



منظمة الأغذية
والزراعة
للأمم المتحدة

联合国
粮食及
农业组织

Food
and
Agriculture
Organization
of
the
United
Nations

Organisation
des
Nations
Unies
pour
l'alimentation
et
l'agriculture

Organización
de las
Naciones
Unidas
para la
Agricultura
y la
Alimentación

E

**INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE**

FIRST SESSION OF THE GOVERNING BODY

Madrid, Spain, 12-16 June 2006

**REPORT BY THE FAO LEGAL COUNSEL ON THE CONSISTENCY
OF THE DRAFT RULES OF PROCEDURE OF THE GOVERNING BODY,
THE DRAFT FINANCIAL RULES OF THE GOVERNING BODY,
THE DRAFT PROCEDURES AND MECHANISMS TO PROMOTE
COMPLIANCE AND TO ADDRESS ISSUES OF NON-COMPLIANCE
AND THE DRAFT FUNDING STRATEGY,
WITH FAO'S ADMINISTRATIVE RULES AND PROCEDURES
AND THE PROVISIONS OF THE INTERNATIONAL TREATY**

Table of Contents

| | <i>Paras.</i> |
|------------------------------|---------------|
| I. Introduction | 1 - 5 |
| II. Draft Rules of Procedure | 6 |
| III. Draft Financial Rules | 7 |
| IV. Funding Strategy | 8 - 10 |
| V. Compliance | 11 |

I. INTRODUCTION

1. During its First Meeting (14-17 December 2005), the Open-Ended Working Group on the Rules of Procedure and the Financial Rules of the Governing Body, Compliance, and the Funding Strategy examined and revised the Draft Rules of Procedure and the Draft Financial Rules for the Governing Body of the International Treaty on Plant Genetic Resources. The Working Group also requested the Legal Counsel to review, in addition to these documents, the Draft Procedures and Mechanisms to Promote Compliance and Address Issues of Non-compliance, and the Draft Funding Strategy, and to prepare “*a document assessing their consistency with FAO’s Administrative Rules and Procedures and the provisions of the Treaty, for the consideration of the Governing Body.*” (see Document CGRFA/IC/OWG-1/05/REP, para. 23).

2. Pursuant to the above, the Legal Office has reviewed the documents submitted to the Governing Body. While formally responding to the request of the Working Group, the present document should be considered in conjunction with the comments and annotations present in such documents which were made by the Secretariat in collaboration with the Legal Office. It should be recalled that the Legal Office cooperates on a permanent basis with the Secretariat in the preparation of various documents submitted for approval or information to the Governing Body and, in particular, the Draft Rules of Procedure and the Draft Financial Rules, and advises regularly at meetings and sessions of bodies and working-groups dealing with Treaty issues.

Basic considerations

3. On negotiating the International Treaty on Plant Genetic Resources for Food and Agriculture, the Contracting Parties decided to conclude it within the framework of the Organization, under the provisions of Article XIV of its Constitution. Consequently, the review of the documents was conducted in the light of the deliberations and decisions of the FAO Conference which adopted the Treaty, as well as of the pertinent provisions of the Constitution and of Rule XXI *Conventions and agreements* of the General Rules of the Organization, and of Part R (*Principles and Procedures which should govern Conventions and Agreements Concluded under Articles XIV and XV of the Constitution...*) of the Basic Texts of the Organization. The Legal Office also took in consideration the deliberations of the FAO Committee on Constitutional and Legal Matters, endorsed by the Council, on this issue.

4. It should be noted that agreements under Article XIV are concluded between States in conformity with the principles of public international law and in line with the pertinent provisions of the FAO Constitution. Consequently, within this legal framework, the Conference adopts rules which it considers appropriate; Part R of the Basic Texts is a mandatory reference only in case the Conference has not established a necessary rule. In particular, it provides a number of principles to be borne in mind as concerns reporting and recommendations.

5. At its Hundred and Twenty-seventh Session (22-27 November 2004), the Council examined the general legal framework applicable to conventions and agreements under Article XIV of the FAO Constitution, the background thereto and a number of pertinent legal considerations. It pointed out that the legal status of bodies established under Article XIV “*has to be seen in such a way as to reconcile, in a suitable manner, the requirements of functional autonomy of such bodies and the fact that they are placed and operate under the framework of FAO. [Their] constituent instruments... do not entrust them with legal personality (i.e. the capacity to hold rights and obligations of their own, and, therefore, they have to act through FAO or drawing on the legal capacity of FAO.*”

I. DRAFT RULES OF PROCEDURE

6. The Legal Office confirms that the Draft Rules of Procedure, as provided for in the document *Annotated Draft Rules of Procedure* are consistent with the Constitution and the Basic Texts of FAO as well as with the provisions of the Treaty. However, it should be noted that:

- (a) on the question of languages (Rule XI), Article 35 of the Treaty provides that its text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish, and that (ii) Article 20.4 requires the Secretary to provide “*documentation in the six languages of the United Nations for sessions of the Governing Body*”. In case the Governing Body decides that Russian be used for purposes such as interpretation, the costs connected with the use of Russian, a non-FAO language, would need to be met out of the autonomous budget of the Treaty;
- (b) it is understood that, as it is the duty of the Director-General of FAO to ensure that host governments of meetings are willing to grant to all delegates, representatives, experts, observers and members of the Secretariat of the FAO attending the meetings the privileges and immunities necessary for the independent exercise of their functions in connection with such meetings (Rule 37.4 of the General Rules of the Organization), it is the Director General of the FAO who, in the case of Rules 4.3, 7.1 and 7.3 of the draft Rules of Procedure, shall issue the pertinent letters of invitations.

II. DRAFT FINANCIAL RULES

7. The Legal Office confirms that the Draft Financial Rules, as provided for in the document *Annotated Draft Financial Rules* are consistent with the Constitution and the Basic Texts of FAO as well as with the provisions of the Treaty. On a more specific way, it should be noted that with respect to their applicability, it is recommended that Rule 1.2 provide that “*The Financial Regulations of the FAO shall apply mutatis mutandis to all matters not specifically dealt with under the present Rules*”.

III. FUNDING STRATEGY

8. The Legal Office takes note of the document *Draft Funding Strategy of the International Treaty*. As it is understood that the document is still at a rather early stage, no detailed comments are made in the present document. It is intended that the Legal Office will necessarily follow the negotiations and provide, as appropriate, its observations during such negotiations.

9. In any case, it is recalled that the Financial Rules shall govern the financial administration of the Treaty and that “*the Financial Regulations of the FAO shall apply mutatis mutandis to all matters not specifically dealt with under [such] rules*” (see Rule 1 of the draft Financial Rules). Depending on the final state of the draft resolution and its *Annex*, the Governing Body should consider inserting a clause into the Funding Strategy which ensures that, in the case of conflicts between the Funding Strategy and the Financial Rules of the Governing Body, the latter will prevail.

10. On the potential establishment of a Permanent Technical Committee, in line with the terms of Paragraph 20 of the Appendix to Part R of the FAO Basic, Article 19.3(e) of the Treaty provides that the Governing Body may “*establish subject to the availability of necessary funds such subsidiary bodies as may be necessary, and their respective mandates and composition*”. Consequently, the amended version of draft Rule 9.1 rightly states that the “*establishment of subsidiary bodies shall be subject to the availability of the necessary funds in the relevant Core*”.

Administrative Budget of the Treaty. Before taking any decision involving expenditure in connection with the establishment of subsidiary bodies, the Governing Body shall have before it a report from the Director-General on the administrative and financial implications thereof.”

IV. COMPLIANCE

11. The Legal Office takes note of the document *Draft procedures and operational mechanisms to promote compliance with the International Treaty and to address issues of non-compliance*. As it is understood that the document is still at a rather early stage, no detailed comments are made in the present document. It is intended that the Legal Office will necessarily follow the negotiations and provide, as appropriate, its observations during such negotiations. However, with regard to the potential establishment of a Compliance Committee, the comments made under paragraph 10 above should be born in mind.