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INTERIM COMMISSION ON PHYTOSANITARY MEASURES

Third Session

Rome, 2-6 April 2001

Items Arising from the Second Session of the Interim Commission on Phytosanitary Measures Dispute Settlement Procedures

Agenda Item 6.2 of the Provisional Agenda

A. INTRODUCTION

1. At its second meeting in October 1999, the ICPM adopted general considerations and dispute settlement procedures proposed by the Informal Working Group on Dispute Settlement Procedures to fulfil one of the functions charged to the ICPM in its Terms of Reference (ICPM INF-2). The ICPM also agreed that the Informal Working Group would undertake to further elaborate certain aspects associated with the procedures as follows:

- a) undertake to develop rules and procedures for the approval of Expert Committee reports by the ICPM or its subsidiary body;
- b) analyze the need for the establishment of a subsidiary body on dispute settlement and make recommendations on structure, functions, and membership;
- c) undertake to develop rules and procedures for the establishment of expert rosters and the selection process;
- d) develop standard formats for dispute settlement reports;
- e) examine the possible roles and functions of regional plant protection organizations in IPPC dispute settlement procedures;
- f) develop standard terms of reference that may be used by the Expert Committee;
- g) develop rules concerning the attendance of observers in expert Committee procedures;
- h) explore the possibilities for enhancing developing countries ability to participate effectively in dispute settlement procedures;
- i) consider guidelines concerning the sharing of expenses associated with dispute settlement;
- j) address any other matters referred to it by the ICPM regarding dispute settlement.

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2. The Informal Working Group met 9-12 May 2000 at FAO Headquarters in Rome. Representatives of the governments of Brazil, Finland, New Zealand, Portugal, and the United States were in attendance. Documents provided by the Chair (Finland) and the United States served as references. Discussions followed the outline of charges given to the group by the ICPM. Proposals from the meeting were subsequently reviewed, modified for correctness, and approved by the FAO Legal Office for submission to the ICPM as presented below.

B. GENERAL CONSIDERATIONS

3. In considering the need for a subsidiary body of the ICPM devoted specifically to oversight, administration, and support of IPPC dispute settlement procedures, the Informal Working Group considered several factors. In particular, it noted that a subsidiary body would provide needed support to the role of the ICPM with regard to dispute settlement in the WTO and other organizations while generally strengthening and specializing the dispute settlement function of the IPPC. It would promote a high level of consistency and professionalism in procedures and reports, including all points in Expert Committee procedures (point 4 of the existing dispute settlement procedure). In addition it is envisioned that a subsidiary body would reduce workload pressures on the Secretariat.

4. In considering the nature of a subsidiary body, the Informal Working Group suggests that the group should not be large, as it should be cost-effective and be able to respond quickly when necessary. It was considered that expertise and a balance of perspectives were essential elements. In particular, it was agreed that the group should be composed of individuals with the qualifications and commitment to assist in guiding a global phytosanitary dispute settlement system that considers the needs and perspectives of both developing and developed countries.

5. In considering options for the composition and structure of a subsidiary body, the Informal Working Group noted a number of possibilities including the option of using only the ICPM and Secretariat as is currently the practice. This was considered to be inadequate to meet future needs of Members if the IPPC dispute settlement procedures were to be made attractive as an option for dispute settlement. In particular it was considered difficult and awkward to manage many aspects of the dispute settlement procedures based on annual meetings of all Members. In addition, it was anticipated that direct support to the Secretariat would be minimal in such a scenario.

6. As an option it was considered that the Bureau of the ICPM could be used as the subsidiary body for dispute settlement. This was deemed more appropriate but was found to have the disadvantage of uncertainty regarding the level of interest and expertise that may be found in the Bureau and the membership would lack continuity beyond two years. Likewise, the idea of ad hoc working groups formed at ICPM meetings had limited appeal as this approach also did not encourage continuity or account for expertise.

7. The most viable options considered by the Informal Working Group were to either form a sub-group selected from the membership of the Standards Committee (proposed seven members) or establish a subsidiary body of the similar size directly from the membership of the ICPM. (see recommendations below).

C. FUNCTIONS OF A SUBSIDIARY BODY ON DISPUTE SETTLEMENT

8. It is proposed that a subsidiary body on dispute settlement assume the following functions:
- a) provide guidance to the Secretariat and disputing parties in selecting appropriate dispute resolution methods and may assist in conducting or administering consultation, good offices, mediation, or arbitration;
 - b) propose nominations for independent experts in IPPC Expert Committee procedures where the disputing parties cannot agree on experts proposed by the Secretariat;
 - c) approve reports of Expert Committees including verification of all points in Expert Committee procedures (point 4 of the adopted procedure);
 - d) undertake other functions as directed by the ICPM, which may include:
 - i) assist the Secretariat with requests from WTO or other organizations;
 - ii) report on IPPC dispute settlement activities as well as dispute settlement activities undertaken or completed by other organizations that have implications for the phytosanitary community;
 - iii) assist in identifying appropriate experts;
 - iv) assist in review and maintenance of expert rosters;
 - v) identify appropriate training opportunities.

D. STRUCTURE AND MEMBERSHIP OF A SUBSIDIARY BODY

9. Options for the composition of a subsidiary body. The size and composition of the subsidiary body may be determined based on:
- a) geographical representation (e.g. one from each FAO region) (quorum of 4; at least three members from developing countries);
 - b) developed and developing country representation (e.g. 2 or 3 OECD + 2 or 3 G77).

The Informal Working Group suggests that, while it is desirable for the subsidiary body to consist of seven or fewer experts, and its composition be based on either geographical representation or developed/developing country status, it is considered essential that members have an interest and experience in dispute resolution. (See recommendations below).

10. Qualifications of subsidiary body members. Experts should have:
- a) experience in phytosanitary systems;
 - b) familiarity with the IPPC and standards;
 - c) experience with regulations/legislation;
 - d) preferably some form of dispute settlement or conflict resolution knowledge, qualifications and/or experience.

Governments should recognize the time, resources, and support necessary for subsidiary body members to adequately fulfil their roles before nominating them.

11. Selection of Chairperson. The subsidiary body elects its Chair from among its membership.
12. Duration of membership. Members of the subsidiary body serve for a minimum two years, with a maximum of six years.
13. Review. The need for a subsidiary body, and its functions and operation will be reviewed by the ICPM after three years, taking into account experience and changing conditions.

E. RULES OF PROCEDURE OF THE SUBSIDIARY BODY

14. Except as indicated below, the rules of procedure of the ICPM will apply *mutatis mutandis* to the subsidiary body.
15. Meetings. The subsidiary body meets at least once per year, preferably at the occasion of the regular session of the ICPM. Other meetings shall be set by the Chair of the subsidiary body as needed, in particular, for the review and approval of Expert Committee reports and the development of reports for the ICPM. The subsidiary body will normally work by mail, facsimile and email, and in the most cost-effective manner within the available resources.
16. Observers. Meetings of the subsidiary body are generally open according to Rule VII of the Rules of Procedure for the ICPM, but the subsidiary body may determine that certain meetings or business need to be conducted without observers, in particular where confidential or controversial information is involved.
17. Language. The working language of the subsidiary body will be English only.
18. Decision-making. The subsidiary body strives for consensus on all decisions but may vote where necessary using a 2/3 majority to take decisions. Decisions shall include dissenting opinions where requested.
19. Amendments. Amendments to the functions and procedures of the subsidiary body will be promulgated by the ICPM as required.
20. Confidentiality. The subsidiary body shall exercise due respect for confidentiality where sensitive information is identified by disputing parties.

F. PROCEDURE FOR APPROVAL OF EXPERT COMMITTEE REPORTS

21. The procedure for approval of Expert Committee reports is as follows (see also Decision-making above):
- a) an initial report, including dissenting views, if any, is prepared by the Expert Committee;
 - b) the Expert Committee may make the initial report available to the disputing governments for informal consultation;
 - c) the initial report is transmitted to the Secretariat and the FAO Legal Office in English;
 - d) comments from FAO are transmitted to the Expert Committee;
 - e) a 2nd draft report is prepared by the Expert Committee, if necessary, considering comments from FAO;
 - f) the 2nd draft report is submitted to the subsidiary body for approval (verifying that the steps of the Expert Committee procedure and standard review and reporting format have been followed);
 - g) the final report as approved by the subsidiary body is submitted by Expert Committee to the Director General of FAO for distribution to the disputing parties.

G. EXPERT ROSTERS

22. Establishment of rosters. The expert roster is established and maintained by the Secretariat. The roster is composed of phytosanitary experts and other individuals with expertise relevant to plant protection or the application of phytosanitary measures. Rosters are made available on request to official contact points.

23. Experts for the roster are nominated by ICPM Members through official contact points. The Secretariat may also seek or accept through official contact points other specialized expertise as necessary for additions to the roster. RPPOs or other organizations may provide advice in this regard.
24. Applications for inclusion on the roster are made by submission through contact points of a completed FAO Personal History Form (PHF) and/or Curriculum Vitae. Minimum information to be supplied includes:
- name, age and contact information;
 - current position;
 - nationality;
 - language ability;
 - period of availability;
 - scientific and technical (including phytosanitary) background;
 - professional experience;
 - knowledge, experience or qualifications with dispute settlement procedures.
25. The roster will be validated by the Secretariat every three years by requesting that the nominating organization or individual provide updated information. Experts may be removed from the roster based on a request by the expert or ICPM Members, or where information is not verified or updated when requested by the Secretariat

H. SELECTION EXPERTS

26. Experts designated by the disputing parties. Each disputing party designates a representative for the Expert Committee. Where several parties are involved in a dispute, parties initiating or responding to the dispute consult to choose only one expert (ensuring that the Expert Committee consists of only 2 experts nominated by disputing parties and only 5 members total).

27. Selection of independent experts

- a) Criteria used by the IPPC Secretariat. In selecting independent experts to propose for an Expert Committee, the IPPC Secretariat considers the following factors:
- i) scientific/technical background relevant to the dispute;
 - ii) independence (no financial or other personal interest in the outcome of the dispute);
 - iii) ability to serve in his/her individual capacity as an expert.

The Secretariat should avoid nominating experts from the disputing parties, recognizing that at times it may be necessary to nominate experts from the disputing parties to obtain the most appropriate expertise.

- b) Selection procedure. The Secretariat and parties propose independent experts for selection by parties. Where parties cannot agree on experts, the subsidiary body may nominate experts. Where the parties cannot agree on experts nominated by the subsidiary body, no expert committee can be formed.

I. FINANCIAL CONSIDERATIONS

28. Costs associated with specific dispute settlement procedures between parties. Parties determine the distribution of all costs when developing the Terms of Reference for the dispute. It is recommended that parties adopt a flexible attitude toward the provision of resources to facilitate the dispute settlement process, including the provision of assistance to developing countries to increase the possibilities for their use of IPPC dispute settlement procedures.

29. Costs associated with the experts include:
- administration and arrangements for expert meetings;
 - interpretation/translation where necessary;;
 - travel and subsistence (includes fees and salaries for the three independent experts unless agreed otherwise).

J. RULES FOR OBSERVERS IN THE EXPERT COMMITTEE PROCEDURE

30. The disputing parties and the Chairman of the Expert Committee agree on observers to be included and the rules of conduct for observers in Expert Committee proceedings. Where there is no agreement on the number and type of observers, no observers are allowed. Where the presence of observers is agreed, but there is not agreement on the conduct of such observers, observers will only be allowed to attend but cannot participate.

K. ENHANCING PARTICIPATION OF DEVELOPING COUNTRIES

31. The ICPM and disputing parties are encouraged to consider the special needs of developing countries, in particular to identify technical assistance for dispute settlement. Dispute settlement procedures of the IPPC may involve:
- Secretariat assistance subject to available resources;
 - developed countries voluntarily provide all or partial funding for dispute settlement with developing countries when the developed country has initiated the dispute;
 - training on dispute settlement procedures may be added to other training activities.

L. ROLE OF RPPO'S

32. Regional plant protection organizations may have any role in dispute settlement that is agreed by disputing parties and the RPPO. It is recommended that RPPOs assuming such a role develop the capability to adequately administer such procedures.
33. In the case of IPPC Expert Committee procedures, RPPOs may:
- assist in obtaining nominations for expert rosters;
 - assist with administrative support and provision of facilities or resources for dispute settlement among parties within their region;
 - facilitate consultations for contracting parties within their region;
 - provide technical or other support on request of member governments.

M. GENERAL FORMAT FOR EXPERT COMMITTEE TERMS OF REFERENCE

34. Principle Terms of Reference. The Expert Committee is required to:
- obtain a signed agreement between parties on the procedure;
 - arrange for the presentation of information;
 - evaluate the information and formulate recommendations;
 - prepare *IPPC Dispute Settlement Expert Committee Report*

35. Elements of these tasks:

- a) Obtain a signed agreement between parties which covers the following:
 - i) Identification of parties and issues
 - 1) identify party(ies) initiating the dispute settlement procedures;
 - 2) identify party responding to the dispute;
 - 3) identify Expert Committee and Chair ;
 - 4) identify observers (according to Rule I);
 - 5) initiating party identifies and defines the issue(s) at dispute, specifying the points alleged to be in conflict with the interpretation or application of the IPPC or ISPMs;
 - 6) Parties identify tasks of the expert committee – clarify expectation.
 - ii) Proceedings :
 - 1) means of presentation of information;
 - 2) language(s) to be used for documents and discussion (Note: report must be in English);
 - 3) conduct of Observers;
 - 4) distribution of costs (subject to provisions of Section H);
 - 5) location and facilities;
 - 6) administrative support arrangements, including whether/how proceedings are recorded;
 - 7) timetable, including submission of information, number of meetings, and presentation of report.
- b) Arrange for presentation of information .
The Expert Committee solicits the submission of information from disputing parties. Methods of presentation may include documents only, and/or verbal presentations as agreed in advance. The Expert Committee may seek additional information from the disputing parties or other sources as it deems necessary and contingent upon explicit agreement of the disputing parties.
- c) Evaluate information and formulate recommendations:
 - i) review scientific and other information;
 - ii) assess relationship of the issue and information to the specified provisions of the IPPC and ISPMs;
 - iii) formulate conclusions and recommendations as required.
- d) Prepare *IPPC Dispute Settlement Expert Committee Report*
The Expert Committee prepares the *IPPC Dispute Settlement Expert Committee Report* with the following elements:

Executive summary

Introduction

- identify disputing parties;
- statement of background and issue(s) at dispute;

Technical aspects of the dispute

- summary of positions of disputing parties;
- summary of Expert Committee analyses of scientific and technical aspects
- assessment of the relationship of the issue to the specified provisions of the IPPC and ISPMs
- conclusions of the Expert Committee

Dissenting views (if any)

Recommendations

- proposal(s) for resolution and options if appropriate

Attachments

- TOR
- identity of Expert Committee
- list of documents and source (if not confidential)
- other information deemed useful by the Expert Committee

N. FORMAT FOR IPPC SECRETARIAT REPORTS ON FORMAL CONSULTATIONS AND OTHER DISPUTE SETTLEMENTS THAT MEMBERS WISH TO HAVE RECORDED

36. Results of consultations : The Secretariat's report on the results of informal or formal consultations includes the following elements:

- statement of background and issue(s) under consultation;
- identity of consulting parties;
- summary of positions of consulting parties;
- outcome

37. Other disputes Members wish to have recorded : Reports of the Secretariat on other disputes Members wish to have recorded by the ICPM follow the format for the *IPPC Dispute Settlement Expert Committee Report* described above and is based on information supplied by Members in this format.

O. RECOMMENDATIONS

38. The Informal Working Group invites the ICPM to:

1. *Note* the General Considerations (Section B).
2. *Adopt* specific procedures described in Sections F, G, H, I, J, K, L, M, and N.
3. *Decide* whether to establish a subsidiary body, and if agreed to establish a subsidiary body:
 - *decide* on the structure and composition of the subsidiary body (Section D);
 - *adopt* procedures described for the subsidiary body in Sections C and E; and
 - *request* that the subsidiary body develop its Terms of Reference taking into account sections C, D, and E.
4. *Request* that the Secretariat integrate newly adopted elements into existing procedures.