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Working Group on Genetically Modified Organisms
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ANALYSIS OF THE IMPLICATIONS OF VARIOUS LEGALLY BINDING OPTIONS FOR FURTHER DEVELOPING THE APPLICATION OF THE CONVENTION TO GENETICALLY MODIFIED ORGANISMS

Prepared by the secretariat in consultation with the Bureau

1. At its first meeting, the Working Group on Genetically Modified Organisms (GMOs) requested the secretariat, in consultation with the Bureau, to prepare an analysis of the implications, including advantages and disadvantages, of possible legally binding options for developing the application of the Convention in the field of GMOs (MP.PP/AC.2/2003/2, para. 28). The analysis should cover all the options raised in the Working Group's meeting and through the subsequent written commenting process agreed at that meeting, and should build upon the earlier legal analysis undertaken under the auspices of the previous Working Group on GMOs (CEP/WG.5/AC.3/2001/4).

I. PURPOSE AND OBJECTIVES OF THE EXERCISE

2. The purpose and objectives of the task which has been given to the Working Group flow to a large extent from its mandate as set out in decision I/4 of the Meeting of the Parties, especially paragraph 3.

3. From this mandate, it may be concluded that: (a) only legally binding options are to be considered; (b) the options under consideration should focus on the public participation aspects

of the Convention; and (c) the options under consideration should address deliberate releases, including placing on the market, and may address contained use.

4. The focus on the legally binding approach – albeit coupled with a requirement to take account of the Guidelines on Access to Information, Public Participation and Access to Justice with respect to GMOs (MP.PP/2002/6) and any experience acquired therewith – is consistent with the compromise reached during the preparatory process for the first meeting of the Parties, during which a significant number of delegations consented to work on the non-binding option of guidelines only on the understanding that work on the legally binding track would be resumed following the meeting of the Parties (see, for example, CEP/WG.5/AC.3/2002/2, paras. 17 and 20).

5. In discussing the purpose and objectives, it is also important to be clear about the need to avoid duplication with relevant work being undertaken in other international forums. The question of duplication arises in particular with respect to the Cartagena Protocol on Biosafety, because it is the main instrument on GMOs whose geographical scope potentially covers all the countries in the ECE region and because of its provisions on public awareness and participation (art. 23). For some countries, the issue of duplication may also arise with respect to the relevant EU legislation but in this case, even if the Aarhus process were to result in obligations identical to those under EU legislation, there would be an added value due to the additional countries in the context of the Aarhus Convention which are not covered by EU legislation.

6. An overview of relevant work being undertaken in other international forums and an examination of the relationship between instruments was provided in the earlier analysis (CEP/WG.5/AC.3/2001/4, paras. 30–77 and 98-101) and the detail of that analysis is not repeated here. However, the analysis did find that whereas the Cartagena Protocol's article 23 on public awareness and participation had a broad scope which appeared to cover both deliberate release and contained use in certain contexts, and furthermore contained some general requirements for public participation in a broad range of activities concerning living modified organisms (LMOs), that article did not elaborate the conditions for public participation in as much detail as article 6 of the Aarhus Convention (CEP/WG.5/AC.3/2001/4, paras. 39 and 40). Thus, as is suggested in the penultimate preambular paragraph of decision I/4, there can be a specific role for the Aarhus Convention in further developing public participation procedures in the field of GMOs which need not constitute duplication.

7. The primary purpose of the Cartagena Protocol is to regulate the transfer, handling and use of LMOs, with a specific focus on transboundary movements. In order to implement the provisions of the Protocol, its Parties will need to establish national regulatory frameworks pertaining to these matters, covering the various stages in the decision-making process. Notwithstanding the focus on transboundary movements, it may be expected that these regulatory frameworks will also cover the domestic level of permitting.

8. Another concern that has been mentioned with respect to the objective of the exercise is that whatever option is chosen should not have a negative effect on the progress towards ratification by States which have not yet become Party to the Convention. This issue is addressed below under the main options considered.

9. A number of representatives of countries with economies in transition have pointed out, to both the previous and the present Working Groups, that some of them do not have adequate

regulatory frameworks for activities involving GMOs, and that public participation in permitting processes as described in article 6 cannot be realized until the permitting processes themselves are put in place (see, for example, CEP/WG.5/AC.3/2001/2, para. 17; CEP/WG.5/AC.3/2001/3, para. 13; and MP.PP/AC.2/2003/2, para. 25).

10. This raises the question as to the extent to which the establishment of regulatory frameworks for GMOs (i.e. frameworks establishing permitting or licensing processes) could be part of the objective of a legally binding option for "further developing the application of the Convention in the field of GMOs" as required under the mandate. The mandate does not explicitly rule out this possibility, and it could be argued that establishing public participation procedures may include establishing certain preconditions for such procedures; and furthermore, that the obligation on the Working Group to take account of "the specific needs and situations of various countries", according to paragraph 3 (c) of decision I/4, provides for such an issue to be addressed.

11. On the other hand, there are several strong arguments pointing in the opposite direction, some of which have been mentioned in the Working Group:

(a) First, as already mentioned, according to paragraph 3 (b) of decision I/4, the Working Group is required to take into account "relevant work being undertaken … in other international forums, having in mind the need to avoid duplication and promote synergies". To the extent that the Cartagena Protocol contains requirements to establish the regulatory framework for GMO decision-making, of which the public participation procedures are a part, the inclusion of a general requirement in or under the Convention to establish a regulatory framework for decision-making on GMOs would be duplicative of the work in those other forums;

(b) Second, to include requirements in or under the Convention for the establishment of a regulatory framework for GMO decision-making would be to treat GMO decision-making in a different way to other decision-making covered by article 6 - or perhaps more accurately put, it would be to extend rather than reduce the differentiated treatment of GMOs which currently exists under the Convention. Decision-making on other activities for which public participation is required under article 6 may be more or less regulated in different States, but the Convention does not attempt to establish a common standard in this regard, or to require that permitting processes should be in place for all annex I activities. Rather it restricts itself to stipulating that where a permitting process exists for an article 6 type activity, the public participation procedures should apply within that process in the manner prescribed;

(c) A third consideration is that unless an obligation to establish a regulatory framework for GMO decision-making were extremely general in nature, it could be difficult and time-consuming to negotiate, and would inevitably involve addressing issues which conceptually fall outside the scope of the Convention.

12. These arguments suggest that it would be preferable to avoid introducing any requirement under the Convention that Parties should establish or maintain a regulatory framework for decision-making on GMOs, including permitting processes for deliberate release, placing on the market and contained use.

13. An argument that was put forward in one submission was that the only "need" of the countries with economies in transition is to establish national biosafety regulatory systems, rather than to introduce more precise legal requirements for public participation provisions than those already contained in the Convention and the Cartagena Protocol. This does not seem to be borne out by the comments of the delegations from the countries with economies in transition themselves, which have on the one hand tended to support the inclusion of more precise legally binding provisions for public participation in GMO decision-making (see for example CEP/WG.5/AC.3/2002/2, para. 19), while at the same time acknowledging the inadequacy of their national regulatory frameworks for GMOs. There is no inconsistency in this approach or implied breach of any hypothetical new obligation on public participation, because the obligations under article 6 are predicated on the assumption that the relevant permitting process is in place. It simply implies that where a regulatory framework with a permitting process is being established for the first time, the public participation procedures would be built in from the beginning.

14. In the following chapters, two ways of looking at options are considered: first, there are the various options for combining the scope of decision-making on GMOs with the scope of public participation procedures to be applied (described as options X, Y and Z). Second, there are various options regarding the legal form of whatever approach is pursued (amendment, protocol, decision etc. – described as options A, B, C etc.). Evidently there are some linkages between these two sets of options, and the paper attempts, at least to a limited extent, to identify some of these linkages. It has been considered to be beyond the scope of the paper to make an exhaustive study of the numerous substantive possibilities that might be pursued under any combination of the options presented here.

II. SCOPE OF DECISION-MAKING AND TYPE OF PUBLIC PARTICIPATION PROCEDURE

15. The issues of the scope of decision-making to be covered and the type of public participation procedures to be applied are considered together in this chapter, because there is a clear relationship between them. That relationship may be characterized as follows: the broader the range of GMO decision-making to be covered, the narrower the range of public participation procedures which it will be possible or at least appropriate to require; and conversely, the broader the range of public participation procedures which are to be applied, the narrower the scope of GMO decision-making will need to be. This is of course a generalization and it is not intended to rule out the possibility of a differentiated approach, with different procedures applying to different categories of GMO decision-making (e.g. deliberate release, contained use etc.), but within those categories, the inverse relationship would probably also apply.

16. One may identify three main options for combining the scope of decision-making with the range of public participation procedures:

(a) First, the public participation requirements set out in article 6, paragraphs 2 to 10, of the Convention could be applied unaltered to a certain range of GMO decision-making (option X). This corresponds to the option of an amendment to the Convention involving the addition of certain GMO activities to annex I, which was the only legally binding option discussed in any depth by the previous Working Group (see, for example, CEP/WG.5/AC.3/2002/2, paras. 14, 15 and 34; CEP/WG.5/AC.3/2002/4, para. 3, option II; CEP/WG.5/AC.3/2002/2, paras. 19-24 and

37; and CEP/WG.5/AC.3/2002/8, para. 3, option III); or possibly the addition of a new annex I bis containing certain GMO activities, linked with the article 6 procedures;

(b) Second, a special set of public participation requirements which would apply to a certain range of GMO decision-making could be developed (option Y). Within this option, several sub-options can be identified, according to whether the public participation requirements for GMO decision-making are a sub-set of those contained in article 6, paragraphs 2 to 10 (option Y1); include all of those contained in article 6, paragraphs 2 to 10, and some additional ones (option Y2); or are simply different from (which could mean either more or less extensive than) those under option X (option Y3);

(c) It would also be possible to have different public participation procedures for different categories of GMO decision-making (option Z). For example, there could be a different procedure for decision-making on deliberate releases than for decision-making on contained use, and these procedures could be more than, less than or simply different from the procedures required under article 6, paragraphs 2 to 10 (Z1, Z2 and Z3).

17. Apart from the obvious substantive differences in these various approaches, they each have somewhat different implications for the negotiating process, which may be summarized as follows:

(a) Under option X, the negotiation process would focus on the scope of GMO decision-making. The task facing the Working Group in developing this option would be simply to decide on what is an acceptable range of GMO decision-making to which the article 6 procedures would have to be applied. The effect of option X would be to group decision-making on GMOs (or at least the selected types of GMO decision-making) with other types of environmentally significant decision-making identified in annex I without distinction (except possibly with respect to paragraph 21 of annex I – see para. 33 below);

(b) Under option Y, there would effectively be two issues to negotiate simultaneously, each affecting the other. This is a common challenge in negotiations and certainly not an insuperable one, but it is likely that the negotiations would be somewhat more complicated than for option X. Conceptually, it is an approach which would continue to set GMO decision-making apart from other types of environmentally significant decision-making, and the reason(s) for doing so would need to be considered carefully (see also para. 36 below);

(c) Under option Y1, the task would be to identify which provisions of article 6 would be problematic to apply to certain GMO decision-making at the same time as deciding which sort of GMO decision-making should be covered at all. The Task Force on GMOs and the previous Working Group on GMOs both considered this issue in some detail (see paras. 29 and 30 below) and the outcome of their deliberations would provide some basis to build on if this option were to be pursued;

(d) Under option Y2, the full public participation requirements of article 6, paragraphs 2 to 10, would apply, and the questions to focus on would then be which additional public participation requirements should apply to the specific case of GMO decision-making, and (as in all cases) what would be the scope of decision-making covered;

(e) Under option Y3, article 6 could be used for reference or inspirational purposes but would not constrain the possibilities. Developing such an option might be more similar to the process of developing the Guidelines, in the sense that it would be a procedure tailor-made for the GMO context, but in binding (and possibly therefore more restricted) form;

(f) Under option Z and its various sub-options, the same considerations would apply as for option Y and its sub-options, except that each category of GMO decision-making for which a distinct public participation procedure is involved would need to be considered separately.

18. In considering the scope of decision-making to be covered, it is noteworthy that decision I/4 clearly differentiates between the deliberate releases of GMOs and the contained use of GMOs. The former *must* be included in any options developed by the Working Group, whereas the latter are to be *considered* for inclusion. That priority should be given to deliberate releases was already reflected in the specific references to deliberate releases both in the resolution of the Signatories (para. 15) and in the Convention itself (preambular para. 20, and art. 6, para. 11). That said, the Task Force and Working Group established under the authority of the Committee on Environmental Policy, whose work the present Working Group is required to build upon, did explore the issue of contained use. Furthermore, the issue of contained use features prominently in the Guidelines, which are also to be taken into account by the Working Group.

19. The Guidelines refer in paragraph 3 to three broad categories of decision-making on GMO, namely deliberate release, placing on the market and contained use, each of these terms being defined in annex I to the Guidelines. (Placing on the market is sometimes regarded as a form of deliberate release, including under EU legislation, but in the Guidelines the concepts are defined and addressed separately.) Paragraphs 4 and 5 of the Guidelines indicate to which types of decision-making within those categories the public participation procedures set out in the Guidelines should apply, and these may provide an important reference point for discussing the scope of decision-making which a legally binding option might encompass. For each category, different circumstances have been identified, either in the Guidelines or in the discussions in the present or former Working Groups, which could possibly reduce or even obviate the need for public participation requirements. These include inter alia:

(a) For deliberate release, “repeat releases” of a GMO where the GMO in question was originally released under comparable conditions (either in a particular location or in a different location from the original release, according to different views), where the authorization of the original release involved a certain public participation procedure (to be specified), or where “sufficient experience” has been obtained with the release of the GMO in question in a particular ecosystem;

(b) For placing on the market, GMOs which have already been placed on the market using a certain public participation procedure (to be specified) and cases where the GMO is being placed on the market exclusively for research or for culture collections; and

(c) For contained use, cases which do not involve the use of genetically modified micro-organisms (GMMs) belonging to the higher risk categories or which are foreseen for use in large-scale industrial installation, cases where contingency plans are not deemed necessary and cases where an authorization has already been granted for such use in a given installation using a certain public participation procedure (to be specified).

III. SOME POSSIBLE LEGALLY BINDING OPTIONS

General considerations

20. In considering options for a legally binding approach, there is a clear relationship between form and content. In other words, the appropriateness of a particular legally binding approach will depend upon the content, which in turn derives from the objectives. Some delegations have suggested that the issue of content must be discussed before the issue of form, and this appears to make sense, at least as a starting point. On the other hand, the choice of form will have implications for the more specific content, and thus for a period the discussion may need to go backwards and forwards between form and content.[1]

21. The two main options for a legally binding approach that have been put forward and drawn significant support in the Working Group and through the commenting process are an amendment to the Convention (with various ideas as to what form that might take) and a protocol to the Convention. Some other options have also been raised, such as a decision of the Parties. All of these options are discussed in the following paragraphs. However, it is important from the outset to be clear that the list of options discussed here is by no means exhaustive and it may be that other options emerge in the course of future discussions.

Option A: Amendment of the Convention

22. Before discussing the various options for amending the Convention, it is worth making some general remarks about the procedures relating to the adoption and entry into force of amendments to the Convention. These are set out in article 14 of the Convention. There is a common procedure for proposing and adopting all kinds of amendments, set out in paragraphs 1 to 3. However, the procedures pertaining to the entry into force of amendments are differentiated according to whether the amendment is to the body of the Convention or to an annex, as follows:

(a) If the amendment is an amendment to the body of the Convention, the 'opt-in' procedure set out in paragraph 4 applies: the amendment enters into force, for those Parties having ratified, accepted, approved or acceded to it, on the ninetieth day after the receipt by the Depositary of the notification of ratification, acceptance, approval or accession by at least three fourths of the Parties. For any Party ratifying, accepting, approving or acceding to the amendment subsequently, the amendment enters into force on the ninetieth day after that Party deposits its instrument with the Depositary;

(b) If the amendment is an amendment to an annex, the 'opt-out' procedure set out in paragraphs 5 and 6 applies: the amendment automatically enters into force twelve months after it has been circulated by the Depositary for all Parties which have not submitted a notification to the Depositary within that period indicating that they are unable to approve the amendment (unless more than one-third of the Parties have submitted such a notification, in which case the amendment does not enter into force at all and in fact becomes void).

[1] A recent example of the interplay between form and content is provided by the preparatory process for the Protocol on Pollutant Release and Transfer Registers.

23. The Convention does not explicitly address the situation of an amendment which involves altering text both in the body of the Convention and in an annex, where the two alterations are linked. In many such cases, it would simply not make sense for one part of the amendment to enter into force at a different time to the rest of the amendment. Indeed, it is usual that multilateral environmental agreements providing for different amendment procedures for the body of the agreement and its annexes specify that an amendment to an annex that involves an amendment to the body of the agreement shall not enter into force until the amendment to the body of the agreement enters into force.[2] In the absence of any such explicit provision along these lines, the practice of the Depositary would be to follow the procedure of those multilateral agreements which have made the procedure explicit. In other words, it may be assumed that if such a "hybrid" amendment were to be adopted under the Aarhus Convention, it should be treated under the paragraph 4 procedure, and that the procedure set out in paragraphs 5 and 6 (sometimes referred to as an expedited procedure) should apply only to amendments which exclusively involve amending the annex.

24. Some significance has been attributed in the Working Group to the difference between the procedures set out in paragraph 4 of article 14 on the one hand and in paragraphs 5 and 6 on the other. It is therefore perhaps important to point out that none of the options which have been put forward in the Working Group would involve amending only an annex, and therefore the procedure under paragraphs 5 and 6 is unlikely to apply. (For the sake of discussion, an option involving only an amendment to annex I has been briefly considered below but is not considered particularly viable.) Furthermore, it should be noted that under either procedure, any Party wishing not to be bound by an amendment may choose not to be bound by it, either by not opting in or by opting out. The opt-out character of the procedure set out in paragraphs 5 and 6 does not alter this formal reality, but there may be a concern that if an administration is 'sleeping' at the wrong moment, it may inadvertently find itself having taken on a new obligation.

25. If an amendment has already entered into force when a State ratifies, accepts, approves or accedes to a convention, the State retains the right to express its intention not to be bound by the amendment irrespective of the procedure through which the amendment has entered into force.[3]

26. A general disadvantage of amendment procedures where each Party is free to decide to be bound or not to be bound by the amendment is that, if many amendments are adopted, it can lead to a situation where there are many different types of Parties, all having different obligations, according to which amendments they have agreed to be bound by.

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[2] E.g. the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; the 1992 United Nations Framework Convention on Climate Change; the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; the 2001 Stockholm Convention on Persistent Organic Pollutants; and finally, the Aarhus Convention's own 2003 Protocol on Pollutant Release and Transfer Registers.

[3] The Vienna Convention on the Law of Treaties, article 40, paragraph 5, states as follows:
"Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, *failing an expression of a different intention by that State*:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement." (emphasis added)

27. Various options for amending the Convention have been mentioned in the Working Group and through the commenting process. These are listed and numbered here for convenience, with an indication of the options referred to in paragraph 17 above to which they appear to correspond most closely:

- A1: Deletion of article 6, paragraph 11, and addition of certain GMO activities to annex I (option X)
- A2: Amendment of article 6, paragraph 11, and addition of new annex I bis (options X, Y or Z)
- A3: Addition of new article 6 bis and addition of new annex I bis (options Y or Z)
- A4: Amendment to article 6, paragraph 11, only (option Y)
- A5: Amendment to annex I only (options X, Y or Z)
- A6: Addition of new annex without amending the body of the Convention (options X, Y or Z)
- A7: Amendment to article 6, paragraphs 1 (b) and 11 (option X)
- A8: Amendment of article 2 (option Y)

These are now considered in turn.

A1: Deletion of article 6, paragraph 11, and addition of certain GMO activities to annex I (option X)

28. The option that has been most discussed within the Convention's processes involves the deletion of article 6, paragraph 11, and the inclusion of a reference to certain types of GMO decision-making in annex I.

29. The Task Force considered this option at its first meeting (Sofia, April 2000). It concluded that paragraphs 2-5, 7-8 and 10 of article 6 could be applied to the deliberate release of GMOs without any adjustment but that some aspects of paragraphs 6 and 9 might be problematic (CEP/WG.5/2000/6, paras. 29-31).

30. The previous Working Group considered the matter further, taking into account the findings of the task force (CEP/WG.5/AC.3/2001/2, paras. 18-23). It concluded that the procedures set out in paragraphs 2 to 10 could be applied to first-time deliberate releases and first-time placing on the market without modification, while noting that some interpretive guidance might be useful. Views were more mixed with regard to subsequent deliberate releases and releases where 'sufficient experience' had been gained, as well as renewals of authorizations for placing on the market and the making available of GMOs for research purposes and culture collections. Most delegations supported or did not oppose full application of the article 6 procedures to first-time contained use of GMMs from the higher risk classes in large-scale installations, whereas views were again mixed in relation to other cases of contained use.

31. The draft text of an amendment along these lines was prepared under the auspices of the previous Working Group (CEP/WG.5/AC.3/2002/8, para. 3, option III) and was used by the present Working Group at its first meeting as a tool for discussing the substantive issues.

32. This option falls under option X, whose characteristics are described in paragraphs 16 (a) and 17 (a) above. Several delegations have expressed their support for an amendment along these lines on the grounds that it would in their opinion take less time and resources than other options

and would be more directly related to the Convention itself. Different options for locating the text on GMOs within annex I have been mentioned, namely as a new paragraph 18 bis or 19 bis or as part of paragraph 19.

33. It was noted during the first meeting of the Working Group that the relation between paragraph 21 of annex I and whatever GMO activities might be included in annex I would need to be considered (MP.PP/AC.2/2003/2, para. 22). Paragraph 21 exempts any of the projects covered by the preceding paragraphs where these are "undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health." Some delegations have put forward the view that paragraph 21 should not apply to GMO activities. If this were to be the view of the Working Group, it would be necessary to find a drafting solution to accommodate GMO activities in annex I without them being covered by paragraph 21.[4]

A2: Amendment of article 6, paragraph 11, and addition of new annex I bis (options X, Y or Z)

34. The idea of adding a new annex on GMOs was first raised in the Task Force on GMOs (CEP/WG.5/AC.3/2001/3, para. 8 (e), 15 and 19). The Task Force concluded that on the one hand, a new annex could be "broad in scope … and address the specific characteristics of GMO activities" as distinct from annex I activities; and that, on the other hand, a separate annex could "distort the balance of the Convention and highlight the GMO issue too strongly".

35. The option of a new annex was further explored in the analysis prepared for the first meeting of the former Working Group. That analysis suggested that "the adoption of a new annex would be inappropriate unless the application of article 6 to GMOs required detailed elaboration" (CEP/WG.5/AC.3/2001/4, para. 97) and that the option would not provide a distinct benefit as compared with the option of amending annex I unless "the Parties wished to elaborate in much greater detail the way in which article 6 applies to decisions involving GMOs or if they wished to address the implementation of the Convention in the context of GMOs (arts. 4, 5, 7 and 9, for example)" (CEP/WG.5/AC.3/2001/4, para. 96). The latter justification would appear to have been ruled out by the focus of the mandate under decision I/4 on the public participation pillar. The former justification remains nonetheless a possibility. In any event, having studied the analysis, the former Working Group decided not to explore the option.

36. The option of a new annex has been raised again under the auspices of the present Working Group. Some delegations have felt it important to distinguish GMO activities from annex I activities, and having a separate annex would be one way to achieve this. Although no detailed justification for such a distinction has been put forward and some concerns have been raised about elevating the profile of GMOs within the Convention, one argument which has been mentioned is the notion that whereas the items listed in annex I tend to be location-specific, this is not the case with placing on the market of GMOs. If deliberate releases of GMOs were to be defined to include placing on the market, or if placing on the market were to be otherwise included, the implications of this would need to be considered. For example, the 'public concerned' with respect to a case of placing a GMO on the market would generally be a

[4] For example, the GMO text could be inserted after paragraph 21, or the phrase "the above projects" in paragraph 21 could be revised to read "the projects referred to in paragraphs 1 to 20".

geographically dispersed group. That said, it is not immediately clear why this would pose any problem for the application of the relevant provisions of article 6 (namely those in paragraphs 2, 5 and 6).

37. A second possible argument would be that alluded to in the earlier analysis, namely the level of detail. However, the length of new text is not on its own a reason to prefer a new annex over an insertion in the existing annex I.

38. A third possible argument concerns the problem relating to paragraph 21 of annex I. However, as indicated in paragraph 33 above, it should be possible to find a drafting solution within annex I, so this is not an overriding argument.

39. A further argument which has been put forward by some delegations and opposed by others is that a new annex could address issues relating to parts of the Convention other than article 6. Given that the mandate requires the focus to be on the public participation aspects of the Convention, this would tend to point to articles 7 and 8. While the idea of strengthening public participation requirements in the development of plans, programmes, policies, regulations and rules might be attractive to some, one would need to consider why GMOs would need special treatment under these articles given that no other specific areas are singled out in them, and whether the phrases "relating to the environment" (art. 7) and "that may have a significant effect on the environment" (art. 8) would not be sufficient to capture GMO decision-making to the desired extent.

40. Probably the most convincing reason to favour a new annex on GMOs, as opposed to an amendment to annex I, would be if it were decided to have a set of public participation provisions applying to GMOs different from those applying to annex I activities. In this case, the range of public participation procedures applying to GMO decision-making could be set out in an amended article 6, paragraph 11, possibly through cross references to the relevant paragraphs of article 6 specifying which of these would or would not apply, and the scope of decision-making (i.e. the thresholds for each category of GMO decision-making) could be set out in the new annex, following the approach in annex I. This suggests that it would be important for the Working Group to reach a substantive decision on whether the public participation procedures for the types of GMO decision-making to be covered would be the same or different from those applying to annex I activities, i.e. to make the choice between option X on the one hand and options Y or Z on the other.

41. The option of a new annex linked to a revised article 6, paragraph 11, might be the most suitable if the intention were to introduce specialized participation procedures for GMO decision-making which cannot be described through simple cross references to earlier paragraphs (in accordance with option Y3 in para. 16 above). If this were the substantive choice of the Working Group, it would be consistent with the present division of content between article 6 and annex I to address the public participation procedures in the operative provisions, i.e. in the text replacing article 6, paragraph 11, which might be one or more new paragraphs, even at the risk of over-emphasizing one particular area of activity in the Convention; and to address the scope of decision-making in the new annex.

A3: Addition of new article 6 bis and addition of new annex I bis (options Y or Z)

42. A variation on the previous option would be to place the text establishing the obligation to provide for public participation in GMO decision-making and containing the reference to the new annex in a separate article rather than in an amended article 6, paragraph 11. There do not appear to be any particular advantages to this variation and indeed it could be said to run counter to the structure of the Convention, according to which each article covers a major theme. Article 6 currently covers all project-level decision-making and the idea that there would be another article on project-level decision-making just for one particular type of activity would arguably give a greatly disproportionate emphasis to just one of many areas of decision-making.

A4: Amendment to article 6, paragraph 11, only (option Y)

43. An option mentioned in the Working Group was that of amending article 6, paragraph 11, without amending any other parts of the text. This could be done in such a way as to clarify or eliminate the terms considered by the task force to be insufficiently clear, namely "feasible and appropriate", "within the framework of its national law", "provisions" and "deliberate release" (see CEP/WG.5/2000/6, para. 24).

44. This option would probably be most appropriate if the intention were to reduce the level of vagueness in article 6, paragraph 11, without going so far as to unambiguously apply the public participation provisions set out in paragraphs 2 to 10 of article 6. The obvious risk of such an option is that it might fall short of meeting the identified need for "more precise provisions".

45. The option might also be attractive if it were decided to unambiguously apply some but not all of the paragraphs 2 to 10 to certain GMO decision-making (spelling out the meaning of "provisions") or to apply all of the paragraphs 2 to 10 and some additional public participation requirements (in line with option Y1 and Y2 in para. 16 above), provided that the scope of decision-making to be covered could be described in relatively simple terms. If the text involved descriptions of differentiations to be made under each of the three GMO decision-making categories, as is done in the Guidelines, this would result in a lengthy text which would tend to increase the anomaly that one area of activity, GMOs, receives specific mention whereas no other specific types of activity are even referred to at all in the rest of article 6. In that case, it might be better to place the text describing the scope of GMO decision-making in an annex, following the analogy with annex I.

A5: Amendment to annex I only (options X, Y or Z)

46. One option would be to amend annex I by adding certain GMO activities to it, without amending the body of the Convention. However, it is doubtful whether this option would be substantively viable, because the addition of certain GMO activities to annex I without any amendment of article 6, paragraph 11, would almost amount to an internal contradiction and could create a fundamental problem of ambiguity in interpretation. The category of GMO activity which would be the most likely to be included in annex I, if any, is deliberate releases of GMOs (howsoever circumscribed). If this is included in annex I, this would appear to establish, through article 6, paragraph 1 (a), a clear obligation to apply the public participation procedures set out in article 6, in apparent contradiction with the vaguer provision in article 6, paragraph 11.

A6: Addition of new annex without amending the body of the Convention (options X, Y or Z)

47. Another possibility would be to add a new annex. While there are examples of annexes to treaties which are not referred to at all in the body of the treaty,[5] the more normal practice would be that every annex is referred to within the body of the treaty text, meaning that the addition of a new annex would be accompanied (in the same amendment) by the addition of a cross reference in an operative provision of the text.

48. As regards the amendment procedure in such a case, the addition of a new annex is not the same as an amendment to an annex, and therefore the paragraph 4 procedure would apply (see also CEP/WG.5/AC.3/2001/4, para. 95).

A7: Amendment to article 6, paragraphs 1 (b) and 11 (option X)

49. Paragraph 1 (b) of article 6 requires Parties to apply the provisions of that article to activities not listed in annex I "which may have a significant effect on the environment". The obligation is qualified by the phrase "in accordance with its national law" and the provision goes on to mandate the Party to determine which activities are subject to the provisions. Activities with GMOs which may have a significant effect on the environment should in principle already be covered by this provision, but it has been proposed by one delegation, as one option for consideration, that the provision could be amended to specify which types of GMO activity have a significant effect on the environment and to reduce or remove any discretion given to Parties by the phrase "in accordance with national law" to exempt such activities. According to the proposal, paragraph 11 would also need to be amended, presumably to avoid the risk of potential conflict or ambiguity between the two paragraphs.

50. On the face of it, the proposal seems to have some disadvantages, and this is to some extent acknowledged by its proponent. First, the provision in question was the outcome of a delicate balancing act during the negotiation of the Convention in which all kinds of environmentally significant activities not covered by annex I had to be taken into account. If one of the purposes of the amendment is to reduce the amount of discretion given to Parties to determine which GMO activities are environmentally significant, this would not only require the removal of the phrase "in accordance with its national law" but also, and arguably more important, would require some amendment of the second sentence giving Parties the mandate to determine what is environmentally significant.[6] However, any amendment of these expressions would clearly affect not only GMO activities but many non-GMO activities, and this would appear to stray outside the mandate of the Working Group. More generally, one could say that paragraph 1 (b) serves a general function in "capturing" a wide unspecified range of activities beyond those listed in annex I and is not necessarily an appropriate place to mention any particular type of activity. Finally, if the proposal is to amend paragraph 11 rather than delete it, this would raise the question as to why the issue could not better be dealt with in one place, i.e. paragraph 11, rather than split between two paragraphs. In short, the idea may have merits but they have yet to be demonstrated.

[5] For example, Decision IV/9 of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal amends the Convention's annex I and adds two new annexes to clarify the obligations in the Convention.

[6] For a discussion of this question, see the Implementation Guide on the Aarhus Convention, (ECE/CEP/72, pp. 30 to 31 and 92 to 94).

A8: Amendment of article 2 (option Y)

51. One option mentioned in the Working Group but not elaborated upon either at the meeting or in subsequent comments was that of amending article 2. One possible purpose behind such an amendment would be to define the term 'deliberate release' As the secretariat has received no further information on the intention behind this option, it is not elaborated upon here.

Option B: Protocol to the Convention

52. Article 10, paragraph 2 (e), of the Convention empowers the Meeting of the Parties to prepare protocols to the Convention. Such protocols are signed and ratified separately from the parent convention, and being a Party to the convention does not imply any obligation to become a Party to its protocols. Generally, protocols have only been open to ratification by Parties to the parent convention, but recently some protocols, including the recently adopted Protocol on Pollutant Release and Transfer Registers (PRTR), have been open to signature and/or ratification by non-Parties to the parent convention (this being specified in the text of the protocol itself). In any case, a distinct step is involved in becoming a Party to a protocol.

53. The notion of adopting a protocol on GMOs was initially considered by the task force (CEP/WG.5/2000/6, para. 25 and CEP/WG.5/AC.3/2001/3, para. 18). The task force noted that a protocol "like a new annex.... could be broad in scope, rather lengthy but also more inclusive"; that it could take "considerable time and resources to develop a protocol"; and that it could "be in conflict with or result in some duplication of existing instruments". This last observation probably links with the idea that a protocol could be broad in scope, covering issues which are addressed for example in the Cartagena Protocol.

54. The protocol option was subsequently examined in the analysis prepared for the former Working Group (CEP/WG.5/AC.3/2001/4, paras. 93-94). Its implicit conclusion was that a protocol would not necessarily be justified unless there were sufficient breadth of content. At that stage, the only objectives which had been put forward were sufficiently narrow, according to the analysis, to be achieved more effectively through an amendment, and therefore the analysis did not go into any detail on the option.

55. It is clear that adopting a protocol would be a 'heavyweight' option in several respects. It implies that there is sufficient breadth of content, and that there is a long-term need which cannot be met through the Convention or other international agreements. Negotiating a protocol would be time-consuming and therefore resource-intensive. It took eight sessions of a Working Group and several drafting group sessions over a two-year period to prepare the text of the recently adopted Protocol on PRTRs. A risk of the protocol option that has been mentioned is that it would lead to attempts to renegotiate the Convention. This risk would be greater if it were decided to prepare an open protocol (i.e. open to non-Parties to the Convention).

56. Once established, a protocol has an ongoing existence. The positive aspect of this is that it would be more likely that the issue of GMOs would be kept under permanent review and that a work programme would be developed, and there would be a mechanism creating a pressure for further progress. However, it would be possible to carry out the same activities under the Convention without developing a protocol, e.g. by including GMO activities under the work programme of the Convention. A negative aspect of the protocol option is that this entails a long-term commitment of time and resources – even if certain economies could be achieved by

combining meetings of the governing body of the protocol with meetings of the Parties to the Convention.

57. As with a standard amendment to the text of the Convention, a protocol does not become legally binding upon a Party unless the Party decides to become bound by it and takes the necessary action. However, it is perceived as being more separate from the Convention than an amendment, and this was cited in the former Working Group as a possible advantage in that there would be less risk of the preparation of the protocol having a deterrent effect on the ratification process for the Convention (even if, as one delegation put it, it is generally a matter of "psychology" rather than legal reality).

58. If it were decided to prepare a legally binding option addressing all three pillars of the Convention in some detail, i.e. a binding version of the Guidelines, or even addressing broader issues such as the establishment of national biosafety frameworks, a protocol might be the most appropriate option. However, since the Meeting of the Parties has deemed that the options should focus on the public participation aspects of the Convention, that option is not up for consideration. Even if it were, the broader the scope, the greater the risk of duplication with other international agreements (notably the Cartagena Protocol).

59. The substantive option which is least easy to accommodate through an amendment (though still possible) would be where a completely tailor-made procedure is used for GMO decision-making, with many differences from the standard article 6 procedure (option Y3), and this is perhaps an option for which it might be appropriate to consider a protocol.

Other options

60. Various other options have been mentioned but up to now these have not received much support. They are nonetheless listed here for completeness.

Option C: Decision of the Parties

61. Any of the options discussed above might be accompanied by a decision of the Parties (e.g. a decision of the Parties adopting an amendment). However, the option of a decision of the Parties on its own has also been discussed in both the present and former Working Groups as well as in the task force and in the earlier analysis. The analysis concluded that while, under very specific circumstances, a decision of the Parties to a treaty may be legally binding, this is not generally the case and does not appear to be the case with the Aarhus Convention (CEP/WG.5/AC.3/2001/4, paras. 80 and 81). The former Working Group took a similar view and did not pursue the option (CEP/WG.5/AC.3/2001/2, para. 14). The option also received almost no support at the first meeting of the present Working Group. Since the mandate of the Working Group is clearly limited to exploring legally binding options, and since no arguments have been advanced to suggest that a decision of the Parties would be legally binding, this option is not explored further here. However, it is worth mentioning that a decision of the Parties, either accompanying one of the other options or as a 'stand-alone' decision in the event of failure to reach agreement on any of the other options, might provide an opportunity to establish non-binding guidance on the interpretation of binding provisions.

Option D: Rendering the Guidelines legally binding

62. The option of the Guidelines being adopted as legally binding has been mentioned. It is not entirely clear by what mechanism the Guidelines could be given legally binding status, but, that aside, there would inevitably be problems in attempting to do so with a text which has been negotiated precisely on the understanding that its provisions would be non-binding. At best, it could serve as an important reference text for negotiating a protocol. A further problem concerns the scope of the Guidelines, which is not limited to the public participation pillar and therefore extends beyond the scope of the options which the Working Group has been asked to explore and develop. Since the option was only raised by a delegation which wished to express its reservations about it, and since there seem to be several disadvantages, this option is not further explored here.

Option E: The 'zero option'

63. Some delegations have raised the issue as to whether any further development of the Convention is needed and have indicated that the 'zero option' should also be considered alongside other options.

64. According to the wording of decision I/4, it is questionable whether such an option is covered by the mandate of the Working Group. The third sentence of paragraph 3 states that "The options under consideration shall be designed to further develop the requirements for public participation in decision-making on deliberate releases of GMOs…". It is difficult to see how the option of taking no action could be considered to be an option "designed to further develop" the said requirements, and through the reference to "*The* options", the text is presented as an elaboration on the previous sentence and does not seem to allow for the possibility that other options could be considered.

65. It would, of course, be open to the Meeting of the Parties not to decide upon, or to decide not to adopt, any or all of the options presented to it by the Working Group. Decision I/4 simply says that the option should be put forward "for *possible* decision and, *if appropriate*, adoption" (emphasis added). Thus it can be said that the "zero option" remains available to the Meeting of the Parties, but the wording of the decision does not appear to allow for the zero option to be included as one of those to be considered by the Working Group and presented to the Meeting.