**CARTAGENA PROTOCOL ON BIOSAFETY**

**Actual cases of unintentional transboundary movement and**

**case studies related to existing mechanisms for emergency measures (Notif. 2015-002)**

**NEW ZEALAND SUBMISSION**

**September 2015**

Please find below New Zealand’s submission in response to part (b) of Notification 2015-002.

*(b) Views on what constitutes unintentional transboundary movements in contrast with illegal transboundary movements and what type of information should be exchanged through the Biosafety Clearing-House*

In New Zealand’s view, “unintentional transboundary movements” and “illegal transboundary movements”, and the consequences of such movements, are quite different.

*Unintentional transboundary movements*

The term “unintentional transboundary movement” is not defined in the Cartagena Protocol, but it is apparent that it means something different from “transboundary movement” as defined in Article 3(k). As is helpfully noted in the IUCN *Explanatory Guide to the Cartagena Protocol on Biosafety* (2003) at p 116, the key element is whether a transboundary movement is deliberate or not. In New Zealand’s view, if a transboundary movement is deliberate, in the sense of being planned or intended, then the Parties concerned are obliged to apply the procedures laid down in the Protocol. If a transboundary movement is *not* deliberate, in the sense that it takes place or may take place outside the procedures laid down in the Protocol, and if it is likely to have significant adverse effects on the conservation and sustainable use of biological diversity (taking also into account risks to human health), it will trigger the obligations set out in Article 17.

The nature of the release that leads or may lead to the unintentional transboundary movement is immaterial: it may be deliberate or accidental. The key point is that if Article 17 is triggered, the Party under whose jurisdiction the release occurs is obliged under paragraph 1 to notify affected or potentially affected States (including non-Parties), the BCH, and relevant international organisations as soon as it knows of the situation, and under paragraph 4 to immediately consult the affected or potentially affected States to enable them to determine appropriate responses and initiate necessary action, including emergency measures. The notification process is supported by the obligation under paragraph 2 to provide contact details to the BCH in advance.

*Illegal transboundary movements*

The term “illegal transboundary movement” is defined in Article 25 of the Protocol as a transboundary movement “carried out in contravention of [a Party’s] domestic measures to implement [the] Protocol”. New Zealand’s understanding of an illegal transboundary movement is well-articulated in the IUCN *Explanatory Guide* at pp 159-160, whereby the illegal nature of a transboundary movement is judged by reference to a Party’s domestic measures, rather than the provisions of the Protocol itself. This means that the Protocol “will not necessarily provide a universal standard of what is considered an illegal transboundary movement. … Thus it is important to have regard to the specific national legislation of the Party of import and Party of export and any transit Party in relation to each transboundary movement …”.

Under paragraph 1 of Article 25, each Party is obliged to adopt appropriate domestic measures aimed at preventing and, if appropriate, penalising illegal transboundary movements. Under paragraph 3, each Party is obliged to make available to the BCH information concerning cases of illegal transboundary movements pertaining to it. This obligation is cast in general terms, with no specific timeframe – in contrast to the more elaborate requirements for notifications under Article 17. It may be that the illegal nature of an illegal transboundary movement cannot be determined until some time after the movement has taken place. Paragraph 3 of Article 25 appears to have been intended to promote experience sharing and cooperation in combating illegal transboundary movements. This is a different purpose from that of Article 17, which is concerned with urgent notification and consultation to enable necessary response action.

It is possible that a given transboundary movement is both unintentional and illegal, in which case both Article 17 and Article 25 will apply: Article 17 in the immediate term, and Article 25 thereafter.

*General comments*

New Zealand notes that the mandate for this work emerges from decision BS-VII/10. The relevant paragraphs in that decision are as follows:

2. Invites Parties and other Governments, in the context of operational objective 1.8 of the Strategic Plan for the Cartagena Protocol on Biosafety for the period 2011-2020, to submit views on what constitutes unintentional transboundary movements in contrast with illegal transboundary movements and what type of information should be exchanged through the Biosafety Clearing-House;

5. Requests the Executive Secretary:

(e) To compile and synthesize information submitted through paragraph 2 above for consideration by the Compliance Committee at its thirteenth meeting and, on the basis of this compilation, submit suggested clarifications on what constitutes an unintentional transboundary movement in contrast with an illegal transboundary movement.

“Working definitions” of illegal transboundary movements and unintentional transboundary movements are set out in paragraph 35 of the Report of the Workshop of the Network of Laboratories for the Detection and Identification of Living Modified Organisms (15 July 2015, UNEP/CBD/BS/DI/WS/2015/1/3). New Zealand sees value in the perspectives brought by participants in the Network, but does not see the Network as an appropriate forum to develop definitions (even if only “working” definitions) of these terms. The interpretation of provisions of the Protocol is a legal question, and in New Zealand’s view, not something that the Network of Laboratories was well-placed to consider.

The proposed working definitions are only partly consistent with Articles 17 and 25 of the Protocol, and include wording that does not appear in those provisions. New Zealand does not agree that a transboundary movement that has “not been approved for particular use in the importing Party” is necessarily illegal for the purposes of Article 25. It may be illegal – but only if it is illegal under the domestic measures of the Parties concerned. Nor is New Zealand persuaded that the description of a unintentional transboundary movement as one that is “not intended to be received by the receiving country” adds usefully to what is already stated in Article 17, given that the focus of that provision is on *notifying* the unintentional transboundary movement, rather than the circumstances that gave rise to it.

In New Zealand’s view, the working definitions cannot be relied on by Parties or the Compliance Committee as authoritative interpretations of the terms “unintentional transboundary movement” and “illegal transboundary movement”. In addition, New Zealand suggests that if Parties considered it necessary to elucidate the meaning of Articles 17 and 25 of the Protocol, it would be for the Conference of the Parties serving as the Meeting of the Parties to do so.