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13 July 2004  
Biosafety Protocol Consultation  
Environment Division  
Ministry of Foreign Affairs and Trade  
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## SUBMISSION

To the Government on the question of ratifying the Cartagena Protocol on Biosafety.

### Overview

The submitter recommends that New Zealand ratify the Cartagena Protocol on Biosafety. New Zealand has much to gain from joining and building a coalition of nations with the capacity and intent to monitor the transboundary movement of LMOs, because that capacity **will make it much less likely that those and other potential biological threats to New Zealand will go undetected before reaching New Zealand.**

New Zealand is an island nation that is rightfully proud, and fiercely protective, of its biodiversity. The Protocol is nothing short of a commitment to develop a deep understanding of our environment before technologies are unleashed here that may be a threat to it. Indeed, **the Protocol makes it possible for New Zealand to expect exporters to meet the level of responsible reporting that is already required of those who work with or develop GMOs within New Zealand.**

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The Cartagena Protocol on Biosafety is...an international agreement that specifically focuses on the transboundary movement of genetically modified organisms (GMOs)...The Protocol now establishes an international, legally binding framework that allows countries, in particular, those that do not yet have in place a regulatory regime for biosafety, to make informed decisions on the import of GMOs into their country.

—Klaus Töpfer, Executive Director, UNEP

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Ratifying the Protocol would also demonstrate New Zealand's willingness to be a good global citizen, both by supporting other nations to develop a deep understanding of their environments and by refraining from introducing threats to those environments (Article 22). The Protocol recognises the simple fact that the earth has but one reservoir of biodiversity. It is the only biodiversity in which human life is so far proven to thrive.

While new technologies that could accelerate change to the world's biodiversity may one day be needed to sustain human life, they nevertheless should be developed and introduced within the context of evidence of their impact on biodiversity and human health.

The Protocol is a significant international agreement that attempts to balance the needs of the world's smaller or poorer nations—to protect their individual, sometimes unique, biodiversity, and the special relationship each culture has to it—with the economic drivers from larger and much wealthier nations. The Protocol is also a mechanism for growing the scientific capacity of the third world, a capacity that is important to the prospects of New Zealand continuing to protect its own biosecurity interests while economic borders become much more porous.

The additional costs to New Zealand for compliance are minimal. Currently and for the indefinite future, New Zealand does not export LMOs for release or for food, feed or processing. It may never do so. The only Protocol requirements that are of demonstrable relevance to New Zealand are exports not intended for release, such as LMOs developed in research laboratories for the purposes of medicine or fundamental science. The Protocol does not impact these exports because the standards set by the Protocol are already routinely practiced by the research community.

Many of the issues raised in the Discussion Paper appear to be more relevant to earlier stages of development of the Protocol rather than to the current question of whether New Zealand should ratify an agreement that has already become international law. For example, that the Protocol has no provision to encourage Parties to adopt the least trade-restrictive approaches to compliance may in theory have ramifications for international trade and the WTO. However, this hypothetical eventuality will not be affected by what New Zealand decides now. Indeed, on this and many other issues, New Zealand would be best placed to influence the evolution of the Protocol as a Party to the Protocol.

## 1. Introduction

- 1.1. This submission is from the University of Canterbury. Correspondence on this submission should be addressed to:

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- 1.2. The Submission was drafted with advice from the The New Zealand Institute of Gene Ecology (NZIGE) and School of Biological Sciences (SBS).
- 1.3. NZIGE and SBS are research and teaching units of the University of Canterbury ([www.canterbury.ac.nz](http://www.canterbury.ac.nz)).
- 1.3.1. The SBS has approximately 65 specialist staff and approximately 500 effective full time students per year.

- 1.3.2. The NZIGE has no commercial interest in genetically modified organisms for release or trade. Membership currently consists of research professionals employed by the UC, Institute of Environmental Science and Research, Ltd., Institute of Crop and Food Research, Ltd., Bioethics Council, University of Otago Christchurch School of Medicine, Wellington School of Medicine, Lincoln University, the Malagan Institute, Rockefeller University, Brigham Young University and the Norwegian Institute of Gene Ecology. The purpose of the NZIGE is to:
  - 1.3.2.1. serve as an independent place of research on the application and impact of biotechnology;
  - 1.3.2.2. advocate the safe application of publicly responsible technologies; and
  - 1.3.2.3. facilitate the training of
    - 1.3.2.3.1. New Zealanders who participate in the development, regulation or use of new biotechnologies, in risk analysis in its broadest sense;
    - 1.3.2.3.2. the regulatory and science communities, civil society and political leaders, and NGO communities of countries that have ratified the Cartagena Protocol on Biosafety.
- 1.4. The SBS and NZIGE consulted extensively with staff and membership in the preparation of this submission.

## 2. Requirements of the Protocol

As indicated in the Discussion Paper, the Protocol will have little or no effect on how New Zealand currently regulates the movements of LMOs into the country. Ratification will require New Zealand to be more conscientious in how it might export LMOs to other countries. **The standards for safe export behaviour set by the Protocol are far less stringent and onerous than our expectations of nations that export to us.**

- 2.1. Requirements for LMOs intended for release into the environment or intended for direct use as food, feed, or for processing.
  - 2.1.1. Compliance with these requirements can be met at minimal or no additional cost to exporters, particularly as few or no exports from New Zealand are LMOs. ERMA has indicated that it has not received any notification that commercial LMOs are even being contemplated for testing.
  - 2.1.2. **These requirements would impose upon New Zealand no more stringency in regulating its exports than it imposes upon those nations that export to New Zealand.**
- 2.2. Requirements for LMOs that are intended for contained use.
  - 2.2.1. The labelling requirements are effectively what is already standard operating procedure for research involving GMOs and thus will have no additional impact on New Zealand.
  - 2.2.2. The additional requirement that both importers and exporters must register the movement of LMOs for contained use with the Biosafety Clearing-

House could be easily accomplished by having ERMA make notifications to the Biosafety Clearing-House when relevant ERMA/IBSC decisions are made. Provided that the ERMA/IBSC approval descriptions were adequate information for importing Parties, there would be no impact on procedural requirements for research.

### 3. Adventitious presence

Whether LMOs are present by design or by accident has no bearing on their ability to threaten human health or the environment. Thus, this difficult issue is neither created by, nor unique to, the Protocol. The Protocol merely creates an awareness of adventitious presence and an incentive to develop better policies and monitoring technologies to reduce this avenue for transboundary movements of organisms.

- 3.1. Adventitious presence is not an issue relevant to the decision to ratify. Any nation that has ratified the Protocol may reject exports from New Zealand as long as the decision to reject the consignment complies with the requirements of the Protocol. This is true regardless of whether New Zealand decides to ratify the Protocol.
- 3.2. Adventitious presence is a demonstrable problem for New Zealand, as demonstrated by the 2002, 2003 and 2004 investigations into confirmed cases of LM corn/maize in New Zealand, and Japan's reaction to a shipment of bread-dough made with an enzyme from a GMO source. This problem will not disappear if New Zealand decides not to ratify the Protocol. By strengthening the Protocol through ratification, New Zealand may be able to reduce the likelihood of adventitious presence.

### 4. Unintentional and Illegal

The Discussion Paper states that "Given that [the] Protocol places the responsibility for any illegal export of an LMO on the Party (the Country) and, (sic) not the individual exporter or company, if New Zealand ratifies the Protocol it will have to develop measures to limit the risks to the Crown through ensuring [that] the exporter responsible [for] any illegal movement bears the responsibility for the costs incurred."

- 4.1. This requirement is fully consistent with New Zealand's obligations as a good global citizen. This requirement appears to be nothing more than an extension of the spirit of domestic law and introduces no fundamentally new issues for New Zealand. It would thus need to be explained how the burden or implications of the "measures" mentioned could constitute grounds for failing to ratify the Protocol.

### 5. Compliance

The Discussion Paper reports that "A number of Parties at the first Meeting of Parties sought to introduce punitive measures for non-compliance, rather than a facilitative

system aiming to encourage and assist Parties to meet their obligations” and implies that New Zealand has decided punitive measures would be less desirable.

- 5.1. A punitive compliance incentive is, at this stage, only a hypothetical possibility. In fact, Article 34 states that Parties will “consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance.” This theme is repeated in even stronger language in the final report of the first MOP.
- 5.2. A “facilitative” compliance regime, if this is indeed New Zealand’s preferred outcome, would be more likely if New Zealand were to participate as a Party to the Protocol.
- 5.3. Should such a punitive regime be adopted, MFAT notes, “new legislation might be needed to specify where additional responsibilities and risks lie, and exporters might have to assume greater risk.” Again, it is not self-evident that this constitutes a reason not to ratify the Protocol. Risks should lie with those who reap the benefits; assuming greater risk should also increase the probability that exporters will act responsibly. This is entirely in line with the Government’s domestic approach to GMOs.
- 5.4. A punitive compliance incentive is not unique to the Protocol. The WTO uses the same mechanisms to achieve compliance and, as the Discussion Paper clearly indicates, New Zealand is a strong advocate of the WTO.

## 6. Liability

The Discussion Paper asserts that “[a] liability regime that applies only to the transboundary movement of LMOs...would be difficult to reconcile with [New Zealand’s] domestic approach [which is currently based on the decision that it is “not sound in principle to implement a liability regime that treats GM and non-GM activities differently”]. Moreover, singling out LMOS (sic) in this way could have a negative impact on activities in New Zealand that involve the transboundary movement of LMOS”.

- 6.1. The recent decision regarding New Zealand’s liability regime (that GM and non-GM activities should be treated the same) is highly contestable. There was (and is) a wide range of arguments offered against this conclusion by a wide range of sources. Therefore this decision should not be regarded as irreversible and should not be allowed to govern a decision as important as New Zealand’s relationship to the Protocol.
- 6.2. Furthermore, it is not clear why New Zealand’s “domestic approach” should remain unchanged in this case when it is so often adjusted to comply with other international agreements.
- 6.3. It is only a theoretical possibility that the working group would develop a liability regime that could not be reconciled with the New Zealand “domestic approach”. It is entirely possible that the liability regime developed, even if specific to LMOs, would be consistent with the general law in New Zealand

which the Paper acknowledges “applies to GM activities and a wide range of non-GM activities”.

- 6.4. Again, as with other future decisions within the Protocol, New Zealand would be in a much better position to influence the Working Group after ratifying the Protocol as compared to its status as an Observer. As the Discussion Paper notes, “the opportunities to affect decision-making [as an Observer] are very limited.”
- 6.5. Finally, such a liability regime, if adopted by the working group, has no obvious economic or competitive impact on New Zealand.
- 6.6. There would be no penalty to the industry that may have developed under a different liability regime because:
  - 6.6.1. few or no exports from New Zealand are LMOs;
  - 6.6.2. ERMA has indicated that it has not received any notification that commercial LMOs are even being contemplated for testing.
- 6.7. Future private or public developers in this area would be able to factor such costs into consideration to commercialise LMOs, well before any investment toward commercialisation is made.

## 7. Non-Parties

According to the MFAT Discussion Paper, “New Zealand’s existing biosecurity system meets the current requirements of the Protocol for import of LMOs from non-Parties, so ratification would not be likely to lead to any major changes. Irrespective of whether New Zealand ratifies the Protocol, New Zealand will apply the same biosecurity regime to imports from both Parties and non-Parties.”

- 7.1. If all other nations, either Party or not to the Cartagena Protocol, must respect New Zealand domestic law when exporting LMOs to New Zealand, then New Zealand can be expected to respect the law of Parties to the Cartagena Protocol regardless of whether New Zealand ratified the Protocol. Therefore, this submitter asserts that there is no obvious new impact on New Zealand through ratifying the Protocol.
- 7.2. However, by being a Party, New Zealand has both greater influence on international developments in this area and additional support for its own determination to protect its environment.

## 8. Other International Agreements

According to the Discussion Paper, “As the Protocol omits the requirement to ensure members adopt non-discriminatory and least trade-restrictive measures necessary to achieve their objectives, other Parties could seek to impose import bans under the Protocol that do not bear an appropriate relationship to the level of environmental risk, for indefinite periods, and with only limited possibilities for review at the behest of an exporter.” But the paper also notes that “[c]ountries that are party to both the Protocol and the WTO agreements will need to ensure that they apply the rules in ways that comply with both.” (Among the current activities of the WTO are efforts to reconcile its agreements with other international agreements, including the UN Convention on

Biological Diversity.) If MFAT regards this as a reason not to sign the Protocol, it must consider how many of New Zealand's trading partners are not now, and are not soon likely to become, members of the WTO and how important to New Zealand is its trade with these countries. For those trading partners who are WTO members, this is not an issue that differs from any other issue under the WTO.

- 8.1. New Zealand's ratification of the Protocol can in no way exacerbate or increase the likelihood of this problem, if it is a problem.
- 8.2. On the contrary, New Zealand is in a better position to influence the evolution of the Protocol as a Party rather than Observer State.

## 9. Future developments

The Discussion Paper states that "the Protocol is an evolving document and that it is difficult at this stage to fully assess all the implications for New Zealand." As it notes, there will be ongoing negotiations among the Parties; decisions regarding as yet unresolved issues will be made at the Meetings of the Parties, where decisions are taken by consensus. The paper argues that "[t]his uncertainty is significant because decisions made at Meetings of Parties are binding", and it implies that this is an unusual, and unusually risky, situation. The Discussion Paper further notes that if New Zealand ratifies the agreement, it "may come under pressure from other major agriculture exporting countries that have not ratified the Protocol, to secure acceptable outcomes."

- 9.1. New Zealand is party to many "evolving" agreements. It is not clear what sets this one apart in that regard.
- 9.2. The WTO itself contains numerous "evolving" agreements and agreements under continuing negotiation; they will be binding on WTO members once agreed.
- 9.3. The statement regarding "pressure from other agriculture exporting countries" is both opaque and worrying. Is MFAT suggesting that New Zealand should not ratify the Protocol because it is unwilling or unable to withstand attempts by those who oppose the Protocol to use New Zealand as a tool to pursue their own interests within the Protocol negotiations? What kind of role does this imply for New Zealand in the world?