

June 1999

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INTERIM COMMISSION ON PHYTOSANITARY MEASURES

Second Session

Rome, 4-8 October 1999

Items Arising from the First Session of the Interim Commission on Phytosanitary Measures Report of the Informal Working Group on Dispute Settlement Procedures

Agenda Item 6.2 of the Provisional Agenda

1. Resolution 12/97 of the 29th Session of FAO Conference resulted in the approval of the New Revised Text of the IPPC and the adoption of interim measures including the establishment of the Interim Commission on Phytosanitary Measures (ICPM). The Terms of Reference for the ICPM set out in Appendix B to Resolution 12/97 assigns specific functions to the ICPM including the establishment of rules and procedures for the resolution of disputes in accordance with the Convention, in particular Article XIII (Annex I).
2. The ICPM at its first meeting in 1998 established an Informal Working Group on Dispute Settlement whose purpose was to prepare a report and make recommendations to the ICPM on dispute settlement procedures for the IPPC which complement existing procedures such as those of the World Trade Organization (WTO). The group met 13-16 April 1999 at FAO Headquarters in Rome. The Terms of Reference for the meeting and a list of participants are found in Annex II.
3. The meeting considered dispute settlement procedures described in the Convention as well as procedures used by several other organizations. The working group found it important to emphasize that the IPPC provides the opportunity for contracting parties to use any procedure deemed appropriate, including the possibility of an Expert Committee procedure identified in Article XIII of the New Revised Text. It also noted that consultation between disputing parties is mandatory.
4. A number of General Considerations were identified by the meeting (Annex III) and dispute settlement procedures were outlined (Annex IV) with recommendations (Annex V). The ICPM is requested to consider and:
 - a) endorse the general considerations;
 - b) adopt the proposed IPPC dispute settlement procedures;
 - c) and accept and act upon the recommendations of the Informal Working Group.

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ANNEX I**ARTICLE XIII Settlement of Disputes**

(from the New Revised Text of the IPPC approved by the 29th Session of
FAO Conference in November 1997)

- 1 If there is any dispute regarding the interpretation or application of this Convention, or if a contracting party considers that any action by another contracting party is in conflict with the obligations of the latter under Articles V and VII of this Convention, especially regarding the basis of prohibiting or restricting the imports of plants, plant products or other regulated articles coming from its territories, the contracting parties concerned shall consult among themselves as soon as possible with a view to resolving the dispute.
2. If the dispute cannot be resolved by the means referred to in paragraph 1, the contracting party or parties concerned may request the Director-General of FAO to appoint a committee of experts to consider the question in dispute, in accordance with rules and procedures that may be established by the Commission.
3. This Committee shall include representatives designated by each contracting party concerned. The Committee shall consider the question in dispute, taking into account all documents and other forms of evidence submitted by the contracting parties concerned. The Committee shall prepare a report on the technical aspects of the dispute for the purpose of seeking its resolution. The preparation of the report and its approval shall be according to rules and procedures established by the Commission, and it shall be transmitted by the Director-General to the contracting parties concerned. The report may also be submitted, upon its request, to the competent body of the international organization responsible for resolving trade disputes.
4. The contracting parties agree that the recommendations of such a committee, while not binding in character, will become the basis for renewed consideration by the contracting parties concerned of the matter out of which the disagreement arose.
5. The contracting parties concerned shall share the expenses of the experts.
6. The provisions of this Article shall be complementary to and not in derogation of the dispute settlement procedures provided for in other international agreements dealing with trade matters.

ANNEX II**A Terms of Reference for the Informal Working Group on Dispute Settlement Procedures**

1. Analyze the possibility of implementation of dispute resolution under the IPPC.
2. Determine relationship with other mechanisms of dispute resolution.
3. Proposal to the ICPM for a procedure to complement the existing mechanisms.
4. Prepare a report to ICPM by June 1999.

B. Participants in the Informal Working Group on Dispute Settlement ProceduresWorking Group Members

Mr. Ralf Lopian (Finland) - Chairperson of the Informal Working Group
Mr. John Hedley (New Zealand) - Chairperson of the ICPM
Mr. John Greifer (United States)
Mr. Blair Coomber (Canada)
Mr. Onyeabo Onwukeme (Nigeria)
Mr. Humberto Bermudez (Panama)

Secretariat and Observers

Mr. Robert Griffin - IPPC Secretariat
Mr. Joao Magalhaes - Observer (WTO-SPS Secretariat)

ANNEX III

General Considerations

1. The terms *dispute settlement* and *resolution of disputes* as used in the Convention are considered to be equivalent terms referring to the same procedures.
2. The promotion of technical assistance provided for in Article XX applies to dispute settlement as it applies to other provisions of the Convention.
3. Dispute settlement procedures of the IPPC are limited to issues falling within the scope of the Convention and its associated standards and complement the WTO processes by providing options for dispute settlement procedures for phytosanitary issues affecting trade. IPPC procedures are primarily aimed at evaluating the technical aspects of phytosanitary disputes. Contracting parties are encouraged to resolve disputes at a technical level wherever possible.
4. Only contracting parties have the right to initiate the dispute settlement procedures under Article XIII. Disputes may be between two or more contracting parties.
5. Requests for dispute settlement and the distribution of reports should be through official IPPC contact points. If contracting parties wish to undertake a dispute settlement procedure under the IPPC, then it is mandatory that parties first consult (Article XIII.1).
6. Art XIII does not preclude contracting parties from using any form of dispute resolution, including mediation or other procedures provided that the parties agree to them, and does not limit the contracting parties to the Expert Committee procedures described in Article XIII.2. Contracting parties are encouraged to consult with the IPPC Secretariat or others concerning the range of dispute settlement procedures that may be appropriate for the dispute in question.

Options include but are not limited to:

Consultation, Good Offices, mediation, or arbitration - Contracting parties are encouraged to pursue options such as Good Offices and mediation as alternatives to the Expert Committee procedure provided in Article XIII. These procedures may be conducted or administered with assistance from the IPPC Secretariat and/or a Subsidiary Body designated by the ICPM.

Supplementary Agreements - Dispute settlement procedures may be agreed under Article XVI (Supplementary Agreements). Such procedures may be binding, but are only binding for the parties to the agreement.

Expert Committee (Article XIII) - The outcome of the Expert Committee procedure initiated under Article XIII is non-binding (Article XIII.4).

7. Any dispute that contracting parties wish to have recorded by the ICPM should be notified to the IPPC Secretariat and its outcome reported according to the procedures set out by the ICPM.
8. IPPC dispute settlement procedures should be conducted as expeditiously as possible.

ANNEX IV

IPPC Dispute Settlement Procedures1) Informal consultation

- a) Contracting parties are encouraged to consult between themselves as soon as possible with a view to resolving the dispute or taking a decision that further informal consultation is not considered productive.
- b) No formal consultation is required if both parties agree that informal consultations have resolved the dispute. If either party indicates that additional consultation is needed, then the parties shall engage in formal consultations (Article XIII.1).

2) Formal consultation

- a) For formal consultation to begin, one or both contracting parties would notify the Secretariat of their interest in dispute settlement procedures under the IPPC.
- b) The Secretariat discusses with both parties the possibility for progress through further consultation and the most appropriate procedure to be used.
- c) The parties in consultation mutually agree on the procedure, location, facilitator (if requested), confidentiality, and other conditions for the consultations. In the instance that parties cannot agree on procedures and conditions, the procedures and conditions may be proposed by the IPPC Secretariat.
- d) Persons not party to the dispute are not admitted to the consultations unless agreed by the consulting parties.
- e) Formal consultation may result in:
 - i) resolution of the dispute;
 - ii) non-resolution, where one party does not cooperate. This may occur when only one party, although obliged to take part in consultation, does not cooperate to the satisfaction of the other party. Either party may initiate further dispute settlement procedures;
 - iii) non-resolution, where both parties cooperate. This results from agreement by the parties that formal consultation has been completed. Either party may initiate further dispute settlement procedures.
- f) The IPPC Secretariat should report to the ICPM or subsidiary body designated by the ICPM on the conduct and outcome of formal consultations.

3) The Selection of a Dispute Settlement Procedure after Consultation

- a) Parties consult with the IPPC Secretariat and others agreed by the parties with a view toward determining the most appropriate dispute settlement procedure.

This includes consideration of:

- the Expert Committee procedure from Article XIII.2 of the IPPC (see 4 below);
- other procedures initiated with the Secretariat's assistance;
- procedures initiated without additional Secretariat assistance.

- b) Dispute settlement procedures are initiated if parties agree on a procedure. In the event parties do not agree on a procedure, the complaining party may:
 - request Article XIII.2 procedures; or
 - initiate other dispute settlement procedures.

4) The IPPC Expert Committee Procedures (Article XIII.2)

The IPPC provides the opportunity for contracting parties to use any dispute settlement procedure but it identifies an Expert Committee procedure implemented through FAO as a specific option. The following describes the Expert Committee procedure.

- a) One or both parties submit a formal request to the Director General of FAO.
- b) The Secretariat verifies that mandatory consultations have occurred and that parties wish to use the Expert Committee procedure.
- c) An Expert Committee is formed as follows:
 - i) at least one expert is designated by each party to the dispute. The designation of more than one expert requires mutual agreement by the parties on the number of experts for which there should be equal numbers for each party;
 - ii) three independent experts, one of which is familiar with the IPPC and associated international standards, are selected by the ICPM or its subsidiary body from a roster of experts supplied by the IPPC Secretariat;
 - iii) the experts are recommended to the Director-General for appointment;
 - iv) the appointed experts constitute the Expert Committee and elect a Chairperson from among the three independent experts;
- d) The Expert Committee agrees, and conducts its proceedings, on terms of reference, including:
 - i) taking account of the special needs of developing countries where such countries are parties to the dispute;
 - ii) provision for the use of outside experts; and
 - iii) rules for the presence and conduct of observers.

If terms of reference cannot be agreed upon, a general format may be provided by the IPPC Secretariat, including rules for the presence and conduct of observers established by the ICPM or its relevant subsidiary body.
- e) Upon completion of the proceedings, the Expert Committee prepares a report consisting of two parts:
 - i) a summary of the technical aspects of the dispute, and
 - ii) recommendations for resolving the dispute.
- f) The Expert Committee seeks to develop consensus on all points in the report. In the event consensus is not possible, the Chairperson ensures that the draft report provides recommendations for the resolution of the dispute while adequately reflecting dissenting views.
- g) In the event the proceedings cannot be completed, the Chairperson ensures that a report is prepared on the proceedings up to the point of termination.

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- h) The draft report is submitted to the IPPC Secretariat for technical review and/or the FAO Legal Office for legal review. Any comments from FAO review are returned to the Committee.
 - i) The Committee prepares and approves its final report considering comments provided by FAO.
 - j) The final report is submitted by the Chairperson to the Director-General. The Director-General transmits the report to the disputing parties as the basis for renewed consideration of the matter out of which the disagreement arose. The approved report may also be made available on request to competent bodies of the international organizations responsible for resolving trade disputes.
 - k) The parties may report to the ICPM on further action or progress based on the recommendations on the matter out of which the disagreement arose.

ANNEX V

The Informal Working Group on Dispute Settlement Procedures recommends:

1) - that the IPPC Secretariat:

- a) maintain rosters for the purpose of identifying experts for dispute settlement procedures associated with phytosanitary measures and the interpretation or implementation of the Convention;
- b) undertake to develop guidelines and other reference information for parties interested in options and procedures for dispute settlement;
- c) maintain records concerning disputes notified by members to the IPPC Secretariat.

2) - that the ICPM form a subsidiary body with the responsibility to:

- a) establish its terms of reference and rules of procedure subject to the approval of the ICPM;
- b) approve reports of completed settlements for Expert Committee procedures;
- c) note information provided by the Secretariat on consultation, mediation, or other dispute settlement activities being conducted by Members;
- d) monitor dispute settlement activities and consistency in IPPC procedures;
- e) recommend experts for the Director General to appoint to Expert Committees;
- f) provide the Secretariat with counsel and guidance regarding the administration of dispute settlement procedures for the IPPC;
- g) report to the ICPM on dispute settlement activities.

3) - that the ICPM, a subsidiary body, or other body designated by the ICPM :

- a) undertake to establish rules and procedures for the approval of Expert Committee reports;
- b) develop standard formats for dispute settlement reports;
- c) examine the possible roles and functions of regional plant protection organizations in IPPC dispute settlement procedures;
- d) establish standard terms of reference that may be used by the Expert Committee;
- e) establish rules concerning the attendance of observers in the Expert Committee procedures;
- f) explore the possibilities for enhancing developing countries abilities to participate effectively in dispute settlement procedures;
- g) consider guidelines concerning the sharing of expenses associated with dispute settlement;
- h) address any other matters referred to it by the ICPM regarding dispute settlement.

4 - that the ICPM, in collaboration with the Secretariat, undertakes to make available good offices, mediation services, and other assistance that may be desired by parties to resolve the dispute without initiating formal dispute settlement procedures.

5) - that the ICPM adopt the procedures specified under part B of this report.