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INTERIM COMMISSION ON PHYTOSANITARY MEASURES

Sixth Session

Rome, 29 March – 2 April 2004

Procedures for Urgent Alteration or Suspension in Exceptional Circumstances of International Standards on Phytosanitary Measures after Adoption

Agenda Item 8.12 of the Provisional Agenda

1. This paper is provided by the FAO Secretariat at the request of the IPPC Body on Strategic Planning and Technical Assistance (SPTA). It examines questions relating to whether and in which circumstances a recommendation may be made to suspend the implementation of an ISPM, outside the ordinary procedures for amending ISPMs. These questions have been raised in the context of actions relating to the implementation of ISPM 15 on wood packaging, as described below.
2. Pursuant to Article XI of the IPPC, the ICPM adopted the Guidelines for Regulating Wood Packaging Material in International Trade (ISPM 15) at its Fourth Session in 2002. ISPM 15, as adopted at the Fourth Session, contained a symbol (the “no bug” logo) to be applied to the wood packaging material to certify that the wood has been subjected to the approved measures for the elimination of pests associated with wood packaging material used in international trade.
3. However, after the original logo was approved by the ICPM, a private company filed an application for registration of a similar mark for pest control services and claimed that the use of the logo approved by the ICPM violated the rights of the company in terms of priority of registration and use in commerce. The company sought payments and compensation from FAO for use of the logo that would likely have amounted to several million dollars. As an illustration, in addition to a lump sum payment, the company asked for a royalty fee for use of the logo of \$240.00 per year, per end user. They also wanted their company name to be included next to the logo on certain stamps using the logo. Eventual participation in legal proceedings relating to this claim would have resulted in substantial costs, with uncertain legal results.
4. As a result of this unforeseen situation, the continued use and implementation of ISPM 15 on the basis of its original symbol raised significant issues of potential liability and damages for FAO and all parties concerned. This could have resulted in significant, unforeseen, operational

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and financial implications on the ability of FAO to carry out its mandates and responsibilities set forth in its governing statutes that have been approved by FAO Members.

5. In this context, FAO recommended to ICPM Members in 2002 to suspend the use of ISPM 15 including the use of the original symbol. The recommendation to suspend the implementation of ISPM 15 (including the symbol) was later changed to a recommendation to only suspend the use of the original symbol. Thus, the action focused on the symbol used within the standard, rather than the substantive content of the standard, and enabled FAO and ICPM Members to avoid the risk of a major, unforeseen economic and legal liability. The Secretariat also developed a new symbol to replace the “no-bug” logo and this symbol was protected as a mark through an international registration process.

6. The above experience has raised questions regarding when it might be necessary or appropriate to suspend or recommend suspension of the implementation of ISPMs, outside the ordinary amendment procedures. Initially, it may be noted that the circumstances regarding the original ISPM 15 symbol were highly unusual and not foreseen. It may be hoped that such a situation does not arise in the future.

7. It is also important to note that FAO, as an organization responsible to its Members, has certain responsibilities that it must fulfil in responding to any such situations should they arise. In particular, FAO has certain responsibilities under its Basic Texts that it must respect. These include the FAO Constitution, the General Rules of the Organization, and the Financial Regulations, which set forth mandates on, *inter alia*, operational and financial matters of the Organization.¹

8. There are also direct linkages established between these governing instruments and the IPPC and the ICPM. FAO Conference Resolution 12/97 established the ICPM under Article VI.1 of the FAO Constitution (which provides authority to establish commissions and other bodies), with specified Terms of Reference. These Terms of Reference note that the ICPM may adopt its own Rules of Procedure which shall not be inconsistent with the Constitution and General Rules of FAO. Rule VIII.3 of the Rules of Procedure, adopted by the ICPM in April 2001, provides that recommendations of the ICPM having policy, programme or financial implications for the Organization shall be brought by the Director General of FAO to the attention of the FAO Conference or Council for appropriate action. Rule XI.2 further provides that “[a]ny financial operations of the Interim Commission and its subsidiary bodies shall be governed by the appropriate provisions of the Financial Regulations of the Organization.”

9. In addition, Article XI.1 of the New Revised Text of the IPPC provides that contracting parties agree to establish the Commission on Phytosanitary Measures “... *within the framework of the Food and Agriculture Organization of the United Nations (FAO)*.” (emphasis added). More generally, the FAO budget process constitutes the core funding mechanism for work under the ICPM and IPPC.

10. As indicated by the above, the FAO as an organization has a number of responsibilities that it must carry out under its governing instruments, and is mandated to take actions that are necessary and appropriate to implement the purposes of the Organization and its Financial Regulations. The IPPC and ICPM are linked directly to these basic authorities.

11. When the situation relating to the original symbol of ISPM 15 created the possibility of significant, unforeseen, implications for the operational and financial mandates of the Organization, the Organization had a duty to address these issues. In this case, the action was a *recommendation* from FAO that the implementation of ISPM 15 with the original logo be suspended and then ceased. In the event that a future action under the IPPC poses such a risk to

¹ Each of these documents, and other governing instruments, are reproduced on the FAO internet site, at www.fao.org.

FAO's ability to carry out its mandated responsibilities, appropriate responsive action may again be needed.

12. ICPM is invited to:

1. *Consider* that emergency suspension or withdrawal of an approved ISPM or elements of an ISPM, as occurred in the case of the original ISPM 15 logo, is an extremely unlikely event.
2. *Consider* that each situation needs to be evaluated on a case by case basis and that it is impossible to predict the circumstances where emergency suspension and/or withdrawal of an ISPM may be needed.
3. *Consider* that the ICPM functions within the framework of FAO and therefore FAO has the responsibility and mandate for the governance of the ICPM (decision making and financial), and to protect the interest of Parties under exceptional and urgent circumstances.
4. *Consider* that under this mandate FAO has the responsibility to act quickly in cases where a risk is posed to the ability of FAO to carry out its core responsibilities and requirements under the FAO Constitution and Basic Texts governing its operations.
5. *Consider* the importance of promoting transparency and consultation between FAO and the appropriate bodies established under the IPPC with respect to any such possible action, but also that circumstances may arise (for example with some types of legal action) where there are requirements for confidentiality and it may not be possible to provide at a certain stage full details to the ICPM.
6. *Agree* that, where recommendations relating to the emergency suspension or withdrawal of an approved ISPM are being considered by FAO:
 - a) As far as possible any recommendations should be discussed and endorsed by an emergency meeting of the Bureau.
 - b) ICPM should be informed of any recommendations and justifications as soon as possible.