Dispute Avoidance and Settlement

(Prepared by the IPPC Secretariat with input from FAO Legal Service)

Background

1. The International Plant Protection Convention (IPPC) specifically references that the CPM establish procedures (Art XI 2 c) and requests contracting parties who have a concern to consult among themselves to resolve the dispute, but if this is not possible, the contracting parties 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. Related IPPC text is presented in Table 1.
2. Table 1: Extracts of IPPC text related to disputes

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| *ARTICLE XI,* *Commission on Phytosanitary Measures*  *……*  *2. The functions of the Commission shall be to promote the full implementation of the objectives of the Convention and, in particular, to:*  *……*  *(c) establish rules and procedures for the resolution of disputes in accordance with Article XIII;* |
| *ARTICLE XIII,* *Settlement of disputes*  *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.* |

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| **Summary of the activities related to dispute settlement** |
| **ICPM-1** (1998), established an Informal Working Group on Dispute Settlement. |
| **ICPM-2 (**1999 October) reviewed the report of the Informal Working Group on Dispute Settlement, which included Dispute Settlement Procedures. **These procedures were discussed, revised and adopted** (Appendix IX to the report). ICPM-2 (1999) also agreed that the existing informal working group on dispute settlement would further analyse the need for establishing a subsidiary body on dispute settlement and rules and procedures for the establishment of expert rosters and the selection process.  The ICPM-2 also decided (from Appendix to report) that the IPPC Secretariat should:  a) maintain and make public 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. |
| **ICPM-3** (2001 April) agreed that the Informal Working Group would undertake to further elaborate certain aspects associated with the following procedures:  a) 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) 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’ abilities 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.  The ICPM-3 noted that the Informal Working Group report (9-12 May 2000) and discussed options for establishing a Subsidiary Body on Dispute Settlement Procedures. The ICPM considered that the IPPC dispute settlement procedure would focus on the resolution of technical issues, and therefore be complementary in function to the formal dispute settlement procedures of the WTO.  The ICPM considered whether a time limit should be introduced in the procedure to make it an attractive alternative the WTO dispute settlement procedures. It noted however that the timing of events should be decided by the disputing parties rather than by a generic time limit. As the IPPC dispute settlement procedure is concerned with technical matters, the inclusion of sanctions in the procedure was not considered appropriate.  The ICPM noted the General Considerations (section A, Appendix XI), approved specific procedures (sections F, G, H, I, J, K, L, M, and N, Appendix XI), decided to establish a Subsidiary Body (decided on the structure and composition and **adopted procedures for the Subsidiary Body (Appendix XI),** requesting the Subsidiary Body develop its Terms of Reference (taking into account sections C, D, E and K, Appendix XI); and requested that the Secretariat integrate the newly adopted elements into existing procedures.  **ICPM-3 also adopted a STRATEGIC PLAN which included a** Strategic Direction, The provision of dispute settlement mechanisms which relates to the non-binding dispute settlement provisions contained in Article XIII of the New Revised Text of the IPPC. The ICPM is charged to develop rules and procedures for dispute settlement under the IPPC. The Convention explicitly recognizes the complimentary role of the IPPC in this area given the formal binding dispute settlement process that exists under the WTO |
| **ICPM-4** (2002)  The CPM confirmed the first members to the Subsidiary Body on Dispute Settlement (SBDS). |
| **ICPM-5** (2003)  The Subsidiary Body on Dispute Settlement (SBDS) presented its first reported to CPM on its activities. |
| **ICPM-6** (2004)  The (SBDS reported to CPM.    The ICPM was concerned that the IPPC dispute settlement process had not been utilized yet, despite the number of trade disputes that are raised through the SPS Committee. The ICPM agreed that the SBDS work would include the production of an advocacy document for the IPPC dispute settlement process, the development of an **IPPC Dispute Settlement Procedural Manual**, and the production of an expert’s roster system that can be used for relevant nominations. |
| **ICPM-7** (2005)  The SBDS reported to CPM.  The ICPM noted that the **dispute settlement manual** and advocacy document would be finalized and printed in 2005 and requested that specific guidance be developed by the SBDS for the submission of requests for clarifications of ISPMs for inclusion in the dispute settlement manual. |
| **CPM-1** (2006)  The SBDS reported to CPM.  The CPM established a Subsidiary Body on Dispute Settlement under the newly formed CPM. The SBDS had discussed the lack of use of the IPPC dispute settlement system and had concluded that the CPM be asked to make contracting parties aware of the system and to run some form of promotional program. The IPPC Secretariat noted that the **manual would be finalized** after CPM-1, and be made available on the IPP. |
| **CPM-2** (2007)  The SBDS reported to CPM.  The CPM were informed that the **IPPC Dispute Settlement Manual and advocacy document had been finalized** and would be available in FAO languages by the end of May 2007. |
| **CPM-3** (2008)  The SBDS reported to CPM.  The CPM were informed that the **IPPC dispute settlement manual** was available in English, Spanish and French and would be made available in Chinese and Arabic after review of the translation.  The Secretariat noted that several inquiries had been made in 2007 regarding disputes, in  particular regarding the interpretation of the term “public officers” in ISPMs Nos. 7 and 12. |
| **CPM-4** (2009)  The CPM was informed that at the originally scheduled meeting of the SBDS there had been no quorum but that the SBDS met later and attained its quorum.  The SBDS reported to CPM. |
| **CPM-5** (2010)  The Secretary informed the CPM that there had been no activity regarding dispute settlement since CPM-4. One member questioned the future role and reason for the Subsidiary Body on Dispute Settlement (SBDS) if there were no disputes. The Secretariat noted that informal discussions between members had often been sufficient to resolve phytosanitary disputes, but that the system put in place under the IPPC was still useful even if not used so far. The Chairperson of the SBDS noted that the SBDS had been established as a consultative technical body and was available for members should they wish to use it. The IPPC dispute settlement system should remain available to contracting parties and he hoped that it would be used in the future. |
| **CPM-6** (2011)  There was no report to CPM-6 as the SBDS did not meet however the CPM were informed that there was the **first request for a resolution of dispute (Republic of South Africa and the European Union regarding Citrus Black Spot)**. The CPM adopted an amendment to the SBDS procedures, to revise rule 5 to state the SBDS can meet when necessary instead of annually, as would be determined through consultation with the Secretariat.  One member queried the existence of the SBDS and suggested that it was time to review  the workings of the SBDS given the lack of resources for this body. |
| **CPM-7** (2012)  The Secretariat noted that they were unable to adequately support the IPPC dispute settlement process during 2012 but additional resources in the Secretariat meant improved support would be possible in 2012. The Secretariat also noted that the current formal outstanding dispute needs to be addressed urgently and that the Secretariat is currently not involved in any informal phytosanitary dispute discussions |
| **CPM-8** (2013)  The SBDS reported to CPM  The CPM was informed that the Secretariat has been involved in facilitating discussions to resolve disputes using the informal processes outlined in the **IPPC Dispute Settlement manual**, but the status of most of the informal disputes is not known and the Secretariat.    The SBDS Chairperson SBDS commented that it has been difficult to obtain a quorum in the SBDS and encouraged increased commitment from regions to support the work of the body.  The SPM requested the SPG 2013 to review the SBDS. A survey had beem launched at CPM-8 (2013) regarding the procedures and activities of the SBDS received only 9 responses, and thus, feedback is minimal. Due to logistical problems, it was difficult to organize a quorum for the meetings in June and September. It was reported that in addition to the ongoing EU-South Africa dispute, there is one other serious inquiry from a member.  Several members of the SPG agreed that the absence of disputes is a positive thing for the IPPC, as long as such disputes are not being taken elsewhere. SBDS is a service provided to CPs so if it is not utilized, other activities such as standard setting and capacity development are apparently functioning sufficiently in member countries. |
| **CPM-9** (2014)  Secretariat presented a paper on the review of the SBDS along with recommendations. The CPM adopted the SBDS recommendations as presented in Appendix 1 of CPM 2014/22:  **SBDS Actions**   1. The chair of the SBDS will regularly report to CPM on all dispute avoidance actions undertaken. The Parties will only be named if they have agreed or the information is already public (if posted on the IPP) as this action would help promote transparency and effectiveness of the process. 2. The report to CPM on dispute avoidance actions will focus on the questions or technical inputs and concerns, actions taken by the IPPC Secretariat and the Parties in question, and the result and the status of the issue under dispute. Neutral language should be used in the report and it should be based on facts. 3. The procedures for the SBDS will be changed to promote greater use of the informal processes and to encourage dispute avoidance and may help the process work more efficiently and effectively:    1. explaining how the informal process works (informal consultation, etc.)    2. ensuring the confidentiality of the process and the parties involved, if required;    3. strengthening the dispute avoidance phase;    4. focusing on solving the problem/answering the question while still in the informal process; and,    5. encouraging countries to provide feedback after using either the informal dispute avoidance or the formal process. 4. SBDS will encourage countries to utilize the revised dispute avoidance process, given that this is a more timely and cost effective process, before taking a dispute further under the IPPC or WTO dispute settlement systems . 5. SBDS should review and revise their Terms of Reference and present them to the CPM for adoption, taking into account the following: 6. provide clarifications on the standards and Convention by the SBDS (coordinate the activity), with possible advisory input from the Standards Committee, and the IPPC Secretariat; 7. monitor the IPPC Dispute Settlement System material to make sure it is updated and appropriate; 8. monitor trade concerns within the WTO-SPS and suggest use of the available IPPC process during the dispute avoidance phase as an option to the WTO-SPS Dispute Settlement System; 9. monitor/evaluate recurrent issues and determine possible implementation issues that may need to be addressed; and, 10. assist with awareness raising within regions and the SPS Committee.   **Secretariat Actions**   1. The IPPC Secretariat will work with SBDS to use various communications channels to increase awareness of the revised dispute avoidance process (RPPOs, CDC, SC, SPS, CPM) using easy to read materials (publications, presentations, etc.). 2. Whenever possible, the IPPC Secretariat should offer the services of the IPPC dispute avoidance process to Contracting Parties while the issue is still at its early stages and before the r phytosanitary trade concerns are registered with WTO SPS Committee. 3. IPPC Secretariat resources should be matched to the demand of dispute avoidance and settlement services. In case that additional resource are required, the Parties concerned will cover the direct additional costs incurred by the IPPC Secretariat. 4. The IPPC Secretariat will remind regions, when nominating members for SBDS,that the regions are responsible for ensuring their SBDS member from their region can participate fully in the SBDS activities recognizing that all SBDS activities are conducted in English language. 5. The IPPC Secretariat should have some flexibility in funding SBDS members that require assistance.   **Other Actions**   1. The CPM should review the need for the SBDS again in 5 years (in 2018). |
| **CPM-10** (2015)  The SBDS reported to CPM.  The Secretariat presented the paper and informed the CPM that there had been a substantial increase in the consultations on dispute avoidance and settlement options from FAO member countries. The Secretariat confirmed that the phytosanitary dispute between the Republic of South Africa and the European Union was progressing and that a second call for independent experts for the IPPC Citrus Black Spot Expert Committee had been made |
| **CPM-11** (2016)  The SBDS provided a verbal report to CPM.  The CPM were informed that emphasis in SBDS would continue  to be on dispute avoidance. |
| **CPM-12** (2017)  The CPM agreed that the Subsidiary Body on Dispute Settlement (SBDS) be dissolved at the same time as the IC is established and the functions and procedures of these committees be transferred to the IC |
| **2018**  IC developed a Terms of Reference for an IC Sub-group on Dispute Avoidance and Settlement (DAS) and it went for consultation 1 July to 30 August 2018. The IC revised the Terms of Reference for the IC Sub-group on DAS and approved them. |
| **2019**  The IPPC Secretariat called for experts for the IC Sub-group on DAS, only two nominations were received which is not enough to establish such a group. The IPPC Secretariat consulted the Bureau in June 2019 and were requested to provide some background to the SPG and have them discuss the issue. |

**Conclusions.**

1. As you see from the summary of the history, the SBDS has not been fully utilized and this is not the first time the SPG is requested to evaluate what to do with disputes.
2. Here are a few points to consider:

* During the adoption of the Dispute Settlement Procedures in 1999 and 2001, some inconsistencies were created and still exist today, which should be rectified urgently.
* There are several references to an IPPC Dispute Settlement manual, that is was under development, that it would soon be published and in 2008, the CPM was informed that it was available. However, inconsistencies were discovered in the manual (similar to the ones in the procedures) and the manual was removed from the IPP.
* The only formal dispute has been the one between the Republic of South Africa and the European Union regarding Citrus Black Spot, which was initiated in 2010 but still remains unresolved. Numerous interventions have been made and the IPPC Secretariat (including FAO Legal Services) have dedicated considerable resources to helping the parties resolve their dispute, including making two calls for experts, which resulted in insufficient experts acceptable to both parties. A budget to cover the IPPC Secretariat costs was submitted along with a proposed Terms of Reference and as these have not been agreed to, the IPPC Secretariat has not received any extra budgetary resources. Most recently, there has been a lack of actual engagement, although both parties have indicated they would still like to use the IPPC Dispute Settlement Procedure.

1. The SPG is invited to:

* *discuss* and *determine* if the IPPC Secretariat should be involved in dispute settlements due to the lack of interest and lack of movement on disputes.
* *discuss* how the IPPC Secretariat should be involved in dispute avoidance and determine the best way to address this work with insufficient nominations to form an IC Sub-group.