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Alimentación

INTERIM COMMISSION ON PHYTOSANITARY MEASURES

Sixth Session

Rome, 29 March – 2 April 2004

Report on the Activities of the Sanitary and Phytosanitary Committee and Other Relevant WTO Activities in 2003

Agenda Item 6.1 of the Provisional Agenda

1. A report on relevant activities of the Sanitary and Phytosanitary (SPS) Committee and the World Trade Organization (WTO) prepared by the WTO Secretariat is provided at Annex 1.
2. The ICPM is invited to:
 1. *Note* the information contained in the report.
 2. *Take* into account any relevant issues in this report when developing the ICPM work programme.

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Annex 1.

**Activities of the SPS Committee and other relevant
WTO activities in 2003**

Interim Commission on Phytosanitary Measures – Sixth Session

Report by the WTO Secretariat¹

1. The present report provides a summary of the activities and decisions of the WTO Committee on Sanitary and Phytosanitary Measures (the "SPS Committee") during 2003 to the Sixth Interim Commission on Phytosanitary Measures (ICPM). It identifies the work of relevance to the ICPM and the International Plant Protection Convention (IPPC), including: specific trade concerns; equivalence; regionalization; monitoring the use of international standards; and technical assistance. The report also includes relevant information on dispute settlement in the WTO which occurred outside the context of the SPS Committee.
2. The SPS Committee held three regular meetings in 2003: on 2-3 April, 24-25 June and 29-30 October.² At the April meeting Mr. Paul Martin (Canada) was appointed Chairperson for the period 2003/2004.
3. The Committee agreed to the following tentative calendar of regular meetings for 2004: 17-18 March, 23-24 June, and 13-14 October.

Specific Trade Concerns

4. A large part of each SPS Committee meeting is devoted to the consideration of specific trade concerns. Any WTO Member can raise particular problems with the food safety, plant or animal health requirements imposed by another WTO Member. Problems raised in this context are usually in relation to the notification of a new or changed measure, or based on the experience of exporters. Often other countries will share the same concerns. At the SPS Committee meetings, Members usually commit themselves to exchange information and hold bilateral consultations to resolve the identified concern.
5. A summary of the specific trade concerns raised in meetings of the SPS Committee is compiled on an annual basis by the Secretariat of the WTO.³ In the eight years of implementation of the SPS Agreement, from 1995 to the end of 2002, 30 per cent of specific trade concerns raised were related to plant health.
6. In 2003, five phytosanitary issues were raised for the first time in the SPS Committee:
 - EC concerns regarding Australia's import requirements for Netherlands truss tomatoes;
 - US concerns regarding Mexico's restrictions on imports of dry beans;
 - US concerns regarding Japan's fumigation standards;

¹ This report has been prepared under the WTO Secretariat's own responsibility and is without prejudice to the positions of WTO Members or to their rights or obligations under the WTO.

² The report of the April meeting is contained in G/SPS/R/29 and corrigendum, that of the June meeting in G/SPS/R/30 and corrigendum, and that of the October meeting will be circulated as G/SPS/R/31.

³ The latest version of this summary can be found in document G/SPS/GEN/204/Rev.3. This document is a public document available from <http://docsonline.wto.org>. The document will be updated prior to the March 2004 SPS Committee meeting, and an excerpt of the phytosanitary concerns will be distributed to the Sixth ICPM meeting.

- Brazil's concerns regarding Japan's restrictions on imports of mangoes; and
 - New Zealand's concerns regarding Chinese Taipei's import restrictions on potatoes.
7. Four issues relating to plant health that had been previously raised were discussed again, including:
- Thailand's concern regarding Australia's restriction on durian imports;
 - Argentina's concern regarding Venezuela's restriction on imports of potatoes, garlic and onions;
 - New Zealand's concerns regarding Japan's official control restriction; and
 - EC concerns regarding Brazil's import requirements for seed potatoes.
8. Two phytosanitary issues were brought to the attention of the SPS Committee related to notifications made by Members, namely:
- Israel and Kenya's concern regarding the EC directive on cut flowers; and
 - Argentina's concern regarding the US implementation of the international standard for phytosanitary measures on wood packaging (ISPM 15).

Equivalence

9. In response to concerns raised by developing countries, in October 2001 the SPS Committee developed guidance on the implementation of Article 4 of the SPS Agreement on equivalence.⁴ In 2002 and 2003, the SPS Committee agreed on clarifications of certain paragraphs of the Decision on Equivalence.⁵ Discussions are continuing on a proposed further clarification of paragraph 5 of the Decision regarding accelerated procedures for the recognition of equivalence of historically traded products.⁶ These clarifications note the work on recognition of equivalence undertaken in the Codex and the OIE, and request the ICPM to take into consideration the Decision on Equivalence and the subsequent clarifications in its work on the judgement of equivalence with regard to measures to address plant pests and diseases. The SPS Committee has been kept informed of the progress made by the IPPC's Expert Working Group on Efficacy of Measures and the work begun in September 2003 on an ISPM for equivalence.

Regionalization

10. In 2003, the SPS Committee began to consider the implementation of Article 6 of the SPS Agreement, which requires consideration of the pest- or disease status of exporting and importing areas. The SPS Committee discussed practical problems based on the experiences of Members concerning recognition of their plant and animal health status.⁷ The Committee received regular updates regarding the work on regionalization undertaken by the IPPC and the OIE, and noted the importance of the participation of representatives from the IPPC and the OIE at the discussions on the subject. A number of WTO Members proposed that the SPS Committee consider developing guidelines for the practical implementation of Article 6 of the SPS Agreement. The SPS Committee agreed to further pursue this issue in 2004, and will hold informal meetings on the subject prior to the regular SPS Committee meetings.

Monitoring the Use of International Standards

11. The procedure adopted by the SPS Committee in 1997 to monitor the use of international standards invites countries to identify specific trade problems they have experienced due to the

⁴ G/SPS/19.

⁵ The agreed clarifications are in G/SPS/19/Add.1 and Add.2.

⁶ G/SPS/W/142.

⁷ Argentina (G/SPS/GEN/433); Chile (G/SPS/GEN/381, G/SPS/W/129 and G/SPS/W/140); European Communities (G/SPS/GEN/101 and G/SPS/GEN/461), Mexico (G/SPS/GEN/388 and G/SPS/GEN/440); South Africa (G/SPS/GEN/139 and G/SPS/GEN/373); Peru (G/SPS/GEN/417, G/SPS/GEN/418 and G/SPS/GEN/445).

use or non-use of relevant international standards, guidelines or recommendations.⁸ These problems, once considered by the SPS Committee, are drawn to the attention of the relevant standard-setting body.

12. Several concerns regarding the implementation of ISPM 15 were raised in the SPS Committee in 2003. Members noted that they did not have a problem with the standard itself, but that they needed more time to adapt their treatment processes to meet new national requirements based on the standard. The SPS Committee agreed to continue discussions on the implementation of ISPM 15.

13. The Committee received regular updates on the standard-setting activities of the IPPC, as well as the OIE and Codex.⁹

Technical Assistance

14. At each of its meetings, the SPS Committee has solicited information from countries regarding their technical assistance needs and activities. The SPS Committee has been kept informed of the collaborative efforts of the IPPC and FAO secretariats to strengthen the capacity of developing countries and of the importance of the participation of the IPPC in the regional SPS workshops organized by the WTO. The IPPC secretariat and the FAO have also provided information regarding their technical assistance activities at each regular meeting of the SPS Committee in 2003.¹⁰

Other Relevant WTO Activities - Dispute Settlement

15. In 2003, dispute settlement reports were issued in the case regarding trade restrictions due to *Erwinia amylovora*, and three new dispute settlement panels were established to consider complaints alleging violation of the SPS Agreement.

The WTO dispute settlement procedure

16. Any WTO Member may invoke the formal dispute resolution procedures of the WTO if they consider that a particular measure imposed by another WTO Member violates any of the WTO Agreements, including the SPS Agreement. If formal consultations on the problem, the first step of the WTO dispute procedure, are unsuccessful, a WTO Member may request that a panel be established to consider the complaint.¹¹ A panel of three individuals considers written and oral arguments submitted by the parties to the dispute and issues a written report of its legal findings and recommendations. The parties to the dispute may appeal a panel's decision before the WTO's Appellate Body. The Appellate Body examines the legal findings of the panel and may uphold or reverse these. As with a panel report, the Appellate Body report is adopted automatically unless there is a consensus against adoption.

17. According to the SPS Agreement, when a dispute involves scientific or technical issues, the panel should seek advice from appropriate scientific and technical experts. Scientific experts have been consulted in all SPS-related disputes. The experts are usually selected from lists provided by the standard-setting organizations referenced in the SPS Agreement, including the IPPC for plant health. The parties to the dispute are consulted in the selection of experts and regarding the information solicited from the experts.

⁸ G/SPS/11.

⁹ G/SPS/GEN/439, G/SPS/GEN/449, G/SPS/GEN/380, G/SPS/GEN/406, G/SPS/GEN/407, G/SPS/GEN/437, G/SPS/GEN/393, G/SPS/GEN/404, G/SPS/GEN/447.

¹⁰ This information is available in the reports of the SPS Committee meetings (G/SPS/R/29; G/SPS/R/30; and G/SPS/R/31).

¹¹ A flow chart of the dispute resolution process can be consulted at (http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm).

18. As of 2003, four SPS-related issues have been considered by panels. Two SPS cases dealt with plant pests and quarantine requirements: the United States complaint about Japan's requirement for testing each variety of fruit for efficacy of treatment against codling moth (*Variety testing*)¹²; and the United State's complaint about Japan's set of requirements on apples imported from the United States relating to fire blight (*Fire blight*).¹³ Two dispute cases concerned food safety regulations – the European Communities (EC) ban on imports of meat treated with growth-promoting hormones, challenged by both the United States and by Canada (*Hormones*).¹⁴ One complaint dealt with diseases of fish, brought by Canada against Australia's import restriction on fresh, chilled or frozen salmon (*Salmon*).¹⁵ A US complaint on this same issue was resolved before the panel completed its examination.

Main findings from the SPS-related trade disputes

19. The panel and Appellate Body reports in the *Fire blight* case were issued during 2003. There was no disagreement between the United States and Japan that fire blight was not currently found in Japan, that the disease did occur in some US apple orchards, and that the disease could cause serious phytosanitary damage. The panel considered Japan's set of requirements as a whole (which included that the fruit come from disease-free orchards in designated states, inspection of orchards at least three times per year, a 500-meter buffer zone around the orchards, chlorine-treatment of harvested apples, containers and packing facilities, etc.) to be the measure at issue. To determine whether there was sufficient scientific evidence supporting Japan's measure, the panel considered the evidence both with regard to mature, symptomless apples, which the United States claimed was the product it exported, and with regard to immature or damaged fruit which might inadvertently enter Japan. The panel noted that this was a well-studied plant disease, yet there was not sufficient evidence that fresh apple fruit could serve as a pathway for the spread of fire blight, nor was there convincing evidence that the disease has ever been spread through trade in apples. The Appellate Body upheld the panel's findings that Japan was maintaining its measure without sufficient scientific evidence. The panel and Appellate Body also ruled that Japan could not defend its measure as a provisional measure in the context of Article 5.7, because this was not a situation in which the scientific evidence was insufficient.

20. In the *Fire blight* case, the United States also challenged the risk assessment provided by Japan. The panel and Appellate Body ruled that Japan had not met the obligations under Article 5.1 to ensure that its measure was based on an appropriate risk assessment, because it had failed to evaluate the likelihood of entry, establishment and spread of the disease from imported apple fruit *per se*. Furthermore, Japan had not evaluated this likelihood according to the SPS measures which **might** be applied, but had only considered the risk in light of the measures which it was currently applying. The risk assessment standards of the IPPC were taken into consideration in this case.

21. In the *Variety testing* case, both the United States and Japan agreed that codling moth presented a risk to Japan. However, the panel concluded that there was no rational relationship between the scientific evidence submitted by Japan and its requirement that each variety be submitted to the full testing protocol to ascertain the efficacy of the fumigation treatment. The Appellate Body upheld the panel's conclusion that Japan was maintaining its measure without sufficient scientific evidence, in violation of Article 2.2. Japan argued that its measure was a

¹² The report of the panel is contained in document WT/DS76/R. The Appellate Body report is contained in document WT/DS76/AB/R.

¹³ The report of the panel is contained in document WT/DS245/R. The Appellate Body report is contained in document WT/DS254/AB/R.

¹⁴ The report of the panels are contained in documents WT/DS26/R/USA and WT/DS48/R/CAN. The Appellate Body report is in document WT/DS/26/AB/R and WT/DS48/AB/R.

¹⁵ The report of the panels are contained in documents WT/DS18/RW. The Appellate Body report is in document WT/DS18/AB/R.

provisional measure, permitted under Article 5.7 in cases where relevant scientific evidence is insufficient. The panel and Appellate Body, however, ruled that Japan did not meet the requirements of this Article because it had failed to actively seek new information and evidence, and it had failed to review its measure within a reasonable period of time.

22. The panel in the *Variety testing* case also ruled that Japan had violated Article 5.6 of the SPS Agreement, because its measure was not the least trade-restrictive reasonably available to achieve the desired level of health protection. The Appellate Body overturned this finding, as it was the experts advising the panel, and not the United States, that suggested that sorption level testing could provide a relatively easy alternative to Japan's varietal testing requirements. The Appellate Body did agree with the panel's ruling that measures which effectively set conditions for import access have to be published regardless of whether they are mandatory, and that Japan's failure to notify its measure was inconsistent with the obligation under Article 7.

23. Although the other SPS disputes have not involved plant products, some of the findings could in future be relevant to disputes involving phytosanitary measures. Decisions in the *Hormones* cases made it clear that WTO Members do not necessarily have to carry out their own risk assessments, and that a risk assessment does not have to be quantitative, but can be qualitative. Furthermore, as the precautionary principle "found reflection" in the SPS Agreement and in particular in Article 5.7, a member cannot invoke the precautionary principle *per se* as a justification for not complying with the provisions of the SPS Agreement.

24. The *Salmon* case clarified that a risk assessment for animal health must:

- (i) **identify** the diseases in question, as well as their associated biological and economic consequences;
- (ii) **evaluate the likelihood** of entry, establishment or spread of these diseases, as well as the associated biological and economic consequences; and
- (iii) **evaluate the likelihood** of entry, establishment or spread of these diseases **according to the SPS measures** which might be applied.

This set of requirements was subsequently confirmed in the *Fire blight* case.

25. Both the *Hormones* and *Salmon* cases examined alleged violations of the requirement in Article 5.5 to avoid arbitrary or unjustified differences in the level of health protection considered appropriate, if this lack of consistency results in discrimination or in hidden barriers to international trade. Situations were considered comparable if they involved the same product, or different products which might result in the same health risks. A member alleging violation of this provision must not only show that arbitrary or unjustified differences are applied, but also that these result in discrimination or a disguised restriction to trade.

New Disputes

26. On 29 August 2003, two new panels were established on SPS-related issues. One will examine the complaints by the United States, Canada and Argentina regarding the European Communities measures affecting the approval and marketing of biotech products.¹⁶

27. Another panel was established to examine complaints by the Philippines against the procedures applied by Australia on imports of fresh fruit and vegetables, including fresh bananas, papaya, and plantains.¹⁷ The Philippines alleges that Australia's import requirements violate the

¹⁶ The requests for the establishment of a panel by the US, Canada and Argentina are found in the documents WT/DS291/23, WT/DS292/17, and WT/DS293/17.

¹⁷ The request by the Philippines for the establishment of a panel is found in document WT/DS270/5/Rev.1.

SPS Agreement because they are not based on an appropriate risk assessment (Article 5.1, 5.2 and 5.3); are not based on scientific principles (Article 2.2); are not the least trade restrictive available (Article 5.6); do not take into account pest- or disease-free areas (Article 6.1 and 6.2); are not based on international standards (Article 3.1); discriminate between Members where similar conditions prevail and are applied in a manner which constitutes a disguised restriction on international trade (Article 2.3); and result in arbitrary and unjustifiable distinctions in levels of phytosanitary protection (Article 5.5). Furthermore the Philippines argues that there is no basis for Australia trying to justify its measures as provisional actions under Article 5.7 of the SPS Agreement.

28. On 7 November 2003, another panel was established at the request of the European Communities to examine Australia's quarantine regime for imports, including tomatoes, fresh citrus fruit, apples, peaches, nectarines, cucumber, lettuce, carrots, apricots, edible eggs and egg products, uncooked pigmeat, pig semen, uncooked poultry meat, calf- milk replacer, and organic fertiliser based on chicken manure.¹⁸ According to the European Communities, the requirements on these products are unduly restrictive and breach Australia's obligations to ensure that its measures are not maintained without sufficient scientific evidence (Article 2.2), and are based on appropriate risk assessments (Article 5.1). Additionally the European Communities seeks examination by the panel of specific conditions for import of pigmeat into Australia, which it considers contradict the obligation to recognize the equivalence of measures providing the same level of health protection (Article 4.1), and are more trade restrictive than necessary in violation of Article 5.6 of the SPS Agreement.

29. It is likely that the panels examining these new complaints will seek scientific advice, including from phytosanitary experts.

¹⁸ The request by the European Communities for the establishment of a panel is found in document WT/DS287/7.