

**1. INTRODUCTION**

1.1 The present dispute concerns certain measures imposed by Costa Rica on the importation of fresh avocados for consumption from Mexico, related to Avocado sunblotch viroid (ASBVd).

*1.1 Complaint by Mexico*

1.2 On 8 March 2017, Mexico requested consultations with Costa Rica pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 11.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), with respect to the measures and claims set out below.<sup>1</sup>

1.3 Consultations were held on 26 and 27 April 2017, but failed to resolve the dispute.<sup>2</sup>

*1.2 Panel establishment and composition*

1.4 On 22 November 2018, Mexico requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of GATT 1994, and Article 11.1 of the SPS Agreement with standard terms of reference.<sup>3</sup> At its meeting on 18 December 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Mexico in document WT/DS524/2, in accordance with Article 6 of the DSU.<sup>4</sup>

1.5 The Panel's terms of reference are as follows:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Mexico in document WT/DS524/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>5</sup>

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<sup>1</sup> Mexico's request for consultations, WT/DS524/1.

<sup>2</sup> Request for establishment of a panel by Mexico, WT/DS524/2 (Mexico's panel request), p.1.

<sup>3</sup> Mexico's panel request, WT/DS524/2, p. 1.

<sup>4</sup> DSB, Minutes of Meeting held on 18 December 2018, WT/DSB/M/423.

<sup>5</sup> Constitution of the Panel established at the request of Mexico, WT/DS524/3.

1.6 On 16 May 2019, the parties agreed that the Panel would be composed as follows:

Chair: Mr Gary HORLICK  
Members: Mr Alejandro BUVINIC  
Ms María de Lourdes FONALLERAS

1.7 Canada, China, El Salvador, the European Union, Honduras, India, Panama, the Russian Federation and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 *Panel proceedings*

1.3.1 General

1.8 In order to hear the views of the parties on the Working Procedures and timetable, the Panel held an organizational meeting on 5 July 2019. The Panel adopted its Working Procedures<sup>6</sup> and timetable on 16 July 2019.<sup>7</sup>

1.9 The Panel received Mexico's first written submission on 9 August 2019 and Costa Rica's first written submission on 25 September 2019. The Panel received third party written submissions from Canada and the European Union on 8 October 2019.

1.10 The Panel sent advanced written questions to the parties and to the third parties on 22 October 2019 and held its first meeting with the parties on 29 and 30 October 2019. A session with the third parties took place on 30 October 2019. The Panel then sent written questions to the parties and third parties on 1 November 2019. Mexico also sent written questions to Costa Rica on the same date.

1.11 Canada, El Salvador and the European Union sent their responses to the Panel's questions on 22 November 2019.

1.12 On 28 November 2019, the parties requested that the Panel extend the deadline for the submission of their written responses to the questions posed by the Panel and by the other party from 29 November 2019 to 6 December 2019. The Panel agreed to the parties' request, and the parties submitted their responses on 6 December 2019.

1.13 On 24 January 2020, the Panel received the parties' second written submissions.

1.14 Since March 2020, the COVID-19 pandemic, and the measures taken in response to this disease in Switzerland, in each party's territory and in the countries of residence of the panelists and of the experts advising the panelists,

<sup>6</sup> See the Working Procedures of the Panel (Annex A-1).

<sup>7</sup> The Panel amended its timetable, at the request of or in consultations with the parties, on multiple occasions, most recently on 8 February 2022.

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called into question the subsequent dates on the timetable, including the dates proposed for the Panel's meeting with the parties and experts and for the Panel's second meeting with the parties.

1.15 On 17 April 2020, the Panel informed the parties that it was assessing the situation caused by the pandemic and that it would contact them again in due course. The Panel also invited the parties to comment on this matter, if they so wished.

1.16 On 6 May 2020, Costa Rica requested that the Panel postpone its meeting with the parties and experts and its second meeting with the parties, scheduled for 2 and 5 June 2020, as it would not be able to complete the necessary formalities to travel to Geneva as a result of the pandemic.

1.17 On 11 May 2020, Mexico indicated that it could agree to Costa Rica's request. Mexico also indicated that ideally the meetings would be held in person as originally planned, but stressed the importance of obtaining a ruling as soon as possible. Mexico stated that, if the evolution of the pandemic did not allow for the remaining meetings to be held as originally planned in the next four months, it would review the matter again and explore alternatives for holding those meetings.

1.18 On 14 May 2020, the Panel informed the parties that its meeting with the parties and experts and its second meeting with the parties were to be postponed until further notice, and that it would continue to monitor the situation caused by the pandemic.

1.19 On 29 May 2020, Mexico and Costa Rica sent a communication to the DSB Chair, stating that both parties had agreed on Procedures for Arbitration under Article 25 of the DSU for this dispute.<sup>8</sup>

1.20 On 9 October 2020, the Panel informed the parties that it was still impossible to hold its meeting with them and the experts and its second meeting with the parties in person, because of the situation caused by the pandemic, including ongoing travel restrictions and the health risks associated with travelling and attending large meetings. The Panel therefore invited the parties to express their views on possible alternatives to move proceedings forward and hold the remaining meetings, including through virtual means, in writing, or using a combination of both.

1.21 On 16 October 2020, the parties sent their comments on possible alternatives to move proceedings forward and hold the remaining meetings. Mexico indicated that the virtual communication methods available to it would allow the remaining meetings to be held virtually. For its part, Costa Rica stated that the most appropriate format for the Panel's second meeting with the parties was a hybrid one, whereby the parties could meet at the WTO in Geneva, and all those who could not be physically present could participate virtually. Costa Rica

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<sup>8</sup> Agreed Procedures for Arbitration under Article 25 of the DSU, WT/DS524/5.

also stated that it would prefer the Panel's meeting with the parties and experts to be conducted in writing, and suggested that the remaining meetings should be held separately, with a minimum of two weeks between the meetings.

1.22 On 20 October 2020, the parties submitted their comments on the other party's comments concerning possible alternatives to move proceedings forward and hold the remaining meetings. Mexico said that there was no compelling reason for the meetings to be held at least two weeks apart, and indicated that, should the Panel meet in person in Geneva to participate in the meetings, the format should be entirely virtual for both parties. Costa Rica requested that, should the Panel adopt alternative procedures, these should be in line with the provisions of its Working Procedures, and reserved the right to comment on them.

1.23 The Panel gave careful consideration to the parties' comments, the technological tools available to them, the situation caused by the pandemic and the availability of both the panelists and the experts.

1.24 On 28 October 2020, the Panel informed the parties that it wished to hold both meetings virtually (through the Cisco Webex platform). The Panel also stated that it wished to move proceedings forward in a manner that resembled as much as possible how they would have unfolded if the world were not in the midst of a pandemic, without having to change the Working Procedures that had already been adopted, or making only minimal changes, while at the same time striving to respond to the challenges arising from the situation.

1.25 The Panel noted that, owing to the participants' time differences and the limitations inherent to a virtual meeting, eight working days would be required for both its meeting with the parties and experts and its second meeting with the parties. The Panel advised that it had been impossible to find eight consecutive working days on which all the participants were available to attend those meetings. Therefore, the Panel was of the opinion that the best approach would be to separate both meetings, as this would be the only way to proceed with at least one of them (the Panel's meeting with the parties and the experts) before the end of 2020. The Panel noted that none of the panelists would be able to travel to Geneva because of the pandemic.

1.26 On 4 November 2020, the Panel proposed a draft of Additional Working Procedures of the Panel on meetings with remote participants to the parties, indicating that the idea behind these procedures was to supplement, rather than change, the Working Procedures of the Panel and the Additional Working Procedures of the Panel for consultations with experts. The Panel clarified that the aim of the Additional Working Procedures of the Panel on meetings with remote participants was to ensure that the meetings were conducted in a manner that resembled as much as possible in-person meetings, albeit by virtual means.

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1.27 On 12 November 2020, the Panel sent the adopted Additional Working Procedures of the Panel on meetings with remote participants to the parties, after considering the comments and views of the parties thereon.<sup>9</sup> The Panel announced that those Additional Working Procedures would apply both to its meeting with the parties and experts and to its second meeting with the parties.

1.28 As described below, the Panel's meeting with the parties and experts was held virtually on 15 and 18 December 2020.

1.29 The Panel's second meeting with the parties was held on 9 and 11 March 2021, also virtually. The Panel sent advanced written questions to the parties on 1 March 2021 and written question after the meeting on 17 March 2021. On 14 April 2021, the parties sent their responses to the Panel's questions. On 28 April 2021, the parties sent their comments on the other party's responses to the Panel's questions.

1.30 On 26 May 2021, the Panel issued the descriptive part of its Report to the parties. The parties sent their comments on the descriptive part of the Report on 9 June 2021.

### 1.3.2 Costa Rica's request for a preliminary ruling

1.31 In its first written submission, dated 25 September 2019, Costa Rica raised a preliminary issue with respect to Mexico's claim that the actions of Costa Rica had been inconsistent with Article 6.1 of the SPS Agreement. Costa Rica considered that Mexico's claim concerning the adaptation of Costa Rica's measures to the areas of origin of the product was outside the Panel's terms of reference.<sup>10</sup>

1.32 Pursuant to paragraph 4(1)(a) of the adopted Working Procedures<sup>11</sup>, the Panel provided Mexico with an opportunity to respond to Costa Rica's preliminary ruling request prior to the Panel's first meeting with the parties. Mexico submitted its response to Costa Rica's request on 15 October 2019. Both parties had an opportunity to comment on Costa Rica's preliminary ruling request at the Panel's first meeting with the parties. Pursuant to paragraph 4(1)(d) of the adopted Working Procedures<sup>12</sup>, the Panel also provided third parties with an opportunity to comment on Costa Rica's preliminary ruling request. Canada commented as a third party on 22 October 2019.

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<sup>9</sup> Additional Working Procedures of the Panel on meetings with remote participants, in Annex A-3.

<sup>10</sup> Costa Rica's first written submission, paras. 4.1-4.18.

<sup>11</sup> The relevant part of paragraph 4(1)(a) provides that "Mexico shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request".

<sup>12</sup> The relevant part of paragraph 4(1)(d) provides that "[t]he Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately".

1.33 The Panel issued its preliminary ruling on 18 December 2019. In its findings, the Panel indicated that the preliminary ruling would become an integral part of the Panel Report. This preliminary ruling can therefore be found in Annex D of the Addendum.

### 1.3.3 Consultation of experts and international organizations

1.34 As the parties' arguments involved complex scientific or technical issues, to ensure conformity with its terms of reference and in accordance with Article 11.2 of the SPS Agreement and Article 13 of the DSU, the Panel consulted scientific or technical experts and the Secretariat of the International Plant Protection Convention (IPPC).

#### 1.3.3.1 Panel decision to consult individual experts and the IPPC Secretariat

1.35 At the organizational meeting held on 5 July 2019, the Panel Chair asked for the parties' initial views on the need to consult experts in this dispute. The Panel Chair also requested the parties' comments on the proposed Additional Working Procedures of the Panel for consultations with experts. The parties had an opportunity to express their views both at the organizational meeting and in writing on 8 July 2019.

1.36 On 25 September 2019, after receiving the parties' first written submissions, the Panel sent a communication to the parties inviting them to express their views on the possibility of seeking scientific or technical advice from individual experts and/or international organizations, as well as on the considerations that should guide the Panel in making its decision.<sup>13</sup>

1.37 The Panel also sought the parties' views, should it decide to seek scientific and/or technical advice from experts and/or international organizations, on: (i) specific issues where they considered that input from experts and/or international organizations would be beneficial; (ii) international or regional organizations or other potential relevant research institutions or bodies, in addition to the IPPC Secretariat, whose assistance the Panel could seek in order to obtain names of potential individual experts; (iii) the profiles of individual experts (for example, their experience and qualifications) that would be more useful or relevant to the dispute; (iv) international or regional organizations or other potentially relevant research institutions or bodies, in addition to the IPPC Secretariat, whose scientific or technical advice the Panel could seek; and (v) the type of consultation that should be used (i.e. written, oral or both types of consultation).<sup>14</sup>

<sup>13</sup> Letter from the Panel to the parties, dated 25 September 2019.

<sup>14</sup> *Ibid.*

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1.38 On 8 October 2019, in its response to the Panel, Mexico stated that it had no objection to the Panel's use of individual experts and international organizations<sup>15</sup>; and that the Panel's main consideration should be that the dispute was fundamentally about scientific and technical issues.<sup>16</sup> Mexico added that the parties had presented arguments and raised issues of fact that were contradictory and, therefore, having impartial and technically justified views would help guide the Panel's deliberations.<sup>17</sup>

1.39 Mexico considered that it would be beneficial to have input from experts and/or international organizations on the following specific issues in the dispute: (i) the nature, characteristics and types of ASBVd; (ii) assessment of phytosanitary risk; (iii) determination of the presence or absence of a pest in an area; (iv) quarantine nature of the pest and economic importance; (v) diversion from intended use in a risk assessment; (vi) ASBVd routes of transmission; (vii) evaluation of the entry, establishment and spread of ASBVd; and (viii) methods of detection and characterization of ASBVd.<sup>18</sup> Mexico also stated that the expert profiles that would be most useful and relevant to the dispute would include those with proven experience in studies related to agricultural sciences, plant virology, phytopathology and, in particular, avocado diseases.<sup>19</sup>

1.40 Mexico identified the North American Plant Protection Organization (NAPPO) and the Inter-American Institute for Cooperation on Agriculture (IICA) as other organizations, in addition to the IPPC Secretariat, whose assistance the Panel could seek in order to obtain names of individual experts, and whose scientific or technical advice it could also seek directly.<sup>20</sup>

1.41 Costa Rica, however, stated that, in its view, there were no specific issues that warranted the Panel using experts and that it was up to the Panel, and not to any technical or scientific expert, to settle this matter, which Costa Rica considered to be of a highly legal nature. Costa Rica added that, should the Panel decide to seek scientific or technical advice, it hoped that the relevant steps would be taken to ensure that the experts met the requirements of independence and impartiality needed to fulfil their task, and assumed that due process would be respected in the relevant consultations and that the proposed Additional Working Procedures of the Panel for consultations with experts would be followed.<sup>21</sup>

1.42 On 18 October 2019, the Panel informed the parties of its decision on the need to seek scientific or technical advice from individual experts and/or relevant international organizations or bodies.

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<sup>15</sup> Letter from Mexico to the Panel, dated 8 October 2019, para. 5.

<sup>16</sup> Letter from Mexico to the Panel, dated 8 October 2019, para. 6.

<sup>17</sup> *Ibid.*

<sup>18</sup> Letter from Mexico to the Panel, dated 8 October 2019, para. 7.

<sup>19</sup> Letter from Mexico to the Panel, dated 8 October 2019, para. 9.

<sup>20</sup> Letter from Mexico to the Panel, dated 8 October 2019, para. 8.

<sup>21</sup> Letter from Costa Rica to the Panel, dated 8 October 2019.



1.43 The Panel noted that Article 13.1 of the DSU gives panels "the right to seek information and technical advice from any individual or body which it deems appropriate"; that this right is of a broad nature<sup>22</sup>; and that Article 11.2 of the SPS Agreement provides that in a dispute under this Agreement involving scientific or technical issues, the panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute.<sup>23</sup>

1.44 The Panel also pointed out that, in addition to the right to seek information and technical advice, panels have, under Article 11 of the DSU, a duty to make an objective assessment of the matter before it, including an objective assessment of the facts of the case.<sup>24</sup>

1.45 The Panel observed that the facts of the present dispute involved scientific and technical issues on which the panelists lacked expertise.<sup>25</sup> Therefore, in order to be able to make an objective assessment of the facts of the case, the Panel would require advice from experts to assist it with the analysis and assessment of the relevant scientific and technical issues.<sup>26</sup>

1.46 In light of the foregoing, the Panel decided to seek scientific or technical advice from individual experts, through written and oral consultations<sup>27</sup>, on the following areas:

- a. Techniques for growing, producing, transporting, storing and marketing avocados, including their propagation from seeds discarded following consumption, both naturally and as a result of diversion from intended use.
- b. The nature, characteristics and types of ASBVd, including the pathways and likelihood of entry, establishment and spread; its geographical prevalence; its seasonality and climate susceptibility; its effects on avocado trees and fruit; its economic importance and its categorization as a quarantine pest; methods for detecting its presence or absence in an area; possible methods for its control, management and eradication.
- c. Phytosanitary risk assessment methods and techniques, including types of investigation, sources of information, scientific method, and criteria on reliability and validity of findings.

<sup>22</sup> Appellate Body Report, *US – Shrimp*, paras. 104 and 106.

<sup>23</sup> Panel decision on the need to seek scientific or technical advice from individual experts and/or relevant international organizations or bodies, dated 18 October 2019, para. 2.1.

<sup>24</sup> Panel decision on the need to seek scientific or technical advice from individual experts and/or relevant international organizations or bodies, dated 18 October 2019, para. 2.2.

<sup>25</sup> Panel decision on the need to seek scientific or technical advice from individual experts and/or relevant international organizations or bodies, dated 18 October 2019, para. 2.3.

<sup>26</sup> Panel decision on the need to seek scientific or technical advice from individual experts and/or relevant international organizations or bodies, dated 18 October 2019, para. 2.4.

<sup>27</sup> Panel decision on the need to seek scientific or technical advice from individual experts and/or relevant international organizations or bodies, dated 18 October 2019, para. 2.5.



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- d. The meaning, scope and application of the International Standards for Phytosanitary Measures (ISPMs).<sup>28</sup>

1.47 Lastly, the Panel adopted the Additional Working Procedures of the Panel for consultations with experts with the amendments it considered appropriate in light of the parties' comments.<sup>29, 30</sup>

1.3.3.2 Panel selection of individual experts

1.48 In its decision of 18 October 2019, the Panel informed the parties that it would seek the assistance of the IPPC Secretariat, of the NAPPO (directly or through the IPPC) and of the IICA to obtain names of potential experts.<sup>31</sup> The Panel also invited the parties to submit an agreed list of experts, if they so wished, by the end of its first meeting with the parties.<sup>32</sup>

1.49 On 22 October 2019, the Panel contacted the IPPC Secretariat, NAPPO and the IICA, seeking assistance to identify potential experts. While the IICA stated that it had not been able to obtain any names of potential experts, NAPPO and the IPPC Secretariat provided some names.<sup>33</sup>

1.50 On 27 November 2019, after informing the parties, the Panel requested assistance from some other regional organizations operating within the framework of the IPPC (the European and Mediterranean Plant Protection Organization (EPPO), the International Regional Organization of Plant and Animal Health (OIRSA) and the Plant Health Committee (COSAVE)) for additional names of potential experts. EPPO, OIRSA and COSAVE provided some additional names.<sup>34</sup>

1.51 Between November 2019 and January 2020, the Panel contacted each of the 19 potential experts who had been suggested, in order to determine whether they would be interested and available to advise the Panel in this dispute and, if so, to collect the relevant documentation. On 16 January 2020, the Panel sent the parties a list of the names of all the persons who had been contacted, identifying the 15 potential experts who had confirmed their interest and availability to

<sup>28</sup> Panel decision on the need to seek scientific or technical advice from individual experts and/or relevant international organizations or bodies, dated 18 October 2019, para. 2.6.

<sup>29</sup> Panel decision on the need to seek scientific or technical advice from individual experts and/or relevant international organizations or bodies, dated 18 October 2019, para. 3.3.

<sup>30</sup> Additional Working Procedures of the Panel for consultations with experts, in Annex A-2.

<sup>31</sup> Panel decision on the need to seek scientific or technical advice from individual experts and/or relevant international organizations or bodies, dated 18 October 2019, para. 2.9.

<sup>32</sup> Panel decision on the need to seek scientific or technical advice from individual experts and/or relevant international organizations or bodies, dated 18 October 2019, para. 2.10.

<sup>33</sup> Email from the IICA, dated 18 November 2019; from NAPPO, dated 4 November 2019; and from the IPPC Secretariat, dated 5 December 2019.

<sup>34</sup> Email from EPPO, dated 12 December 2019; from OIRSA, dated 13 December 2019; and from COSAVE, dated 13 December 2019.

assist the Panel. The Panel also provided the relevant documentation that had been gathered.<sup>35</sup>

1.52 Pursuant to paragraph 4 of the Additional Working Procedures of the Panel for consultations with experts<sup>36</sup>, the Panel provided the parties with an opportunity to comment in writing and to make known any compelling objections to any particular expert. The Panel received the parties' comments on 31 January 2020 and the parties' comments on the other party's comments on 7 February 2020.

1.53 On 14 February 2020, the Panel issued its decision on the selected experts. Pursuant to paragraph 5 of the Additional Working Procedures of the Panel for consultations with experts<sup>37</sup>, and in consideration of both parties' comments, the Panel chose Prof Dr Ricardo Flores Pedauy<sup>38</sup>, Mr Pablo Cortese<sup>39</sup> and Mr Robert L. Griffin<sup>40</sup> as experts to provide scientific or technical advice in this dispute.<sup>41</sup>

<sup>35</sup> This documentation included: their curricula vitae, lists of publications, and statements of potential conflicts of interest of those who had indicated that they would be interested and available to participate in the proceedings.

<sup>36</sup> Paragraph 4 of the Additional Working Procedures of the Panel for consultations with experts states: "[p]arties shall have the opportunity to comment and to make known any compelling objections to any particular expert."

<sup>37</sup> Paragraph 5 of the Additional Working Procedures of the Panel for consultations with experts states: "The Panel shall select the experts on the basis of their qualifications and the need for specialized scientific expertise, and shall not select experts whom the Panel considers to have a conflict of interest either after self-disclosure or otherwise. The Panel shall decide the number of experts in light of the number and type of issues on which advice shall be sought, as well as of the different areas on which each expert can provide expertise."

<sup>38</sup> The late Professor Dr Ricardo Flores Pedauy was a research professor with the Department of Molecular and Evolutionary Plant Virology at the Institute of Molecular and Cellular Plant Biology (IBMCP) of the Spanish National Research Council (CSIC) in Valencia, Spain. In addition to having held various teaching positions, Ricardo Flores Pedauy conducted various scientific studies, published numerous articles on virology issues, including ASBVd, and participated in many national and international conventions and conferences. He supervised pre-doctorate, doctoral and post-doctorate theses, and was, *inter alia*, vice president of the Spanish Society for Virology, chair of the Viroids Study Group of the International Committee on Taxonomy of Viruses, advisor on viroids to the United States' National Center for Biotechnology Information, editor and reviewer of various journals, and assessor of various scientific units.

<sup>39</sup> Mr Pablo Luis Cortese, agricultural engineer and holder of a Master's degree in plant protection, is currently the Director of Phytosanitary Strategic Information at the National Agriculture and Food Quality and Health Service (SENASA) of Argentina, and Associate Professor and Chair of Plant Protection at the Faculty of Agronomy of the University of Buenos Aires. He also served as the National Coordinator of the National Citrus Health Programme of the Plant Health Directorate at SENASA. Pablo Cortese has authored various publications on surveillance and has experience of governance at the national, regional and international levels, having been involved, *inter alia*, in the development and coordination of programmes for phytosanitary surveillance, prevention and management of agricultural pests; the development of operational and technical manuals in the field of plant protection; the development of traceability systems; and the design and coordination of information systems and databases. Pablo Cortese also represents Argentina in the MERCOSUR Plant Health Commission, has been a member of expert groups of COSAVE and in the framework of the IPPC, and has acted as a consultant with the IICA and the IPPC.