# Preamble

131. *The preamble of an international agreement sets out the context in which the agreement was negotiated and concluded. Under general rules of treaty interpretation the preamble is not considered to be part of the legally binding or "operative" text of the agreement. Instead the preamble forms part of the "context" in which the agreement's obligations must be interpreted. It often recalls and refers to any related international agreements that may have provided the mandate for the negotiations or that the negotiators felt were in other ways relevant to the agreement. In practice, negotiators will also often include in the preamble references to principles or concepts that are relevant to the international agreement, but that proved too controversial to be included as binding obligations in the operative text.*

**The Parties to this Protocol,**

***Being*** **Parties to the Convention on Biological Diversity, hereinafter referred to as "the Convention",**

132. The opening preambular paragraph indicates that this international agreement is a Protocol to the CBD, and that it has been negotiated and adopted by the Parties to the CBD, in accordance with Article 28 of the CBD. The background to these negotiations is described in the Introduction.

***Recalling*** **Article 19, paragraphs 3 and 4, and Articles 8 (g) and 17 of the Convention,**

133. Article 19(3) of the CBD established the mandate for the negotiation of a Protocol on Biosafety. It requires the Parties to the CBD to:

> consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling, and use of any LMO resulting from biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity.

134. Article 19(4) creates a general obligation for Parties to the CBD to provide information on any LMO transferred to another Party. This obligation exists in the CBD independently of the Protocol – it is thus binding on States that are Parties to the CBD even if they do not become Parties to the Protocol.

135. Article 8 (g) of the CBD requires Parties to:

> [e]stablish or maintain means to regulate, manage or control the risks associated with the use and release of LMOs resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health.

136. Article 8(g) obliges Parties to the CBD to regulate risks associated with LMOs at the national level, including both domestically produced and imported LMOs. The reference to "risks to human health" in Article 8(g) is also incorporated into the scope of the Protocol (see Introduction).

137. Article 17 of the CBD deals with exchange of information. The reference here underlines the importance of information-sharing for biosafety regulation, particularly for developing countries.

***Recalling*** **also decision II/5 of 17 November 1995 of the Conference of the Parties to the Convention to develop a Protocol on biosafety, specifically focusing on transboundary movement of any living modified organism resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, setting out for consideration, in particular, appropriate procedures for advance informed agreement,**

138. This paragraph recalls the legal basis for the launch of the Protocol negotiations, i.e. decision II/5 adopted at the second meeting of the CBD COP in Jakarta in 1995. This is described more fully in the Introduction.

***Reaffirming*** **the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development,**

139. This reference to Principle 15 of the Rio Declaration places the Protocol and its precautionary approach to regulating LMOs in the context of a historical and broader international recognition of the importance of precaution in protecting the environment. The precautionary approach is also referred to or reflected in certain operative provisions of the Protocol. The precautionary approach is discussed in the Introduction, as well as in the commentary on the relevant operative provisions (see commentary on Articles 1, 10(6) and 11(8)).

***Aware of*** **the rapid expansion of modern biotechnology and the growing public concern over its potential adverse effects on biological diversity, taking also into account risks to human health,**

***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,**

140. These two paragraphs reflect key perspectives in the biosafety debate, namely, on the one hand, recognition of the potential benefits of modern biotechnology, and, on the other, concerns over potential effects of LMOs on the environment and on human health. These are considered in more detail in the Introduction to this guide.

***Recognizing also*** **the crucial importance to humankind of centres of origin and centres of genetic diversity,**

141. By pointing out here that centres of origin and centres of genetic diversity (see Box 9) are of crucial importance to humankind, this paragraph signals the need for special care in conserving them, and, in this particular instance, the need to take into consideration potential effects of LMOs on such centres. This is a particular concern for States which host centres of origin and centres of genetic diversity. This concern is also echoed in Annex I and Annex II, which require information on the centres of origin and centres of genetic diversity, if known, of the recipient organism and/or the parental organisms, to be provided by the Party of export in the notification and information required under Articles 8 and 11 respectively.

**Box 9. Centres of origin and centres of genetic diversity**

A centre of origin is the area where a particular organism was first domesticated and brought into use by humans. Centres of origin may still retain a very high diversity of the genetic resources base and wild relatives from which the organism concerned was domesticated.

A centre of genetic diversity is an area where there is a high diversity present amongst a particular group of related species – either within a family, genus, or sub-species, varieties, cultivars, strains, or other sub-categories within a species.

***Taking into account*** **the limited capabilities of many countries, particularly developing countries, to cope with the nature and scale of known and potential risks associated with living modified organisms,**

142. This paragraph points to the need for capacity-building for biosafety, which is reflected in several operative provisions of the Protocol, in particular Article 22.

***Recognizing*** **that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,**

***Emphasizing*** **that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,**

***Understanding*** **that the above recital is not intended to subordinate this Protocol to other international agreements,**

143. The three paragraphs above address the relationship between the Protocol and any other international agreements which relate to the same subject matter as the Protocol. They can be read to guide the interpretation of the Protocol in circumstances when a Party's rights and obligations under the Protocol overlap with its rights and obligations under any "existing" or "other" international agreements. It is clear from the Protocol's negotiating history that these paragraphs were added to the preamble in order to address concerns arising from Parties' obligations under the World Trade Organization.

144. The combined effect of these three paragraphs is ambiguous, and produces a counterbalanced logic that leaves the interpreter little specific guidance as to how to resolve any conflict that may arise between the Protocol and any other international agreement. Ultimately, these paragraphs may be taken to reflect the Parties' awareness of the potential for conflict and their aspiration that any such conflict be resolved in a manner that respects both instruments.

145. A more detailed analysis of the relationship between the Protocol and the WTO is provided in the Appendix.

### Relationship between the Protocol and other international agreements

146. During the negotiations, various delegations were concerned that the Protocol's efforts to regulate the international trade in LMOs could either undermine, or be undermined by, existing WTO rules. WTO rules regulate the trade in all products between its Members, including trade in LMOs. For example, the WTO requires Members to ensure that trade measures do not unnecessarily discriminate between like products, and that health and safety restrictions on imports have a scientific basis. Trade-related issues may arise from the implementation of the Protocol if Parties have conflicting perceptions of the differences between LMOs and conventional products, and of the risks associated with LMOs.

147. The Protocol was negotiated in the context of an international debate on the desirability, necessity, and safety of LMOs, their means of production and their by-products. Many governments were in the process of developing domestic and regional rules and procedures designed to regulate the trade, sale and use of LMOs. Although no dispute related to LMOs had been brought to the WTO, in the mid-1990s other conflicts related to food safety were working their way through the WTO's new and powerful dispute settlement system. During the course of the Protocol negotiations, the WTO heard disputes between the US and the EC over European bans on the import of hormone-treated beef,[42] between Canada and Australia over Australian restrictions on the import of fresh salmon,[43] and between the US and Japan over Japanese techniques to control pest infestations in fruit.[44] Each dispute involved a challenge of the WTO compatibility of a trade measure put in place to regulate threats to human, animal or plant life or

[42] *European Communities – Measures Affecting Meat and Meat Products*, complaint by the USA (EC – Hormones), WT/DS26, WT/DS26/AB/R, 13 February 1998.

[43] *Australia – Measures Affecting the Importation of Salmon*, complaint by Canada (Australia – Salmon), WT/DS18, WT/DS18/AB/R, 6 November 1998.

[44] *Japan – Measures Affecting Agricultural Products*, complaint by USA (Japan – Varietals) WT/DS76/AB/R, 19 March 1999.

health. Each dispute involved questions of the adequacy of scientific assessments of risk, and, in each case, the judgement of a domestic regulator was overturned as having an insufficient scientific basis and as violating a WTO discipline.

148. Concerned about the potential for a similar clash over the regulation of LMOs, different groups of negotiators sought *either* (i) to shield measures taken in accordance with the Protocol from a WTO challenge, *or* (ii) to ensure that, should a conflict arise, the WTO rules would prevail. This is not unusual in the design of treaties. Through the inclusion of "savings" or "conflicts" clauses, new international agreements can specify that they are subject to an earlier or later treaty. The compromise that emerged from the Protocol's negotiation follows closely the approach taken by the negotiators of the 1998 Rotterdam Convention on Prior Informed Consent (the "Rotterdam Convention"). The result is three paragraphs of preambular text that seek to counterbalance and accommodate the concerns of various delegations, in a manner that is intended overall to avoid conflicts between the Protocol and existing international law.

***Recognizing*** *that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,*

149. The ninth paragraph reflects the aspiration of Protocol Parties that trade agreements (for example, the WTO Agreements) and environment agreements (for example, the Protocol, the CBD and other MEAs) "should be mutually supportive." This paragraph seeks to direct both domestic authorities and any relevant international body, to interpret and apply the Protocol and trade agreements in a manner that achieves the goals of both regimes.[45] The provision reflects a general rule of treaty interpretation that agreements between the same States and covering the same subject matter should be interpreted in such a way that promotes their compatibility.

150. The term "mutually supportive" has, furthermore, taken on a particular meaning within the trade and environment context. The term is drawn from the work of the WTO's Committee on Trade and Environment (WTO-CTE), which has been reviewing the relationship between the WTO and MEAs since 1995. In 1996, the WTO Ministerial Conference endorsed the report of the WTO-CTE which had concluded that:

> WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them, due respect must be afforded to both.[46]

151. In 2001, the WTO Ministerial Conference adopted the Doha Development Agenda, which mandates the WTO-CTE to revisit the relationship between the WTO and MEAs. Ministers agreed, with a view to enhancing the mutual supportiveness of trade and environment, "to negotiations, without prejudging their outcome, on:

> … the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question."

It is not yet clear what the implications of these negotiations, if any, will be for Parties to the Protocol.

***Emphasizing*** *that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,*

***Understanding*** *that the above recital is not intended to subordinate this Protocol to other international agreements,*

152. The tenth and eleventh paragraphs anticipate cases where the spirit of "mutual supportiveness", described in the ninth paragraph, is not sufficient to avoid or resolve a conflict

[45] The Protocol text is nearly identical to the text in the 8th preambular paragraph of the Rotterdam Convention which reads: "Recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development."

[46] Report of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, para. 171; Section VII of the Report of the General Council to the 1996 Ministerial Conference, WT/MIN(96)/2, 26 November 1996.

between the Protocol and any "existing" or "other" international agreement. While these paragraphs apply generally to *all* international agreements to which Protocol Parties are also party, they were also designed with the WTO Agreements specifically in mind. The tenth paragraph emphasizes that by joining the Protocol, a Party does not intend to give up its rights or obligations under any existing international agreement.[47]This text resembles a "savings" or "conflict" clause.[48]When such a clause appears in the operative text of a treaty, it can indicate which treaty – the existing treaty or the new treaty – the Parties intended to prevail in the case of a conflict.[49]

153. The tenth paragraph needs to be understood in the context of general principles of treaty interpretation. When it was adopted the Protocol was, of course, later in time than any "existing" international agreements, including the WTO Agreements. General principles of treaty interpretation could support an argument that as the more recent agreement, the Protocol was intended to prevail over any existing agreement between the same States and governing the same subject matter.[50] Furthermore, supplementary rules of treaty interpretation could suggest that the most recent agreement would, implicitly, reflect most accurately the will of the Parties.[51]

154. The Protocol is arguably more specific than trade rules, because it applies to an identified category of products, LMOs, while the WTO applies to all products in international trade. Supplementary rules of treaty interpretation could be taken to suggest that, in the event of a conflict, the Protocol Parties intended the more specialized rules in the Protocol to prevail over more general WTO rules.[52]

155. The tenth paragraph is thus intended to anticipate and to counterbalance arguments that the Protocol should be interpreted as an implicit decision by Parties to modify their obligations under the WTO and other existing international agreements. The provision could also be used to counterbalance arguments that the Parties implicitly intended the Protocol to prevail based on the fact that it is later in time, and contains specific rules related to LMOs.

156. The eleventh paragraph, is, on the other hand, intended to counterbalance any implication from the tenth paragraph that the WTO and other existing agreements would necessarily prevail in the case of a conflict.[53]It clarifies that the tenth paragraph is not intended to "subordinate" the Protocol to other international agreements, either existing agreements or those developed in the future. The reference here to "other international agreements" rather than only "existing" international agreements may be important. It implies that the tenth paragraph, will apply only to the Parties' rights and obligations under the WTO and other international rules as they currently exist, and not to new international agreements that may be developed later, either under WTO auspices or elsewhere.

---

47 The Protocol text is similar to the text in the 9th preambular paragraph of the Rotterdam Convention which reads: "Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection."

48 Vienna Convention on the Law of Treaties, Article 30(2), which provides that "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

49 The Protocol language is similar to, but departs from, the text in the CBD, which was also included, in part, to deal with potential conflicts with the WTO (then GATT). The CBD language, which is contained in operative rather than the preambular text, states that the "provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement". It goes on to provide an exception, suggesting that the CBD will prevail over existing treaties "where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity" (CBD, Article 22(1).

50 Vienna Convention on the Law of Treaties, Articles 30(3), 59(1)(b), 59(2).

51 This "supplementary rule" of treaty interpretation is known as "lex posterior derogat legi priori".

52 This "supplementary rule" of treaty interpretation is known as "lex specialis derogat legi generali".

53 The Protocol text is similar to the 10th preambular paragraph of the Rotterdam Convention, which reads: "Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements."

### Related Protocol provisions

157. In addition to these preambular references, negotiators included in the Protocol's operative text other provisions that are relevant to the Protocol's relationship to other international agreements:

- Article 2(4) reflects the same counterbalanced logic of the tenth and eleventh paragraphs of the Preamble. Article 2(4) reserves the right of a Party to take measures that are more "protective" than those provided for in the Protocol. However, it then constrains the exercise of that right to action consistent with the "objective and the provisions" of the Protocol, as well as Parties' "other obligations under international law" (see commentary on Article 2).[54]
- Article 14(1) applies to any future bilateral, regional and multilateral agreements the Parties may enter into "regarding intentional transboundary movements of LMOs". Such agreements must be "consistent with the objective of this Protocol" and may "not result in a lower level of protection than that provided for by the Protocol". This provision aims to ensure the Protocol provides an agreed minimum standard of protection and these standards would, presumably, apply to later international agreements, including those developed under the WTO (see commentary on Article 14).
- Article 18(1) and 18(3), which requires Parties to take into consideration relevant international rules and standards when dealing with the handling, transport, packaging and identification of LMOs (see commentary on Article 18).
- Article 24, which authorizes Parties to enter into agreements and arrangements with non-Parties if they are consistent with the objective of the Protocol (see commentary on Article 24).
- Article 26(1) which allows Parties when implementing the Protocol to take into account, consistent with their international obligations, socio-economic considerations arising from the impact of LMOs on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities (see commentary on Article 26).

158. Further references to international agreements and institutions in the Protocol include:

- Article 2(2) which refers to the relationship between the Protocol and international law and instruments related to the law of the sea (see commentary on Article 2).
- Article 2(5), which refers to "instruments . . . undertaken in international forums with expertise in the area of risks to human health" (see commentary on Article 2).
- Article 5 of the Protocol provides that it shall not apply to human pharmaceuticals that "are addressed by other relevant international agreements" (see commentary on Article 5).
- Article 17(1), which requires Parties to notify, where appropriate, "relevant international organizations", when a release of LMOs occurs that may have transboundary consequences (see commentary on Article 17).

[54] Article 2(4) is similar in spirit to references in the WTO TBT and SPS Agreements.
The TBT Agreement, in its sixth preambular paragraph provides:
*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.
The first preambular paragraph to the SPS Agreement provides:
*Reaffirming* that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade.