



Convention on Biological Diversity

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CONFERENCE OF THE PARTIES TO THE CONVENTION ON BIOLOGICAL DIVERSITY SERVING AS THE MEETING OF THE PARTIES TO THE CARTAGENA PROTOCOL ON BIOSAFETY

Fifth meeting

Nagoya, Japan, 11-15 October 2010

Item 11 of the provisional agenda*

RIGHTS AND/OR OBLIGATIONS OF PARTIES OF TRANSIT OF LIVING MODIFIED ORGANISMS

Note by the Executive Secretary

I. INTRODUCTION

1. The Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety adopted, at its third meeting decision BS-III/16, inviting Parties, other Governments and relevant international organizations to provide further views and information on experience on the rights and/or obligations of Parties of transit of living modified organisms, for consideration at its fifth meeting. The views sought include whether or not a Party acting only as a Party of transit takes on obligations of a Party of export under the Protocol.

2. Two countries, Botswana and Mexico, responded to the invitation and stated that they had no experience or information on the matter.

3. This document provides, in section II, a background to discussions held on the item in previous meetings and reproduces the synthesis of submissions made for the purpose of those meetings. Section III briefly highlights how consignments in transit are understood under a few other international agreements. Section IV presents some examples of regulatory or policy requirements concerning transit of living modified organisms. Finally, section V submits a few elements of a draft decision for consideration by the Conference of the Parties serving as the meeting of the Parties to the Protocol.

II. BACKGROUND

4. The need to clarify the responsibilities and/or rights of a Party of transit in the context of a transboundary movement of living modified organisms was first raised by two submissions made for the consideration of the Conference of the Parties serving as the meeting of the Parties to the Protocol at its

* UNEP/CBD/COP-MOP/5/1.

second meeting. One of those submissions suggested that the Conference of the Parties serving as the meeting of the Parties to the Protocol 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, paragraph 2 (a). An example of a definition of transit was provided in the submission as follows:

“LMO shipments shall be deemed to be in transit across the territory of a Party when the passage across such territory, with or without transshipment, warehousing, breaking of bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the Party across whose territory the LMO shipment passes.”

5. The other submission did not express a particular view but requested clarification of the issue with respect to documentation requirements.

6. The Conference of the Parties serving as the meeting of the Parties to the Protocol took note of the submissions and invited more submissions of views on the clarification of the rights and/or obligations of transit States, particularly related to documentation for inclusion in a synthesis report to be considered at its third meeting (decision BS-II/14, paragraph 1). Accordingly submissions were received from the European Union, New Zealand, Norway; Argentina, Canada, the United States of America; the Global Industry Coalition, and the International Grain Trade Coalition.² The full texts of these submissions were circulated in an information document for the third meeting of the Parties to the Protocol (UNEP/CBD/BS/COP-MOP/3/INF/9).

7. Most submissions noted the reference to transit in Article 6, paragraph 1, of the Protocol. Six submissions noted that a Party of transit has the right to regulate the transport of living modified organisms through its territory, and seven submissions noted that Article 6, paragraph 1, exempts living modified organisms in transit from the Advance Informed Agreement procedure. One of these submissions stated that it is unclear to what extent other articles apply to living modified organisms in transit, while two other submissions referenced Article 4 and expressed the view that the Protocol applies to living modified organisms in transit with the exception of the Advance Informed Agreement procedure as stated in Article 6, paragraph 1. Two submissions expressed the view that the Conference of the Parties serving as the meeting of the Parties to the Protocol does not need to consider any additional measures or requirements regarding transit at this time. One submission expressed the view that the Conference of the Parties serving as the meeting of the Parties to the Protocol should confirm that documentation requirements of Article 18, paragraph 2 (a), do not apply to shipments in transit.

8. Regarding definitions of transit, one submission noted that a definition of “transit” exists in the international trade context and is consistent with the objective of the Protocol, and that there is no need to develop a definition of “transit” in the context of the Biosafety Protocol. That submission referred specifically to the definition of “transit” that appears in the context of the World Trade Organization (WTO), as follows:

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”*.

² A synthesis of the views submitted was prepared for consideration by the third meeting of the Parties to the Protocol. The synthesis is reproduced herein in paragraphs 7, 8 and 9 below, for ease of reference.

9. Two submissions noted the need to have a clear understanding of the term “transit”. One of these expressed the view that it would be useful for Parties to agree on a definition of transit. The following existing definitions were suggested for consideration:

(a) 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 (source: World Customs Association);

(b) 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 (source: Canadian Food Inspection Agency, Plant Health Division, Policy directive D-99-01);

(c) “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 (source: Bangkok Port Authority).

III. “TRANSIT” UNDER OTHER INTERNATIONAL AGREEMENTS

10. The International Standards for Phytosanitary Measures (ISPM) No. 20 (2004) (*Guidelines for a phytosanitary import regulatory system*) of the International Plant Protection Convention provides the following:

“4.3 Consignments in transit

“According to ISPM No. 5 (*Glossary of phytosanitary terms*), consignments in transit are not imported. However, the import regulatory system may be extended to cover consignments in transit and to establish technically justified measures to prevent the introduction and/or spread of pests (Article VII.4 of the IPPC, 1997). Measures may be required to track consignments, to verify their integrity and/or to confirm that they leave the country of transit. Countries may establish points of entry, routes within the country, conditions for transportation and time spans permitted within their territories.”

11. The 1992 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal requires the State of export to notify or to require the generator or exporter to notify the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes.³ “States concerned” is defined to mean “Parties which are States of export, or transit States, whether or not Parties”.⁴ “State of transit”, in turn, is defined as “any State, other than the State of export or import, through which a movement of hazardous wastes or other wastes is planned or takes place”.⁵ It seems that a transit State has similar rights and obligations as the State of import. It is, for example, required to acknowledge receipt of notification; and respond to the notifier in writing, within 60 days, consenting to the movement with or without conditions, denying permission for the movement or requesting additional information.⁶

³ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, article 6, paragraph 1.

⁴ Ibid., article 2, paragraph 13.

⁵ Ibid, article 2, paragraph 12.

⁶ Ibid., article 6.

12. The 1965 Convention on Transit Trade of Land-Locked States,⁷ though specific to situations related to land-locked countries, has some important principles and definitions that may contribute to the understanding of the status of Parties of transit for shipments of living modified organisms in the context of the Biosafety Protocol. For example one of the principles affirmed by the Convention in its preamble states:

“The State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind”.

13. Article 1(b) of the Convention defines the term “traffic in transit” to mean:

“[T]he passage of goods including unaccompanied baggage across the territory of a Contracting State between a land-locked State and the sea when the passage is a portion of a complete journey which begins or terminates within the territory of that land-locked State and which includes sea transport directly preceding or following such passage. The trans-shipment, warehousing, breaking bulk, and change in the mode of transport of such goods as well as the assembly, disassembly or reassembly of machinery and bulky goods shall not render the passage of goods outside the definition of “traffic in transit” provided that any such operation is undertaken solely for the convenience of transportation”.

IV. SOME EXISTING REGIONAL AND NATIONAL REQUIREMENTS REGARDING TRANSIT OF LIVING MODIFIED ORGANISMS

14. The European Union regulation on transboundary movements of genetically modified organisms requires the exporter to ensure notification of the transit of genetically modified organisms (GMOs) to Parties that have taken the decision to regulate transit of GMOs through their territory and have informed the BCH of this decision.⁸

15. Export and transit of genetically modified products through the territory of the Poland require a permit from the Minister of Environment. An application for a permit is to include information on the end user and product (description, instructions for use and storage, description of GMO contained in product and information on the organism it was derived from) as well as recommended safety measures, potential hazard to human health and environment, information on packaging and labelling of product, information on permits obtained for placing in other foreign markets and any refusals of such permits, quantity of product, route and means of transport, contact information of the receiver, confirmation of acceptance to receive product from authorities of import country and consent from authorities of any other transit state, if applicable.⁹

16. In Slovakia,¹⁰ the risk class assignment that the user is required to do with respect to any planned contained use of a genetically modified organisms is not required for transit and national transport of

⁷ The Convention was adopted by the United Nations Conference on Transit Trade of Land-locked Countries, which had been convened pursuant to the decision of the General Assembly of the United Nations taken at its 1,328th plenary meeting on 10 February 1965, and entered into force in 1967.

⁸ Article 13, regulation (EC) No 1946/2003 of the European Parliament and of the Council of 15 July 2003 on transboundary movements of genetically modified organisms (http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2003&nu_doc=1946)

⁹ The Act of 22 June 2001 on genetically modified organisms, <http://www.paiz.gov.pl/index/?id=05128e44e27c36bdba71221bfccf735d>.

¹⁰ Article 10, paragraph 7, 2002 Act on the use of genetic technologies and genetically modified organisms, as amended in 2005 <http://bch.cbd.int/database/attachedfile.aspx?id=448>

genetically modified organisms by road, rail, water and air. If any transit of genetically modified organisms is undertaken in line with international contracts on transport of dangerous substances, the consent required under Articles 13, 17 and 21 of the Act on the use of genetic technologies and genetically modified organisms is also not required.

17. Transit of GMOs or genetic products through the territory of the Czech Republic¹¹ from the place of entry to the place of exit may only take place if the transport means safeguarded against an undesirable leakage of genetically modified organisms or genetic products into the environment, or against their loss or theft with regard to potential risk to human health and the environment. The genetically modified organism or genetic product may not be released into the transit customs regime if such requirements have not been met. The persons that import, export or transit genetically modified organisms or genetic products shall be obliged to declare the shipment to the customs authorities.¹²

18. The persons who or which are to transit genetically modified organisms through Bulgaria¹³ shall notify the Ministry of Environment and Water thereof in writing 14 days prior to the planned date of transit of the GMOs. The notification is required to include certain minimum information. Following the notification, the Minister issues a certificate to the notifier no later than three days before the date of transit. The Minister shall also notify the National Customs Agency and the Ministry of Agriculture and Forestry of each certificate of transit of genetically modified organisms issued.

19. In case of transit of genetically modified organisms, products or goods originating from genetically modified organisms through the territory of Viet Nam¹⁴ with discharge thereof at port, their owners must send documents containing the necessary information, made according to a set form, to the concerned managing ministries for consideration. In the case of transit without discharge thereof at port, their owners must send written notices on measures to ensure safety in the course of transit to the concerned managing ministries for consideration and decision. The General Department of Customs shall carry out relevant procedures only after having received opinions regarding biological safety of the above-said products or goods from the concerned managing ministries.

¹¹ § 26, 2004 Act on the use of genetically modified organisms and genetic products
<http://bch.cbd.int/database/attachedfile.aspx?id=1623>

¹² *Ibid*, paragraph 9, § 25.

¹³ Article 99, Section V, Genetically Modified Organisms Act of 2005. <http://bch.cbd.int/database/attachedfile.aspx?id=1529>

¹⁴ Paragraphs 3 and 4, Article 13, Decision No. 212/2005/QĐ-TTg of August 26, 2005, Promulgating the Regulation on Management of Biological Safety of Genetically Modified Organisms, Products and Goods Originating from Genetically Modified Organisms <http://www.agbiotech.com.vn/en/?mnu=preview&key=349>

20. A person transporting genetically modified organisms through Kenya that are not destined for use in Kenya shall apply for a written approval of such transport from the National Biosafety Authority, and ensure that the genetically modified organisms being transported are properly packaged and transported in accordance with such regulations as may be prescribed and any applicable international standards.¹⁵

21. The Biosafety Act of Zambia¹⁶ applies to the import, development, export, research, transit, contained use, release or placing on the market of any genetically modified organism, whether intended for release into the environment, for use as a pharmaceutical, for food, feed or processing, or a product of a genetically modified organism. A person shall not transport or transit any genetically modified organism or a product of any genetically modified organism through Zambia without authorization from the National Biosafety Authority.¹⁷

22. Entities wishing to transit consignments that contain genetically modified organisms, or may inadvertently contain genetically modified organisms through the territory of South Africa¹⁸ must submit specific information/documentation to the Registrar for genetically modified organisms prior to commencement of the activity. A separate application must be submitted for each transit shipment of food aid destined to southern Africa. Transit consignments containing genetically modified organisms (raw or processed) that have not been approved for commercial use in South Africa, must be, in addition to the documentation outlined in the policy, accompanied by a declaration from the exporting country, in the absence of a clearing house, regarding safety of the genetically modified organisms present in the consignment to human health.

23. In Mexico,¹⁹ genetically modified organisms in transit need only be accompanied by information and recommendations as to the proper packaging and handling during transport. There are also specific requirements by the Transport Ministry for the transport of dangerous substances, which also include genetically modified micro-organisms.²⁰

24. New Zealand requires approval for the transshipment of any new organism through New Zealand. The term “new organism” includes genetically modified organisms.²¹ In Switzerland,²² anyone who imports or exports genetically modified organisms or is responsible for their transit must:

(a) Take the necessary precautions required by the situation to prevent genetically modified organisms, their metabolites or the waste thereby engendered from endangering animals, the environment or, indirectly, human beings;

¹⁵ Article 22, The Biosafety Bill, 2008. http://www.kenyalaw.org/Downloads/Bills/2008/The_Biosafety_Bill_2008.pdf

¹⁶ The Biosafety Act, 2007. http://www.parliament.gov.zm/index.php?option=com_docman&task=doc_view&gid=65

¹⁷ Ibid, paragraph 2, article 31, part IX.

¹⁸ Policy on GMOs Consignment in Transit compiled within the framework of the Genetically Modified Organisms Act, No. 15 of 1997, Department of Agriculture. <http://www.nda.agric.za/docs/geneticresources/Transit-final.pdf>

¹⁹ Article 76, Reglamento de la Ley de Bioseguridad de Organismos Genéticamente Modificados, 2008 <http://www.agrobiomexico.org.mx/uploaded/documento19.doc>

²⁰ Nom-051-sct2/2003, especificaciones especiales y adicionales para los envases y embalajes de las sustancias peligrosas de la división 6.2 agentes infecciosos: Norma publicada en el Diario Oficial de la Federación el 1 de diciembre de 2005 http://www.sct.gob.mx/fileadmin/normatividad/transporte_terrestre/56NOM-051-SCT2-2003.pdf

²¹ Section 2A, Hazardous Substances and New Organisms Act 1996 as amended by Hazardous Substances and New Organisms Amendment Act of 2003. http://www.legislation.govt.nz/act/public/1996/0030/latest/whole.html?search=ts_all%40act%40bill%40regulation_GENETICALLY_resel#DLM382982 The application form for approval is available here: <http://www.ermanz.govt.nz/resources/publications/pdfs/ER-AN-07-2.pdf>

²² Article 3, Ordinance on the Transboundary Movements of Genetically Modified Organisms, 3 November 2004, (Cartagena Ordinance, CartO) <http://www.admin.ch/ch/e/rs/8/814.912.21.en.pdf>

- (b) Ensure that their handling, packaging, labelling and transportation takes account of all relevant national and international norms and regulations; and
- (c) Ensure that accompanying documentation is provided for each transboundary movement.

25. In Washington State in the United States of America, the Director of Agriculture “may make rules with reference to plants, plant products, bees, bee hives and equipment, and genetically engineered organisms while in transit through the state as may be deemed necessary to prevent the introduction into and dissemination within the state of plant and bee pests and noxious weeds”.²³

V. SUGGESTED ELEMENTS FOR A DRAFT DECISION

26. The Conference of the Parties serving as the meeting of the Parties to the Protocol may wish to take note of:

- (a) The exchange of views that took place at its second and third meetings on issues related to the possible rights and/or obligations of Parties of transit of living modified organisms;
- (b) The existing national, regional and international requirements relating to transit of goods and substances in general, and transit of living modified organisms in particular; and
- (c) The lack of submissions of specific views or information from Parties to the Protocol in response to the last invitation.

27. Taking into account the elements above, the Conference of the Parties serving as the meeting of the Parties to the Protocol may wish to decide to:

- (a) Set aside any further consideration of this item, and encourage Parties to continue addressing it at the domestic level;
- (b) Consider the item or refer it to the Compliance Committee, as appropriate, in the future, if and when a specific request is made by a Party, or a need for such consideration is identified, through analysis of national reports.

²³ Revised Code of Washington §17.24.011: Regulation of plant, plant product, bee movement, and genetically engineered organisms. <http://apps.leg.wa.gov/RCW/default.aspx>.