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Item 16 of the provisional agenda*

OBLIGATIONS AND RIGHTS OF TRANSIT STATES

*Compilation of views submitted by Parties, other Governments and relevant international organizations
on obligations and rights of transit States ***

CONTENTS

SUBMISSIONS FROM PARTIES AND OTHER GOVERNMENTS.....	2
ARGENTINA	2
CANADA	2
EUROPEAN COMMUNITY AND ITS MEMBER STATES.....	3
NEW ZEALAND.....	4
NORWAY	6
UNITED STATES OF AMERICA (USA).....	6
SUBMISSIONS FROM ORGANIZATIONS	7
GLOBAL INDUSTRY COALITION (GIC).....	7
INTERNATIONAL GRAIN TRADE COALITION (IGTC).....	9

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SUBMISSIONS FROM PARTIES AND OTHER GOVERNMENTS

ARGENTINA

[13 SEPTEMBER 2005]
[SUBMISSION: SPANISH]

La Decisión BS-II/14 invita a las Partes y otros gobiernos a presentar sus opiniones con vistas a la clarificación de los derechos y obligaciones de los Estados de tránsito.

El artículo 6.1 del Protocolo de Cartagena exime a los cargamentos en tránsito del procedimiento de Acuerdo Fundamentado Previo. No obstante, el Protocolo reconoce a las Partes de tránsito su derecho de reglamentar el transporte de OVM por su territorio y de comunicar sus decisiones sobre tránsito al Centro de Intercambio de Información.

Al respecto, la República Argentina considera necesario destacar que dicha reglamentación debe ser compatible con otras obligaciones internacionales vigentes, en particular, las contenidas en el Acuerdo sobre la Aplicación de Medidas Sanitarias y Fitosanitarias y el Acuerdo sobre Obstáculos Técnicos al Comercio.

Cualquier medida más restrictiva para reglamentar el tránsito por el territorio de una Parte de un cargamento de OVM originado en el territorio de una no Parte que las pactadas en los acuerdos internacionales vigentes sólo podrá realizarse mediante los acuerdos y arreglos bilaterales y regionales previstos por el artículo 24.1 del Protocolo.

Los derechos y obligaciones referidos a los requisitos de documentación de los cargamentos de OVM, son de particular interés cuando el exportador y el importador no son Partes del Protocolo, mientras que el Estado de tránsito es Parte.

Al respecto, la República Argentina considera que la emisión de la documentación que acompaña al cargamento de OVM no debe ser una obligación para el Estado de tránsito, sino que debe ser generada por el país exportador únicamente.

CANADA

[21 SEPTEMBER 2005]
[SUBMISSION: ENGLISH]

Canada would like to thank the Chair of MOP-2 and Parties for a commitment to discuss the issue of transit at MOP-3 in March, 2006.

Transit is an important issue for bulk commodity shipments, some of which are Living Modified Organisms, as they often transit through countries (via ship, train, truck, or air) en route to their final destination.

After informal discussions with many Parties and other governments, and a helpful preliminary discussion at MOP-1, Canada believes that there is a need for a more focussed discussion on this issue.

First, it would be useful to reach a consensus understanding on the specific rights and obligations of Parties vis-à-vis shipments in transit. A plain reading of Article 6.1 of the Biosafety Protocol would

appear to indicate that all articles of the Protocol, including the documentation requirements of Article 18.2(a), apply to shipments in transit, with the exception of the Advance Informed Agreement (AIA).

Is this an interpretation shared by all Parties? For example, do transit states have obligations for generating documentation for such shipments, particularly for those shipments that originate in countries that are not Party to the Protocol?

With respect to Article 18.2 (a), it is Canada's view that the obligation to require that documentation accompanies a shipment pertains to a Party acting as a State of export (i.e. the state from which the export has originated) and does not apply to a Party acting solely as a Transit state. A transit Party would not "become" a Party of export unless the LMOs in question had been imported and materially transformed prior to their subsequent export.

Second, we need to develop a clear and common definition of what is considered a transit shipment. To reach such a common interpretation of this article, it may be useful to begin with a definition of transit, one that is agreed to by all Parties. Canada has suggested a definition based heavily on that of the World Customs Organization (WCO).

For your information, the WCO definition is:

Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes.

Other definitions for possible use would include:

Consignment that is not imported into a country but passes through it to another country, subject to official procedures which ensure that it remains enclosed, and not split up, not combined with other consignment nor has its packaging changed. (Canadian Food Inspection Agency, Plant Health Division, Policy directive D-99-01)

"In - Transit Cargo" means general cargo or container cargo that has origin and destination outside the Kingdom of Thailand and has been discharged onto the terminal for delivery to foreign country which has a treaty or special agreement with Thailand or stored in the transit warehouse for delivery to such country. (Bangkok Port Authority)

Canada is willing to discuss these definitions or any others which have had currency internationally.

Canada looks forward to a discussion at MOP-3 that will bring clarity to Article 6.1 and will facilitate the predictable application of this article by all Parties.

**EUROPEAN COMMUNITY AND ITS MEMBER
STATES**

[9 SEPTEMBER 2005]
[SUBMISSION: ENGLISH]

The EU acknowledges the importance of clarifying the rights and obligations of parties of transit and recognizes the complex dimensions of this issue.

The EU notes that consignments of LMOs often transit through the territories of parties and non-parties on their way to the party of import.

Article 4 of the Protocol makes it clear that the Protocol applies to LMOs in transit, although article 6 makes it clear that the Advance Informed Agreement Procedure does not apply to living modified organisms in transit.

The EU acknowledges that a party of transit shall have the right, in accordance with international law, to regulate the transport of living modified organisms through its territory, including requiring communication in writing to competent national authority of the party of transit if this is required by the regulations of that party of transit.

This submission should be viewed as representative of current EU thinking on the issue of transit. However, this issue is one that we are currently studying carefully and reserve the right to submit further views to the secretariat.

NEW ZEALAND

[30 OCTOBER 2005]
[SUBMISSION: ENGLISH]

The second meeting of the Conference of Parties to the Cartagena Protocol on Biosafety, in decision BS-II/14, invited Parties to submit views regarding the clarification of the rights and/or obligations of transit States, particularly related to documentation, and whether a clear definition of transit should be included in a synthesis to be considered by the third meeting of the Conference of Parties.

In response to that invitation, New Zealand sets out its views on the clarification of the rights and/or obligations of transit States on the transboundary movement of living modified organisms (LMOs) under the Protocol and the New Zealand position on definition of the term “transit”.

New Zealand View

Rights and Obligations of Transit States

New Zealand supports the view articulated in UNEP/CBD/BS/COP-MOP/2/INF/6 that a Party acting as a transit State should not take on the Party of export obligations and is not required to generate documentation to accompany a shipment that is in transit through its territory.

New Zealand is of the view that Article 6 clearly protects the right of a Party of Transit to regulate the transport of LMOs through its territory; such that the COP/MOP does not need to consider additional measures at this time. The wording in Article 6 reflects a carefully balanced compromise achieved in the negotiation of this Article and its substance should not be renegotiated through COP-MOP decisions. The Article provides scope for national implementation consistent with national circumstances, and the objectives of the Protocol. There is no need for a further COP/MOP decision on this matter.

In support of this position, New Zealand notes that:

- A definition of ‘transit’ exists in the international trade context, and is consistent with the objective of the Protocol;
- The Protocol does not oblige transit States to take additional measures to ensure that documentation accompanying LMOs complies with documentation requirements;

- The Protocol preserves the right of a transit State to choose to take additional measures to regulate LMOs and gives States adequate flexibility to protect their interests as they see fit;
- The nature of the obligations in Article 18 are such that it is the Party of Export, not the Party of Transit, that will be able to provide and verify the information; responsibility for the documentation accordingly lies with the Party of Export.

Should Parties determine that there is a need to clarify the rights and obligations of transit States, New Zealand's position is that any measures taken by Parties in respect of LMOs in transit must:

- be focused on what is necessary to meet the objectives of the Protocol;
- avoid undue compliance costs being imposed on producers, exporters and Parties (including Parties of Transit);
- be consistent with other international obligations and must not be applied in a manner that would constitute an unjustified restriction on trade.

In this context, any clarification of the rights and obligations of transit States should take into account the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and as far as possible follow the principles and guidelines in the International Convention on the Simplification and Harmonisation of Customs Procedures (the 'Revised Kyoto Convention'):

- Under Annex C of the SPS Agreement, which relates to guidance on control, inspection and approval procedures, inspection and information requirements on (transiting) goods must be "*limited to what is reasonable and necessary*"; and
- Annex E of the Revised Kyoto Convention sets out useful principles and procedures on the transit of goods through a Party such as "goods declaration for Customs transit" and "sealing and identification of Consignments".

The general aim is to limit to the minimum, and harmonise to the greatest possible degree, the extent and nature of the documents and data to be presented purely in respect of transiting goods.

The WTO and the World Customs Organisation (WCO) also provide useful modalities and standards for identification, handling, packaging and transport practices, which would be relevant when considering whether there is a need to develop additional standards with regard to identification, handling, packaging and transport practices for LMOs in transit.

Definition of Transit

In the synthesis of views on the obligations and rights of transit states (UNEP/CBD/BS/COP-MOP/2/14 of 3 March 2005), it is noted that a submission suggested that the COPMOP, preferably at its second meeting, should provide a clear definition of transit and should clarify that a Party acting as a transit State does not have the obligations of a Party of export, particularly those obligations relevant to Article 18(2)(a).

New Zealand maintains its position that there is no need for a COP/MOP decision on this matter. Furthermore, there is no need to further define the term "transit" in the Biosafety Protocol context.

New Zealand supports the view that the existing definition of 'transit' which appears in the World Trade Organisation (WTO) context, specifically in GATT Article V:1 is a suitable definition for the purpose of

the Protocol. Accordingly it is not necessary to create a new definition of 'transit'; and it would be unhelpful to have a definition that was inconsistent with that found in the GATT context:

- Article V:1 of the General Agreement on Tariffs in Trade 1994 (GATT) deems goods to be “in transit” across the territory of a Contracting Party when the passage of those goods, *“is only a portion of a complete journey beginning and terminating beyond the frontier of the Contracting Party across whose territory the traffic passes”*.

Conclusion

New Zealand does not consider that there is a need for the COP/MOP to further consider the rights and obligations of transit states. Furthermore, New Zealand does not consider that there is a need to develop a definition of “transit” as an applicable definition already exists.

NORWAY

[14 SEPTEMBER 2005]
[SUBMISSION: ENGLISH]

Norway recognizes the importance of clarifying the rights and obligations of parties of transit.

With the exception of the provisions on the advance informed agreement procedure, the Cartagena Protocol applies to transit of living modified organisms (LMO). This follows from Articles 4 and 6 of the Protocol. It also follows from Article 6 that a Party of transit has the right to regulate the transport of LMO through its territory.

Norway is aware that consignments of LMOs often transit through the territories of parties and non-parties on their way to the party of import.

Norway is of the view that a clarification of the rights and obligations concerning transit should bear in mind the objective of the Protocol as set out in Article 1 and take due account of the interests of the Parties concerning the need for information and documentation on LMO transported through and imported into its territories.

Given the complexity of this matter, this submission conveys Norway's present thinking on the issue of transit. Norway reserves the right to submit further views to the secretariat.

UNITED STATES OF AMERICA (USA)

[26 SEPTEMBER 2005]
[SUBMISSION: ENGLISH]

Summary: The United States believes that the role of a Party of transit should be understood in the context of the Protocol. Establishing this role will ensure that the crucial transportation and logistical requirements of global grain trade, as well as collaborative international research and development, are not negatively affected. For example, many Parties of transit have jurisdiction over valuable canal, waterway, and port assets. Failure to assess regulatory burdens may render these assets less useful to traders across the globe. With this in mind, Parties should: (1) recognize that the language in Decision BS-II/14 which refers to “transit states” is inconsistent with Article 6 which refers to “parties of transit.” (2) establish a clear understanding of the term 'transit' consistent with other international obligations; and (3) reiterate that the requirements of the AIA do not apply to a Party of transit.

Background: Paragraph 1 of decision BS-II/14 of COP/MOP-2 invites Parties, other Governments, and relevant international organizations to submit their views to assist in clarifying the rights or obligations of “transit states.” These views, especially related to documentation, will be included in a synthesis report to be considered at MOP-3.

U.S. Views:

- 1) **As an initial matter, a clarification is needed regarding the language in Decision BS-II/14 which refers to “transit states.” This is not a term found in the Cartagena Protocol on Biosafety and it should not be used in related decision documents. Article 6 refers to “Party of transit.” Non-party transit States have no rights or obligations under the Protocol.**
- 2) **There is a need for Parties to have a clear understanding of the term 'transit' that is consistent with other international obligations, including the WTO, and that does not result in any additional documentation requirements under 18.2 for transit shipments.**

Although a Party of transit may choose to regulate the movement of LMOs within its territory, any such regulation must be consistent with the provisions of the Protocol and in accordance with other international obligations.

As a practical matter, a Party of transit will have the ability to obtain information from the shipping documents provided by the exporter. However a Party of transit is not and should not be subject to the same set of obligations that apply to a Party of export.

- 3) **The requirements of the Advance Informed Agreement (AIA) do not apply to a Party of transit.**

Article 6(1) of the Protocol explicitly states that the provisions of the Protocol do not apply to LMOs in transit with respect to the requirements of the Advance Informed Agreement procedure (AIA). As such, exporters have no obligation to notify the national authority of a transit state, prior to the intentional trans-boundary movement of a shipment containing LMOs. This applies even if this shipment is for intentional introduction into the environment of the Party of import.

Conclusions

In conclusion, additional requirements applying to the transit of LMOs through Parties are unnecessary and may impede the flow of research, development, and commercial products. Such requirements, if imposed without careful consideration may have costly consequences for importers, exporters, scientists and researchers, and Parties of transit themselves.

SUBMISSIONS FROM ORGANIZATIONS

GLOBAL INDUSTRY COALITION (GIC)

[13 SEPTEMBER 2005]
[SUBMISSION: ENGLISH]

The following provides the views and comments of the users and developers of modern biotechnology regarding the rights and/or obligations of transit states under the Cartagena Protocol on Biosafety (the “Protocol”), particularly with respect to documentation:

1. The requirements of the Advance Informed Agreement do not apply to transit states.

The Protocol clearly applies to transit of living modified organisms (LMOs);¹ however, transboundary movements through transit states do not require advance informed agreement (AIA) under the Protocol. Article 6(1) of the Protocol clearly states that, notwithstanding the right of a Party of transit to regulate the transport of LMOs through its territory, the provisions of the Protocol do not apply to LMOs in transit with respect to the requirements of the AIA. As such, exporters are not obliged under the Protocol to notify the competent national authority of transit states prior to the transboundary movement of a shipment containing LMOs for intentional introduction into the environment of the Party of import. Neither are exporters required to submit any other information to transit states.

2. The Protocol requires the shipping documentation to include specific information useful to transit states.

While the Protocol does not require exporters to notify transit states or provide them with detailed information as required under the AIA, each shipment must be accompanied by documents that do provide transit countries with a great deal of information in accordance with the requirements of Article 18.2 (b) and (c) of the Protocol. The users and developers of modern biotechnology have developed guidelines for the shipments of LMOs destined for contained use and LMOs intended for intentional introduction into the environment of the Party of import that implement the requirements under Article 18.2(b) and (c) in accordance with the provisions of the Protocol as further elaborated by the COP/MOP-1 decision.² These guidelines apply to all shipments of LMOs, including those through transit states, and they include much of the information that would be supplied under the AIA mechanism, including: name, address and contact details of the exporter and importer; name and identity of the LMO; and suggested methods for the safe handling, storage, transport and use. Additional information may be found on the Biosafety Clearing-House for LMOs being shipped under Article 18.2(c).³

3. Shipments of LMOs have adequate and appropriate information on the shipping documentation for exporting, importing and transit countries.

During the negotiations of the Protocol, countries agreed that shipments of LMOs through transit countries would *not* be subject to the extensive AIA requirements because all agreed that there exists a very low likelihood of any negative impacts resulting from LMO shipments on the conservation and sustainable use of biodiversity in transit states. All materials are packaged in

¹ See Article 4 which sets out the Scope of the Protocol as applying to “the transboundary movement, transit, handling and use of all living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.”

² See UNEP/CBD/BS/COP-MOP/2/15.

³ See Article 20.2 (c) & (d) of the Protocol that states that the Biosafety Clearing House “shall serve as a means through which information is made available.” Each Party shall make available “summaries of risk assessments or environmental reviews of LMOs” and the final decision regarding importation or release of LMOs.

such a way as to avoid any loss of material during movement. Any additional obligations imposed on such shipments must consider that the requirements put in place to protect the conservation and sustainable use of biological diversity must be consistent with the risk presented by the movement of such materials.

4. Transit States should consider implications of regulating transit.

Clearly transit states have the sovereign right to regulate the movement of LMOs within their territory in any way that is consistent with the objectives and provisions of the Protocol and in accordance with their other international obligations; *however*, when addressing the specific rights and/or obligations under the Protocol of transit states related to documentation, the shipping documentation must contain the required information provided in Article 18 which adequately informs transit and importing states of the contents of the shipment, but no notification of the shipments is required. In addition, while transit states have the authority to regulate LMO shipments within their borders, such states should consider the implications of imposing burdensome obligations on exporters. Additional obligations could result in loss of economic opportunity related to use of that state's ports and could impact the level of trade as such regulations would impose higher costs on exporters.

The Protocol specifically exempts exporters from the obligation to notify transit states of LMO shipments as required for importing countries under the AIA procedure. In addition, the documentation accompanying LMO shipments currently includes adequate information to allow transit states to identify the contents of the shipment. In order to allow trade of LMOs to continue in the safe and appropriately informed environment as exists at present, transit states should ensure that requirements on transboundary movement of LMOs through their territories should be reasonable and not impede the flow of research, development and commercial products.

**INTERNATIONAL GRAIN TRADE COALITION
(IGTC)**

[14 SEPTEMBER 2005]
[SUBMISSION: ENGLISH]

The International Grain Trade Coalition (IGTC) is pleased to respond to COP/MOP-2's request contained in BS-II/14 to provide clarification of the "rights and/or obligations of transit states, particularly related to documentation."

The IGTC represents importers and exporters of grain from over 80 countries and submits the following comments regarding the status of transit shipments of grain intended for use as FFPs (food, feed or for processing) under the Cartagena Protocol for Biosafety (The Protocol).

The IGTC seeks to assure that provisions for implementation of the Protocol do not impose barriers to the free movement of product through transit states for FFP. Specifically, we seek confirmation that documentation provisions of Article 18.2(a) do not apply to transit shipments of FFPs.

Parties should give transit states the flexibility to design regulatory structures that take into account the relatively small risk to the environment and potential negative economic consequences of unnecessarily stringent documentation requirements. Therefore, discussion of and confirmation that documentation requirements of Article 18.2 (a) do not apply to transit shipments should be an agenda item for COP/MOP 3.

IGTC emphasizes that restrictive regulation/documentation for transit shipments will impose requisite costs to importers and will affect the volume of trade moving through individual transit states. The decision to use transit states with the least burdensome regulations can be expected, when cross-border movement of FFPs is contemplated.
