



Building Support for Global Tobacco Control

Negotiation of a Protocol to the WHO Framework Convention on Tobacco Control

The Conference of the Parties (COP) to the WHO Framework Convention on Tobacco Control (FCTC) may adopt protocols to the Convention (Article 33). As is common under multilateral treaties, Article 33 states that a protocol may be proposed by any Party to the Convention, and that such proposals will be considered by the COP. In practice, protocols to most multilateral treaties are developed by a negotiating body – usually referred to as a ‘working group’ – established and given its terms of reference by the Conference of the Parties to the treaty. The working group develops the text of a proposed protocol, usually within a timeframe set by the COP, and then submits the text to the COP for its consideration. A protocol may then be adopted by the COP and signed and ratified by Parties to the treaty wishing to become Parties to the protocol. This is the procedure most likely to be followed by the FCTC COP in developing a protocol to the FCTC.

The essential elements of the working group process for development of a protocol are as follows:

- **The COP decides to establish a negotiating body, usually referred to as a ‘working group’.** Its decision tasks the working group with developing a proposed protocol to the treaty; recalls relevant Articles of the treaty and previous decisions of the COP; outlines the reasons for the development of a protocol; and sets the terms of reference for the working group, including its composition, priorities, and a timeframe for the completion of its work.
- **The working group holds a number of sessions at which it develops consolidated negotiating text of a protocol.** To enable the group to carry out the necessary work within the timeframe set out in its mandate, its sessions are usually more frequent and often of longer duration than those of the COP. Participants in the sessions include Parties to the treaty, observer States, UN bodies and specialised agencies, intergovernmental and accredited nongovernmental organizations. Only Parties to the treaty are permitted to vote. The working group develops consolidated negotiating text of a protocol and reports periodically to the COP on its progress.
- **The working group negotiates and completes the draft text of the protocol and communicates the text to Parties to the treaty.** Once the working group has agreed on the proposed text of a protocol, the text is communicated to all Parties to the treaty in accordance with requirements set out in the treaty.
- **The text is considered by the COP, which may adopt a protocol to the treaty.** Once adopted, the protocol is opened for signature and ratification by all Parties to the treaty wishing to become Parties to the protocol.

The likely process for developing the text of a protocol to the FCTC

The text of a protocol to the FCTC would need to be negotiated by the Parties to the Convention. For this to happen, the most likely procedure is that the COP would establish a negotiating body to develop the text. The COP would likely take the decision to establish a negotiating body – usually referred to as a ‘working group’ – recalling relevant Articles of the FCTC and previous decisions of the COP, outlining the reasons for the development of a protocol, and tasking the group with developing a proposed protocol. The decision would set the terms of reference for the working group, including its composition, priorities, and a timeframe for the completion of its work.¹

At its first meeting, a working group tasked with developing the text of a protocol would normally elect its officers,² agree on how to approach the tasks set for it in the COP decision which established it, and suggest dates and venues for future meetings which would allow it to complete the process of developing a proposed protocol within the timeframe set by the COP. The working group would then report to each session of the COP on the progress of its work, and would make recommendations to the COP to facilitate its work, as to matters such as the dates and venues of future meetings. Meetings of the working group would be serviced by the treaty Secretariat, and the group could periodically request the Secretariat to provide it with necessary information, for example by compiling background documents and bibliographies of relevant literature. The protocol text would be developed through the compilation of, and negotiation on, draft text prepared by Parties to the FCTC participating in the group, the Secretariat, and the chairperson of the working group. Once agreed upon by the working group, the proposed text would, in accordance with Article 33 of the FCTC, be communicated to all Parties at least six months before the session of the COP at which it were proposed for adoption.

A working group developing the text of a protocol usually meets more frequently and often for longer periods than the COP, so that the necessary work can be carried out within the timeframe set out in its mandate. The working group procedure for the development of protocols, common under multilateral conventions, allows the development of the text of a protocol to take place in a targeted forum with the participation of Parties to the treaty and other appropriate participants such as observer States, UN bodies and specialised agencies, intergovernmental and accredited nongovernmental organizations. Only Parties to the Convention would be permitted to vote at sessions of an FCTC working group. If Parties to the Convention were to submit proposed protocols to the COP individually, as they are permitted to do under Article 33, such proposals would usually be included for consideration by the working group, along with other relevant materials.

¹ Note that Rule 25.2 of the FCTC COP Rules of Procedure states: ‘The Conference of the Parties shall determine the matters to be considered by each [...] subsidiary body, including its mandate, objectives, duration and budget, and may authorize the President, upon the request of the Chairperson of a subsidiary body, to make appropriate adjustments in the allocation of work.’

² Note that this is the approach adopted by the FCTC Conference of the Parties for subsidiary bodies to the COP. Rule 28.1 states: ‘Unless the Conference of the Parties decides otherwise, the Chairperson of a subsidiary body shall be elected by that subsidiary body. Each subsidiary body shall elect its own officers with due regard for the principle of equitable geographical representation, balanced representation of developing and developed countries and gender balance. Officers shall not serve for more than two consecutive terms’.

Examples from two major environmental treaties

The Kyoto Protocol to the United Nations Framework Convention on Climate Change

Establishment of the working group	The ‘open-ended ad hoc group of Parties’, or ‘Ad Hoc Group on the Berlin Mandate’, which developed the text of the Kyoto Protocol was established by the UNFCCC COP in its Decision 1 of COP-1 (1/CP.1, April 1995). The decision is appended to this document as Annex I.
Terms of reference	<p>The Group was established to begin a process to enable the COP to take appropriate action for the period beyond 2000, including strengthening the commitments of Parties listed in Annex I to the Convention ‘through the adoption of a protocol or another legal instrument’.</p> <p>The process was to be guided by the principles enumerated in Part I of Decision 1/CP.1, which included: the objective and guiding principles of the Convention; the specific needs and concerns of developing country Parties; and the need for all Parties to participate in the process and to cooperate in good faith. The specific aims of the process were set out in Part II of Decision 1/CP.1. A number of procedural requirements for the Group – including: that the process ‘be carried out in light of the best available scientific information and assessment on climate change and its impacts’; that it ‘make use of other available expertise’; and that ‘the protocol proposal of the Alliance of Small Island States... along with other proposals and pertinent documents, should be included for consideration in the process’ – were outlined in Part III of the Decision.</p>
Timeframe	The process was to ‘begin without delay and be conducted as a matter of urgency’, with meetings ‘scheduled to ensure completion of the work as early as possible in 1997, with a view to adopting the results at the third session of the Conference of the Parties’. The group was to report to COP-2 (held in July 1996) on the status of the process.
Meetings	The group held eight sessions: the first, second, third, fourth, and fifth in Geneva, Switzerland (21-25 August 1995; 30 October - 3 November 1995; 27 February - 8 March 1996; 8-18 July 1996; and 9-13 December 1996) (with the fourth held in conjunction with COP-2, held in Geneva from 8-19 July 1996); the sixth, seventh and eighth (part 1) in Bonn, Germany (3-7 March 1997; 28 July - 7 August 1997; and 20-31 October 1997); and the eighth (part 2) in Kyoto, Japan (30 November 1997), before COP-3, held in Kyoto from 1-10 December 1997. Documentation of most of the sessions is available online at: http://unfccc.int/cop4/resource/agbm96.html .

Attendance at meetings	The sessions were attended by representatives of most of the Parties to the UNFCCC, and of some observer States, as well as by representatives of UN offices and programs, specialised agencies, intergovernmental organizations, and over 100 nongovernmental organizations. Only Parties to the UNFCCC were permitted to vote at the sessions.
Role of the treaty Secretariat	The UNFCCC Secretariat arranged and serviced meetings of the Group.
Completion of the draft text of the protocol	At its sixth session, the Group requested its Chairman, assisted by the Secretariat, to complete the negotiating text for a protocol or other legal instrument in time to enable the Secretariat to make it available to the Parties to the UNFCCC in the six UN languages by June 1997 (i.e. six months before COP-3). The negotiating text was duly made available within this timeframe, but significant issues remained unresolved, as Parties' positions in the negotiations differed widely. At its seventh and eighth sessions, the Group continued to negotiate, and the Chairman produced a new Consolidated Negotiating Text. The eighth and final session of the Group was held in two parts: the first in October 1997, at which negotiations on the proposed protocol were unable to be completed; and the second on 30 November 1997 to resolve issues left outstanding at the suspension of the session. At the conclusion of the eighth session, some issues still remained to be considered by the COP at its third session, held directly following the eighth session of the Group.
Communication of the text to Parties to the Convention	The text of a proposed protocol, along with outstanding issues for consideration by the COP, was communicated to the Parties to the UNFCCC for their consideration at COP-3 in December 1997. Under Article 17 of the UNFCCC, the text of any proposed protocol is required to be communicated to all Parties at least six months before the session of the COP at which it is proposed for adoption. It appears that this requirement was able to be satisfied by the communication to Parties of the Chairman's Negotiating Text in June 1997, although negotiations of the Group continued at its seventh and eighth sessions in July-August 1997 and October and December 1997.
Adoption of the protocol by the COP	The Kyoto Protocol to the UNFCCC was adopted by consensus at COP-3 in December 1997, by Decision 1/CP.3. The Decision invited Parties to the UNFCCC to become Parties to the Protocol, and invited States that were not Parties to the UNFCCC to become Parties to the UNFCCC so that they may also become Parties to the Protocol.

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity

Establishment of the working group	The ‘Open-ended Ad Hoc Working Group’ which developed the text of the Cartagena Protocol on Biosafety was established by the CBD COP in its Decision II/5 of COP 2 (II/5, November 1995). The decision is appended to this document as Annex II.
Terms of reference	<p>The Group was established pursuant to the decision of the COP to seek solution to concerns outlined in Decision II/5, ‘through a negotiation process to develop, in the field of the safe transfer, handling and use of living modified organisms, a protocol on biosafety’.</p> <p>The terms of reference according to which the Group was to operate were set out in the Annex to the Decision, which provided that the Group was to: ‘elaborate, as a priority, the modalities and elements of a protocol based on appropriate elements from... the report of the Open-ended Ad Hoc Group of Experts on Biosafety’; consider the inclusion in the proposed protocol of specified elements; and elaborate the key concepts and terms to be addressed in the process. The Annex also specified principles which the protocol should take into account and conditions it should fulfil, and outlined a number of procedural requirements for the Group, including: that the process ‘be carried out on the basis of the best available scientific knowledge and experience, as well as other relevant information’; and that it be ‘guided by the need for all Parties to cooperate in good faith and to participate fully, with a view to the largest possible number of Parties to the Convention ratifying the protocol’.</p>
Timeframe	The process of developing a protocol on biosafety was to be conducted ‘as a matter of urgency’. The Executive Secretary of the Convention was to make the necessary arrangements for the Group to meet ‘as soon as possible, at least once before the next meeting of the Conference of the Parties’. The Group was to report to each subsequent meeting of the COP on its progress, and to ‘endeavour to complete its work in 1998’.
Meetings	<p>The Group held six sessions: the first in Aarhus, Denmark (22-26 July 1996) before COP-3, held in Buenos Aires, Argentina from 4-15 November 1996; the second, third, and fourth in Montreal, Canada (12-16 May 1997; 13-17 October 1997; 5-13 February 1998) before COP-4, held in Bratislava, Slovakia from 4-15 May 1998; and the fifth and sixth in Montreal, Canada (17-28 August 1998) and Cartagena, Colombia (14-19 February 1999), before the first extraordinary session of the COP, begun in Cartagena, Colombia from 22-23 February 1999 and reconvened in Montreal, Canada from 24-28 January 2000.</p> <p>Documentation of the sessions is available online at: http://www.biodiv.org/biosafety/background.shtml.</p>

Attendance at meetings	Sessions of the Group were attended by representatives of most of the Parties to the Convention, representatives of UN bodies and specialised agencies, intergovernmental organizations, nongovernmental organizations, and private sector representatives. Only Parties to the CBD were permitted to vote at the sessions.
Role of the treaty Secretariat	The Executive Secretary of the CBD arranged and serviced meetings of the Group. The Executive Secretary also conducted research and provided information at the request of the Group, particularly during the earlier stages of its negotiations. For example, after its first session, the Group requested that the Secretariat provide: a background document on existing international agreements relevant to a protocol on biosafety; a bibliography of relevant literature regarding both positive and negative potential socio-economic effects of biotechnology; and a glossary of relevant terms, for use at its second session.
Completion of the draft text of the protocol	At its sixth session, after much work in previous sessions to develop consolidated text upon which to base its negotiations, the Group considered and adopted its proposed text of a protocol.
Communication of the text to Parties to the Convention	The text of a proposed protocol, along with outstanding concerns of the Parties, was communicated to the CBD COP for consideration at its first extraordinary session, convened in February 1999 for the purpose of adopting a protocol on biosafety. Under Article 28 of the CBD, the text of any proposed protocol is required to be communicated to all Parties at least six months before the session of the COP at which it is proposed for adoption. ³ The final proposed text was communicated to Parties as an appendix to the Group's report to the first extraordinary session of the COP in February 1999.
Adoption of the protocol by the COP	The COP was not able to finalize its work on the protocol on biosafety in the time available at the first sitting of its first extraordinary session, and the negotiations were suspended and reconvened at a second sitting in January 2000. The Cartagena Protocol was adopted, by Decision EM-1/3, at this session. By this Decision, the COP called upon Parties to the CBD to become Parties to the Protocol as soon as possible, and called upon States that were not Parties to the CBD to become Parties to the CBD without delay, enabling them also to become Parties to the Protocol.

³ It appears that this requirement may have been satisfied by the communication to Parties of the Working Group's consolidated negotiating text, though it is difficult to verify this from the documentation available.

Annex I

Decision 1/CP.1

The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up

The Conference of the Parties, at its first session,

Having reviewed Article 4, paragraph 2(a) and (b), of the United Nations Framework Convention on Climate Change, and

Having concluded that these subparagraphs are not adequate,

Agrees to begin a process to enable it to take appropriate action for the period beyond 2000, including the strengthening of the commitments of the Parties included in Annex I to the Convention (Annex I Parties) in Article 4, paragraph 2(a) and (b), through the adoption of a protocol or another legal instrument:

I

1. The process shall be guided, inter alia, by the following:
 - (a) The provisions of the Convention, including Article 3, in particular the principles in Article 3.1, which reads as follows: "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof;"
 - (b) The specific needs and concerns of developing country Parties referred to in Article 4.8; the specific needs and special situations of least developed countries referred to in Article 4.9; and the situation of Parties, particularly developing country Parties, referred to in Article 4.10 of the Convention;
 - (c) The legitimate needs of the developing countries for the achievement of sustained economic growth and the eradication of poverty, recognizing also that all Parties have a right to, and should, promote sustainable development;
 - (d) The fact that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that the per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs;
 - (e) The fact that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in

accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions;

- (f) Coverage of all greenhouse gases, their emissions by sources and removals by sinks and all relevant sectors;
- (g) The need for all Parties to cooperate in good faith and to participate in this process.

II

2. The process will, inter alia:

- (a) Aim, as the priority in the process of strengthening the commitments in Article 4.2(a) and (b) of the Convention, for developed country/other Parties included in Annex I, both
 - to elaborate policies and measures, as well as
 - to set quantified limitation and reduction objectives within specified time-frames, such as 2005, 2010 and 2020, for their anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol,

taking into account the differences in starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort, and also the process of analysis and assessment referred to in section III, paragraph 4, below;

- (b) Not introduce any new commitments for Parties not included in Annex I, but reaffirm existing commitments in Article 4.1 and continue to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4.3, 4.5 and 4.7;
- (c) Take into account any result from the review referred to in Article 4.2(f), if available, and any notification referred to in Article 4.2(g);
- (d) Consider, as provided in Article 4.2(e), the coordination among Annex I Parties, as appropriate, of relevant economic and administrative instruments, taking into account Article 3.5;
- (e) Provide for the exchange of experience on national activities in areas of interest, particularly those identified in the review and synthesis of available national communications; and
- (f) Provide for a review mechanism.

III

3. The process will be carried out in the light of the best available scientific information and assessment on climate change and its impacts, as well as relevant technical, social and economic

information, including, inter alia, reports of the Intergovernmental Panel on Climate Change. It will also make use of other available expertise.

4. The process will include in its early stages an analysis and assessment, to identify possible policies and measures for Annex I Parties which could contribute to limiting and reducing emissions by sources and protecting and enhancing sinks and reservoirs of greenhouse gases. This process could identify environmental and economic impacts and the results that could be achieved with regard to time horizons such as 2005, 2010, and 2020.

5. The protocol proposal of the Alliance of Small Island States (AOSIS), which contains specific reduction targets and was formally submitted in accordance with Article 17 of the Convention, along with other proposals and pertinent documents, should be included for consideration in the process.

6. The process should begin without delay and be conducted as a matter of urgency, in an open-ended ad hoc group of Parties hereby established, which will report to the second session of the Conference of the Parties on the status of this process. The sessions of this group should be scheduled to ensure completion of the work as early as possible in 1997, with a view to adopting the results at the third session of the Conference of the Parties.

*9th plenary meeting
7 April 1995*

Annex II

Decision II/5

CONSIDERATION OF THE NEED FOR AND MODALITIES OF A PROTOCOL FOR THE SAFE TRANSFER, HANDLING AND USE OF LIVING MODIFIED ORGANISMS

The Conference of the Parties,

Recalling Article 19, paragraph 3, of the Convention on Biological Diversity,

Recognizing the link between paragraphs 3 and 4 of Article 19,

Recognizing also the link between Articles 8(g) and 19, paragraph 3,

Recalling its decision I/9 made at its first meeting, held in Nassau, Bahamas, from 28 November to 9 December 1994,

Having considered the report and recommendations prepared for its second meeting by the Open-ended Ad Hoc Group of Experts on Biosafety, which met in Madrid from 24-28 July 1995,

Recognizing that modern biotechnology has great potential for human well-being if developed and used with adequate safety measures for the environment and human health,

Recognizing also that, although considerable knowledge has accumulated, significant gaps in knowledge have been identified, specifically in the field of interaction between living modified organisms (LMOs) resulting from modern biotechnology and the environment, taking into account the relatively short period of experience with releases of such organisms, the relatively small number of species and traits used, and the lack of experience in the range of environments, specifically those in centres of origin and genetic diversity,

Noting that there is a need for further analysis of existing national, regional and international regulations and legally binding instruments of relevance to the impact of LMOs on the conservation and sustainable use of biological diversity,

Affirming that international action on biosafety should offer an efficient and effective framework for the development of international cooperation aimed at ensuring safety in biotechnology through effective risk assessment and risk management for the transfer, handling and use of any LMO resulting from modern biotechnology that may have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking into account the risks to human health, and taking also into account Articles 8(g) and 19, paragraph 4, of the Convention,

Considering that, although there are existing international agreements of relevance to the impact of LMOs resulting from modern biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity, none of these specifically address the transboundary movements of such LMOs, and therefore there is an urgent need to give attention to this issue,

Taking into account that the large majority of delegations present at the meeting of the Open-ended Ad Hoc Group of Experts on Biosafety favoured the development, within the context of an international framework for safety in biotechnology, of a protocol on biosafety under the Convention on Biological Diversity,

Stressing the importance of the urgent finalization of the United Nations Environment Programme International Technical Guidelines on Safety in Biotechnology and that this could contribute to the development and implementation of a protocol on biosafety, but noting that this does not prejudice the development and conclusion of such a protocol,

Noting that guidelines on biosafety, including the proposed United Nations Environment Programme International Technical Guidelines on Safety in Biotechnology, may be used as an interim mechanism during the development of the protocol and to complement it after its completion, for the purposes of facilitating the development of national capacities to assess and manage risks, establish adequate information systems and develop expert human resources in biotechnology,

1. Decides to seek solution to the above-mentioned concerns through a negotiation process to develop, in the field of the safe transfer, handling and use of living modified organisms, a protocol on biosafety, specifically focusing on transboundary movement, of any living modified organism resulting from modern biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity, setting out for consideration, in particular, appropriate procedure for advance informed agreement;
2. Decides to establish an Open-ended Ad Hoc Working Group under the Conference of the Parties which shall operate in accordance with the terms of reference in the annex to this decision;
3. Requests the Executive Secretary of the Convention to make the necessary arrangements for the Open-ended Ad Hoc Working Group to meet as soon as possible, at least once before the next meeting of the Conference of the Parties.

Annex to decision II/5

TERMS OF REFERENCE FOR THE OPEN-ENDED AD HOC WORKING GROUP

1. The Open-ended Ad Hoc Working Group should be composed of representatives, including experts, nominated by Governments and regional economic integration organizations.
2. The Open-ended Ad hoc Working Group shall, in accordance with operative paragraph 1 of the present decision:
 - (a) elaborate, as a priority, the modalities and elements of a protocol based on appropriate elements from Sections I, II and III, paragraph 18 (a), of Annex I of the report of the Open-ended Ad Hoc Group of Experts on Biosafety;

(b) consider the inclusion of the elements from Section III, paragraph 18 (b), and other elements, as appropriate;

3. The development of the draft protocol shall, as a priority:

(a) elaborate the key concepts and terms that are to be addressed in the process;

include consideration of the form and scope of advance informed agreement procedures;

identify relevant categories of LMOs resulting from modern biotechnology.

4. The protocol will have to reflect that its effective functioning requires that Parties establish or maintain national measures, but the absence of such national measures should not prejudice the development, implementation and scope of the protocol.

5. The protocol will take into account the principles enshrined in the Rio Declaration on Environment and Development and, in particular, the precautionary approach contained in Principle 15 and will:

(a) not exceed the scope of the Convention;

(b) not override or duplicate any other international legal instrument in this area;

(c) provide for a review mechanism;

(d) be efficient and effective and seek to minimize unnecessary negative impacts on biotechnology research and development and not to hinder unduly access to and transfer of technology.

6. The provisions of the Convention will apply to the protocol.

7. The process will take into full account the gaps in the existing legal framework identified through analysis of existing national and international legislation.

8. The process shall be guided by the need for all Parties to cooperate in good faith and to participate fully, with a view to the largest possible number of Parties to the Convention ratifying the protocol.

9. The process will be carried out on the basis of the best available scientific knowledge and experience, as well as other relevant information.

10. The process of developing a protocol should be conducted as a matter of urgency by an open-ended ad hoc group, which will report on progress to each subsequent meeting of the Conference of the Parties. The Open-ended Ad Hoc Working Group should endeavour to complete its work in 1998.