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SUGGESTED CLARIFICATIONS ON WHAT CONSTITUTES UNINTENTIONAL TRANSBOUNDARY MOVEMENTS IN CONTRAST WITH ILLEGAL TRANSBOUNDARY MOVEMENTS

Note by the Executive Secretary

I. INTRODUCTION

1. At its eleventh meeting, the Compliance Committee under the Cartagena Protocol on Biosafety observed that Parties have “different approaches in understanding and addressing illegal and unintentional transboundary movements”.¹ In that regard, the Compliance Committee recommended that the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety (COP-MOP) provide guidance on what constitutes unintentional transboundary movements in contrast with illegal transboundary movements and what follow-up action is required in each circumstance.
2. In response to this recommendation, in decision BS-VII/10, COP-MOP invited Parties and other Governments to, among other things, submit views, in the context of operational objective 1.8 of the Strategic Plan for the Cartagena Protocol on Biosafety for the period 2011-2020, 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 (BCH).
3. In the same decision, COP-MOP requested the Executive Secretary to compile and synthesize information submitted in accordance with 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.
4. The present note is aimed at assisting the Compliance Committee in its consideration of this agenda item. Section II provides a synthesis of views submitted on what constitutes unintentional transboundary movements in contrast with illegal transboundary movements and what type of information should be exchanged through the BCH. Section III provides an overview of the outcome of the discussions held by the Network of Laboratories for the Detection and Identification of Living Modified Organisms on this issue. Finally, section IV contains suggested clarifications on what constitutes an unintentional transboundary movement in contrast with an illegal transboundary movement for consideration by the Compliance Committee of a possible way forward.

¹ See UNEP/CBD/BS/CC/11/4. Available at <https://www.cbd.int/doc/meetings/bs/bssc-11/official/bssc-11-04-en.pdf>.

II. SYNTHESIS OF SUBMISSIONS ON WHAT CONSTITUTES UNINTENTIONAL TRANSBOUNDARY MOVEMENTS IN CONTRAST WITH ILLEGAL TRANSBOUNDARY MOVEMENTS

5. In response to decision BS-VII/10, the Secretariat issued a notification² requesting Parties and other Governments 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 BCH.

6. A total of 12 Parties (Brazil, Cambodia, Colombia, European Union, Malaysia, Mexico, Nigeria, New Zealand, Norway, Philippines, Republic of Korea and Zimbabwe) and one non-Party (Australia) submitted views as of 17 December 2015.³

7. Several submissions were framed within the scope of Article 17, paragraph 1. In particular, it was recalled that the obligation to notify affected or potentially affected States and the BCH when a Party knows of an occurrence under its jurisdiction that leads or may lead to an unintentional transboundary movement of a living modified organism (LMO) only applies to LMOs that were deemed likely to have significant adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.

8. It was also noted that the obligation to notify relevant States and the BCH, pursuant to Article 17, paragraph 1, applies in cases of both deliberate and accidental release. Furthermore, in some submissions, it was noted that the obligation to notify is triggered by the knowledge of such a release, irrespective of whether or not a transboundary movement actually occurs.

9. Various examples were provided among the submissions of ways in which deliberate or accidental releases of LMOs could lead to unintentional transboundary movements. The examples included acts of God, *force majeure*, human error in labelling or inventorying, poor or careless handling and transport of commodities, and natural and biological dispersal mechanisms.

10. In two submissions a link was made between the concept of unintentional transboundary movements and “low level presence” (LLP), and “adventitious presence” (AP)⁴ in shipments containing LMOs that are not authorized for import into certain countries. In this context, the importance of establishing mechanisms to facilitate international trade in such shipments was noted. However, in another submission, it was noted that unintentional transboundary movements resulting from LLP and AP in shipments would be in contravention of domestic measures to implement the Protocol under the jurisdiction of some Parties, whereby they would be considered “illegal transboundary movements”.

11. In contrasting unintentional with illegal transboundary movements, several submissions noted the definition provided under Article 25 of the Protocol, which states that transboundary movements of LMOs that are carried out in contravention of a Party’s domestic measures to implement the Protocol are deemed illegal. The illegality of a transboundary movement is therefore determined on the basis of the national legislation of the Parties involved in the transboundary movement, rather than on the basis of the provisions of the Protocol.

12. In one submission it was noted that the transboundary movement of an LMO that has not been approved under that country’s jurisdiction would be considered illegal only if that LMO was present

² In response to decision BS-VII/10, the Secretariat also invited Parties and other Governments, through notification 2015-002 (<https://www.cbd.int/doc/notifications/2015/ntf-2015-002-bs-en.pdf>), to submit information on actual cases of unintentional transboundary movement and case studies related to their existing mechanisms for emergency measures in case of unintentional transboundary movements of LMOs that are likely to have significant adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, including information on existing rapid alert mechanisms and monitoring systems. This information will be synthesized for consideration by COP-MOP at its eighth meeting.

³ The original submissions can be found at http://bch.cbd.int/protocol/cpb_art17/submissions.shtml.

⁴ In accordance with the relevant Codex guidelines, “low level presence” (LLP) refers to the detection of low levels of genetically modified crops that have been approved in at least one country on the basis of a food safety assessment, and “adventitious presence” (AP) refers to detection of the unintentional presence of genetically modified crops that have not been approved in any countries on the basis of a food safety assessment (http://www.fao.org/fileadmin/user_upload/agns/topics/LLP/AGD803_3_Final_En.pdf).

in large quantities. In another submission, it was stated that the transboundary movement of an LMO that had not been approved in its jurisdiction would be considered an illegal transboundary movement regardless of the amount of the LMO present.

13. A final example of illegal transboundary movements that was provided among the submissions is the violation of procedures specified in the relevant national legislation or domestic measures, including the use of an imported LMO for purposes other than those that were approved by the country.

III. OVERVIEW OF THE OUTCOME OF THE DISCUSSIONS HELD BY THE NETWORK OF LABORATORIES FOR THE DETECTION AND IDENTIFICATION OF LIVING MODIFIED ORGANISMS

14. In response to decision BS-VII/10, the Secretariat sought an input from the Network of Laboratories for the Detection and Identification of Living Modified Organisms on what constitutes unintentional transboundary movements in contrast to illegal transboundary movements during online discussions⁵ and a face-to-face workshop.

15. The emerging agreement among participants in the Network is that the terms “unintentional transboundary movements” and “illegal transboundary movements” refer to two distinct concepts in the context of the Protocol.

16. In providing conceptual clarity for the term “illegal transboundary movement” as defined in the Protocol (i.e. transboundary movements of LMOs carried out in contravention of domestic measures of a Party to implement the Protocol), participants in the Network noted that the term generally relates to: (a) an LMO that has not been authorized through the decision-making procedure of the importing Party either because a notification was not submitted, is under evaluation or was withdrawn without a decision being taken; (b) an LMO whose import for one or more intended uses has not been authorized in the importing Party; or (c) cross-border movements of LMOs that are carried out in contravention of specific requirements of the importing Party with respect, for example, to labelling, packaging and documentation accompanying an LMO shipment.

17. Participants in the Network considered various aspects that might be taken into account when providing clarity on the term “unintentional transboundary movement” and noted that, the use of the term “unintentional” notwithstanding, intent is very subjective and difficult to prove.

18. Some participants in the Network also noted that “unintentional transboundary movements” include cases in which one or more LMOs are present in small amounts, such as:

(a) Imported conventional non-living modified (LM) agricultural commodities (such as seeds) contain a small quantity of LMOs, which is also referred to as “botanical impurity” caused, for example, by mixing of the commodity during handling;

(b) Non-LM products are accidentally/involuntarily mixed with LMOs, which are present in quantities that are below analytical limits of detection;

(c) An LM crop accidentally makes its way into the international food or feed supply chain through “low level presence” and/or “adventitious presence”.

19. On the other hand, some participants also noted the possibility of “unintentional transboundary movements” of LMOs that are present in large amounts and that, therefore, quantity should not be a determining factor in clarifying the term “unintentional transboundary movement”.

20. In an attempt to amalgamate the different views brought forward during the online discussions of the Network, the Secretariat drafted proposals for operational definitions of the terms “unintentional transboundary movement” and “illegal transboundary movement” for further consideration of the Network during its face-to-face workshop.⁶

⁵ The online discussions of the Network can be found at http://bch.cbd.int/onlineconferences/portal_detection/discussions.shtml.

⁶ The face-to-face workshop of the Network was held in Ispra, Italy, from 9 to 11 June 2015, with financial support from the Government of Japan through the Japan Biodiversity Fund and in collaboration with the Institute for Health and Consumer

21. The participants in the workshop deliberated and made revisions to the draft operational definitions of the terms “unintentional transboundary movement” and “illegal transboundary movement” as contained in the report of the workshop (UNEP/CBD/BS/DI/WS/2015/1/3).⁷

IV. SUGGESTED CLARIFICATIONS ON WHAT CONSTITUTES AN UNINTENTIONAL TRANSBOUNDARY MOVEMENT IN CONTRAST WITH AN ILLEGAL TRANSBOUNDARY MOVEMENT

22. The Protocol describes “illegal transboundary movements” as those transboundary movements of LMOs carried out in contravention of domestic measures of a Party to implement the Protocol; it does not provide such a description for “unintentional transboundary movements”.

23. As noted by the Compliance Committee at its eleventh meeting⁸ and on the basis of submissions from Parties and other Governments as well as the input from the Network of Laboratories for the Detection and Identification of Living Modified Organisms, it is evident that Parties have different ways of understanding and addressing illegal and unintentional transboundary movements.

24. Nevertheless, the consensus emerging from the submissions and discussions of the Network may help clarify what constitutes an “unintentional transboundary movement” in contrast with an “illegal transboundary movement” as may be seen below.

25. As per Article 16, paragraph 3, each Party must take appropriate measures to prevent unintentional transboundary movements of LMOs, including such measures as requiring a risk assessment to be carried out prior to the first release of an LMO. As such, risk assessments carried out prior to the first release of an LMO into the environment are to include, where appropriate, an assessment of the risk of an unintentional transboundary movement, such as that resulting from the use of natural and biological dispersal mechanisms.

26. As per Article 17, paragraph 1, the obligation of a Party to notify affected or potentially affected States, the BCH, and, where appropriate, relevant international organizations is triggered in cases wherein the Party knows of an occurrence under its jurisdiction that resulted in a release that leads, or may lead, to an unintentional transboundary movement of an LMO that is likely to have significant adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health. The occurrence may be an accidental or a deliberate act that resulted in the release of an LMO that leads or may lead to an unintentional transboundary movement. Occurrences such as spillages during transport or due to a natural disaster are examples of accidental releases. In certain cases, the occurrence could be a deliberate release of an LMO under a Party’s jurisdiction that results in the LMO crossing or being likely to cross the national borders of another State. Furthermore, an unintentional transboundary movement may also arise from the failure to take appropriate risk management measures with regard to an LMO that was deliberately released into the environment.

27. As per Article 25, Parties must adopt measures aimed at preventing and, if appropriate, penalizing transboundary movements of LMOs carried out in contravention of their domestic measures to implement the Protocol. Such movements are deemed illegal transboundary movements.

28. An unintentional transboundary movement may also be considered an illegal transboundary movement if the movement results in a contravention of the affected Party’s domestic measures to implement the Protocol. For example, if a Party has provisions in place that allow certain amounts of undeclared or unapproved LMOs to be present in its imports — for example, through low level presence — an unintentional transboundary movement containing such LMOs and within the conditions stipulated by the importing Party will not be considered illegal on the basis of low level presence. However, if the Party affected by the unintentional transboundary movement had not

Protection of the European Commission’s Joint Research Centre, discussed the issue building upon the outcomes of the online discussions.

⁷ Available at: <http://www.cbd.int/doc/meetings/bs/bsdiws-2015-01/official/bsdiws-2015-01-03-en.pdf>.

⁸ <http://www.cbd.int/doc/meetings/bs/bscc-11/official/bscc-11-04-en.pdf>.

established an exception for low level presence of LMOs, the unintentional transboundary movement would be considered illegal, and the provisions under Article 25 would also apply.

29. Taking into account the information submitted by Parties and other Governments and the input from the Network of Laboratories for the Detection and Identification of Living Modified Organisms, the following draft operational definitions are put forward for consideration by the Compliance Committee:

(a) “*Illegal transboundary movement*” is a transboundary movement carried out in contravention of the domestic measures to implement the Protocol that have been adopted by the affected Party and may include transboundary movements of living modified organisms that have not been approved for a particular use in the jurisdiction of that Party;

(b) “*Unintentional transboundary movement*” is a transboundary movement of a living modified organism that has inadvertently crossed the national borders of a Party whereby the living modified organism was released either deliberately or accidentally. An unintentional transboundary movement may also be considered an illegal transboundary movement if the movement results in a contravention of the affected Party’s domestic measures to implement the Protocol.

30. In considering the views synthesized in the present document and the suggested clarifications on what constitutes an unintentional transboundary movement in contrast with an illegal transboundary movement and with a view to assisting Parties in implementing the Protocol, the Compliance Committee may wish to recommend to the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol at its eighth meeting to adopt the operational definitions of the terms “unintentional transboundary movement” and “illegal transboundary movement” as described in paragraph 29 above.
