocol. Paragraph 1 of Article 29 of the Protocol thus provides that the Conference of the Parties “shall serve as the meeting of the Parties to this Protocol.” The fact that no new and legally-independent institution is created is underscored by the deliberate use of the lower case “m” for

“meeting” in the phrase “Conference of the Parties serving as the meeting of the Parties to the Protocol.” Consequently, the Protocol does not establish a distinct and separate “Meeting of the Parties” as is the case with, for example, the Montreal Protocol on Substances that Deplete the Ozone Layer and the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and Their Disposal. Similar considerations guided the negotiators of the Kyoto Protocol to the United Nations Framework Convention on Climate Change whose Article 13(1) is in the same vein as paragraph 1 of Article 29 of the Cartagena Protocol.

3. Once the policy decision was adopted to utilize the same institutional structure for both instruments, certain consequences, of both a procedural and substantive nature, necessarily followed. Provisions had to be crafted that would promote the central objectives of institutional unity and coherence while at the same time acknowledging the “intimately related-but-distinct” nature of the Convention and the Protocol as legal instruments. These provisions relate to the rules of procedure for meetings of the Conference of the Parties serving as the meeting of the Parties to the Protocol; guidance to the financial mechanism; and the secretariat and associated budgetary matters.

### III. RULES OF PROCEDURE

4. The issue of the rules of procedure for meetings of the Conference of the Parties serving as the meeting of the Parties to the Protocol has been examined in detail in the Note prepared by the Executive Secretary for this meeting and referenced UNEP/CBD/ICCP/2/6. It should be noted in this regard that the benchmark is established by paragraph 5 of Article 29 of the Protocol which provides that “the rules of procedure of the Conference of the Parties...shall be applied *mutatis mutandis* under this Protocol.” It may be underlined, however, that whereas the need to employ uniform rules of procedure under the Convention and the Protocol followed directly from the decision to utilize the same institutional processes, it was also readily apparent that some amount of flexibility was desirable to respond to the distinct nature of the Protocol as a legal instrument. Thus, as is demonstrated by the Note by the Executive Secretary on the issue, a number of provisions in the Protocol either expressly qualify the existing rules of procedure or invest the Conference of the Parties serving as the meeting of the Parties to the Protocol with the discretion to deviate from those rules as and when it deems it appropriate. Such qualifications include: (a) When the COP serves as the meeting of the Parties to the Protocol, COP bureau members who represent non-Parties to the Protocol shall be substituted by members from Parties to the Protocol (Article 29.3); (b) Parties to the Convention who are not Parties to the Protocol shall participate in proceedings of meetings of the Conference of the Parties serving as the meeting of the Parties to the Protocol only as observers (Article 29.2); and, (c) Decisions by the Conference of the Parties serving as the meeting of the Parties to the Protocol shall be taken only by Parties to the Protocol (Article 29.2).

### IV. GUIDANCE TO THE FINANCIAL MECHANISM

5. The issue of guidance to the financial mechanism has also been examined in detail in a note prepared by the Executive Secretary for this meeting and referenced UNEP/CBD/ICCP/2/5. The present note therefore focuses only on a few major points.

6. Paragraph 2, Article 28, of the Protocol provides that “the financial mechanism established in Article 21 of the Convention shall, through the institutional structure entrusted with its operation, be the financial mechanism for this Protocol.” The designation of the financial mechanism of the Convention as the financial mechanism of the Protocol has important implications for decision-making under the Protocol with regard to financial resources for its implementation. According to Article 21 of the Convention, the financial mechanism shall function under the guidance and authority of, and be accountable to, the Conference of the Parties. Moreover, paragraphs 6 and 26 of the *Instrument for the Establishment of the Restructured Global Environment Facility* (1994) provide (with respect to those international environmental conventions for which the GEF operates a financial mechanism) that the GEF shall function under the guidance of, and be accountable to, the Conferences of the Parties which shall decide on the policies, program priorities and eligibility criteria for the purposes of the conventions. In terms of these provisions, it is only the Conference of the Parties to the Convention that has the competence to provide guidance to the financial mechanism. Paragraph 3, Article 28, of the Protocol therefore stipulates that the Conference of the Parties serving as the meeting of the Parties to the Protocol shall provide guidance with respect to the financial mechanism **“for consideration by the Conference of the Parties.”** It would seem, therefore, that whereas the Conference of the Parties serving as the meeting of the Parties to the Protocol may propose guidance with respect to the policy, strategy, programme priorities and eligibility criteria relating to access to and utilization of financial resources provided by the mechanism, the Conference of the Parties to the Convention remains the final authority in determining such policy, strategy, etc. Paragraph 3 of Article 28 of the Protocol seems to have been inspired not only by the need to ensure policy coherence towards the financial mechanism but also by the legal limitations imposed by the relevant provisions of the Convention and the GEF *Instrument*.

7. In addition, paragraph 5 of Article 28 of the Protocol provides that the guidance to the financial mechanism of the Convention in relevant decisions of the Conference of the Parties, including those agreed before the adoption of the Protocol, shall apply, *mutatis mutandis*, to the provisions of Article 28. The Conference of the Parties has, since its first meeting, adopted several decisions containing guidance to the financial mechanism some of which are relevant in the context of the Protocol. Paragraph 5 of Article 28 thus facilitates the application to the Protocol not only of this important body of guidance decisions already adopted by the Conference of the Parties but also of any future guidance to the financial mechanism that may be decided upon by the Conference of the Parties.

## V. THE SECRETARIAT AND RELATED BUDGETARY MATTERS

8. During the negotiation of the Protocol, the Parties were also determined to avoid the creation of a new and legally independent Secretariat and the establishment of distinct and separate budgetary arrangements. The provisions of the Protocol relating to the Secretariat and its functions follow the same logic as those governing the Conference of the Parties serving as the meeting of the Parties to the Protocol. This is underscored by (a) paragraph 1 of Article 31 which provides that the Secretariat of the Convention, established by Article 24 of the Convention, “shall serve as the secretariat to this Protocol” (note the use of the lower case “s” in “secretariat”); (b) paragraph 1 of Article 20 which establishes a Biosafety Clearing-House as part of the clearing-house mechanism under Article 18 of the Convention; (c) paragraph 3 of Article 31 on budgetary arrangements; and, (d) paragraph 2 of Article 31 which stipulates that paragraph 1 of Article 24 of the Convention governing the functions of the Secretariat shall apply, *mutatis mutandis*, to the Protocol. These provisions underline the institutional unity and coherence of

secretariat arrangements for the two instruments and related budgetary matters, as well as with regard to the clearing-house mechanism, while at the same time acknowledging the distinct nature of some of the costs of the secretariat services for the Protocol. The Protocol does not therefore establish a distinct and legally-independent Secretariat or Biosafety Clearing-House.

9. However, the designation of the Secretariat of the Convention as the secretariat of the Protocol raises important issues regarding the determination and sharing of the costs of secretariat services between the two instruments. Paragraph 3 of Article 31 states that “to the extent that they are distinct, the costs of the secretariat services for this Protocol shall be met by the Parties thereto.” Thus, it is the Conference of the Parties serving as the meeting of the Parties to the Protocol that would decide the necessary budgetary arrangements regarding the secretariat services for the Protocol (in so far as they are distinct from those for the Convention) and the costs appertaining thereto shall be met only by Parties to the Protocol. This, however, assumes that it is possible to distinguish the costs related to the Protocol from those of the Convention. Given the important overlaps in secretariat functions, services and programmes of work to be carried out in relation to the Protocol and the Convention (e. g., management and administration of the Protocol as part of the Convention, review of national reports, support to subsidiary bodies, etc.) such a distinction may neither be clear nor easy. It is apparent from the wording of paragraph 3 of Article 31 that where the costs of the secretariat services are not distinct or cannot be distinguished they will have to be met by the Parties to the Convention rather than the Parties to the Protocol. The Conference of the Parties would therefore be the one to determine the necessary budgetary arrangements in this regard.