



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

Продовольственная и  
сельскохозяйственная  
организация  
Объединенных  
Наций

Organización  
de las  
Naciones  
Unidas  
para la  
Agricultura  
y la  
Alimentación

## Item 12 of the Provisional Agenda

### COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

#### Twelfth Regular Session

Rome, 19 -23 October 2009

### THE STATUS OF THE COMMISSION

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## I. INTRODUCTION

1. In considering, at its Eleventh Regular Session, its mode of operation, the Commission on Genetic Resources for Food and Agriculture (the Commission) requested the Director-General “to initiate preliminary consideration of ways in which the status of the Commission might be raised, within the constitutional framework of FAO, in order to reflect the Commission’s role as the only intergovernmental body responsible specifically for biodiversity for food and agriculture.”<sup>1</sup>

2. This document describes the Commission’s current constitutional status, recapitulates the provisions under which bodies of FAO utilizing the services of the FAO Secretariat shall be set-up, and considers options to raise the status of the Commission within the constitutional framework of FAO.

## II. CURRENT CONSTITUTIONAL STATUS OF THE COMMISSION

3. The Commission has been established under Article VI.1 of the FAO Constitution. According to Article VI.1 of the FAO Constitution, the Conference or Council may establish commissions “to advise on the formulation and implementation of policy and to coordinate implementation of policy.”

4. The Commission’s operations are governed by the General Rules of the Organization, by Part R of the Basic Texts of the FAO,<sup>2</sup> and in particular, by its Statutes. The current mandate of the Commission which covers “all components of biodiversity of relevance to food and agriculture” was established by Resolution 3/95 of the FAO Conference. The Statutes of the Commission in their current form were adopted by the Council in 1995.<sup>3</sup> These provide that the Commission has a coordinating role and deals with policy, sectoral and cross-sectoral matters related to the conservation and sustainable use of genetic resources of relevance to food and agriculture. The Commission’s terms of reference are:

- i) *to keep under continuous review all matters relating to the policy, programmes and activities of FAO in the area of genetic resources of relevance to food and agriculture, including their conservation and sustainable use and the fair and equitable sharing of benefits derived from their utilization, and to advise the Director-General and the Council and, as appropriate, its technical committees, including in particular the Committees on Agriculture, Forestry and Fisheries, on such matters;*
- ii) *to recommend such measures as may be necessary or desirable to ensure the development, as appropriate, of a comprehensive global system or systems on genetic resources of relevance to food and agriculture and to monitor the operation of its/their components, in harmony, where applicable, with the Convention on Biological Diversity and other relevant international instruments;*
- iii) *to provide an intergovernmental forum for negotiations and to oversee the development, upon the request of the FAO Governing Bodies, of other international agreements, undertakings, codes of conduct or other instruments relating to genetic resources of relevance to food and agriculture, and to monitor the operation of such instruments;*
- iv) *to facilitate and oversee cooperation between FAO and other international governmental and non-governmental bodies dealing with the conservation and sustainable use of genetic resources, in particular with the Conference of Parties to*

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<sup>1</sup> CGRFA-11/07/Report, paragraph 102.

<sup>2</sup> *Principles and procedures which should govern conventions and agreements concluded under Articles XIV and XV of the Constitution, and Commissions and Committees established under Article VI of the Constitution.*

<sup>3</sup> CL 110/REP, Resolution 1/110.

*the Convention on Biological Diversity and the UN Commission on Sustainable Development, and to seek to develop appropriate mechanisms for cooperation and coordination in consultation with such bodies;*

- v) *subject to approval by the Governing Bodies of FAO, as appropriate, to respond to requests from the Conference of the Parties to the Convention on Biological Diversity in the specific area of genetic resources of relevance to food and agriculture, including the provision of information and other services to the Conference of the Parties and its subsidiary bodies, especially in the areas of early warning systems, global assessment and clearing house facilities, in particular, and as appropriate, through the Global System for the Conservation and Utilization of Plant Genetic Resources for Food and Agriculture.*

5. The Commission reports to the Director-General, who brings to the attention of the Conference, through the Council, any recommendations adopted by the Commission that have policy implications, or that affect the programme or finances of the Organization. As soon as they become available, copies of each report of the Commission are circulated to Members and Associate Members of the Organization, as well as to international organizations and agencies that are concerned with genetic resources.

6. The Secretary of the Commission is appointed by the Director-General and is administratively responsible to him. The Secretariat of the Commission monitors and coordinates the preparations for the Commission meetings and the work for the Sectoral Working Groups, where established. The expenses of the Secretariat of the Commission shall be determined and paid by the Organization within the limits of the relevant appropriations in the approved budget of the Organization.

### III. STATUTORY BODIES AND GOVERNING BODIES OF FAO

7. For many years, the concept of „statutory bodies,” in FAO practice, has been very broad and inclusive, referring to all bodies and structures of the Organization. Statutory bodies included bodies established under Article VI (e.g. the Commission) and those established under Article XIV of the FAO Constitution (e.g. the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture).

8. „Governing Bodies,” in FAO practice, were usually considered a sub-set of the statutory bodies. However, in the absence of a legal definition of „Governing Bodies” and statutory bodies and given that there was no clear-cut division of responsibilities or types of responsibility between the two groups, the distinction between Governing Bodies and statutory bodies was in practice not relevant. However, the Immediate Plan for Action for FAO Renewal (IPA), approved by the FAO Conference at its Thirty-fifth (Special) Session, foresees, that „the term Governing Body will be defined, preferably in the Basic Texts.”<sup>4</sup> In response, an amendment to the Basic Texts was developed under the guidance of the Conference Committee on Follow-up to the Independent External Evaluation of FAO (CoC-IEE). Subsequently, the Committee on Constitutional and Legal Matters, at its Eighty-seventh Session, considered and endorsed an amendment to be introduced in a suitable part of the Basic Texts stating the following definition of Governing Bodies:

*“The Governing Bodies of FAO are the bodies which directly, or indirectly through their parent bodies, contribute within their respective mandates, to (a) the definition of the overall policies and regulatory frameworks of the Organization; (b) the establishment of the Strategic Framework, the Medium-Term Plan and the Programme of Work and Budget and (c) exercise, or contribute to the oversight of the administration of the Organization. The Governing Bodies comprise the*

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<sup>4</sup> IPA action 2.73

*Conference, the Council, the Programme Committee, the Finance Committee, the Committee on Constitutional and Legal Matters, the Technical Committees (i.e. Committee on Commodity Problems, Committee on Fisheries, Committee on Forestry, Committee on Agriculture, Committee on World Food Security) and the Regional Conferences (i.e. for Africa, Asia and the Pacific, Europe, Latin America and the Caribbean, and the Near East)."*<sup>5</sup>

10. In reviewing the proposed amendments to the Basic Texts, the Council, at its Hundred and Thirty-sixth Session, endorsed the substance of the proposed amendments, and noted that the amendments would be set out in appropriate draft Conference resolutions, which would be reviewed by the Council at its next Session (28 September – 2 October 2009) and referred to the Thirty-sixth Session of the Conference (14 – 21 November 2009) for approval.

11. There is currently no legal provision that defines the role and functions of statutory bodies vis-à-vis the role and functions of Governing Bodies of FAO. It is acknowledged that there are Governing Bodies that have not had a particularly strong role in policy-making. On the other hand, there are statutory bodies that without being a Governing Body, at least partially, fulfilled the criteria proposed for Governing Bodies. The Commission, for example, has contributed considerably to the definition of policies and regulatory frameworks of the Organization, in particular through the development of the International Treaty on Plant Genetic Resources for Food and Agriculture, as well as to the planning and programming of FAO's work (e.g. through its Multi-Year Programme of Work) which the FAO Conference endorsed,<sup>6</sup> even though it had not formally requested the Commission to develop such programme. The fact that the Commission is considered a statutory body, rather than a Governing Body, has never prevented it from contributing within its mandate, to the definition of overall policies and regulatory frameworks.

12. It remains to be seen if a future definition of Governing Bodies and other decisions that may be taken in the follow-up to the review of FAO's statutory bodies, which is foreseen for 2009/2010,<sup>7</sup> will have any implication for the work and mandate of the Commission. The Commission may wish to recommend that no decision that may directly or indirectly affect its status within the constitutional framework of FAO be taken, before the Commission has been consulted on this matter.

#### IV. ARTICLE VI AND ARTICLE XIV BODIES

13. When approving, at its Ninth Session in 1957, the *Principles and procedures which should govern conventions and agreements concluded under Article XIV and XV of the Constitution, and commissions and committees established under Article VI of the Constitution*, which are set down in Part R of the Basic texts of the Organization, the FAO Conference also adopted Resolution 47/57. By this resolution the Conference, having considered „*the desirability of avoiding any ambiguity regarding the legal status of bodies promoted by the Organization*” decided that „*in future bodies utilizing the Secretariat services of the Organization shall be set up either:*

- (a) *under Article VI or Article XIV of the Constitution and the relevant Rules; or*
- (b) *under Article XV of the Constitution in which case the relationship of such bodies to the Organization shall in each instance be clearly defined; or*
- (c) *entirely outside the framework of the Organization and as such completely independent, any co-operation or coordination to be developed through a relationship agreement to be approved by the Council and Conference under Rule*

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<sup>5</sup> CL 136/20, Appendix II, I.C.

<sup>6</sup> C 2007/REP, Resolution 12/2007, paragraph 2.

<sup>7</sup> Action 2.69 of the Immediate Plan of Action (C 2008/REP, Resolution 1/2008).

*XXV-4 (d) of the Rules adopted by the Conference and Article XIII of the Constitution, which agreement shall make any servicing by the Organization subject to the program, financial procedures and operations of such bodies being consistent with and in furtherance of the objectives of the Organization.”*

14. At its Twenty-sixth Session in 1991, the FAO Conference adopted a few amendments to Part R with the aim of introducing more flexibility, in order to take account of a number of developments that had occurred both within and outside the Organization.

15. At present, there are 16 conventions and agreements concluded under Article XIV of the FAO Constitution. There are a number of organizations that were established by conventions and agreements, prepared with the assistance of FAO, but which are completely independent from FAO. In a number of cases, FAO has entered into a relationship agreement with such organizations under the terms of Article XIII of the FAO Constitution. At present there are no bodies established under Article XV of the FAO Constitution.

16. In considering raising the status of the Commission within the constitutional framework of FAO, the Commission may wish to consider re-establishing itself as a body under Article XIV of the FAO Constitution.

17. In broad terms, bodies established under Article VI are more closely tied to the internal structure of FAO and are in principle only advisory to the Director-General or the Governing Bodies of FAO, without independent decision-making powers of their own. They also cannot have their own autonomous budgets. Article XIV bodies being established by separate agreements with a legal life of their own, have more independence and flexibility than bodies established under Article VI of the FAO Constitution, and can in practice, have decision-making powers of their own. Article XIV bodies enjoy functional autonomy even though they are enshrined and inextricably linked to FAO.

#### ***Establishment of Article VI and Article XIV bodies***

18. Article VI bodies are established by the Conference or the Council. While Article VI bodies may suggest amendments to the basic resolutions by which they were set up and which determine their terms of reference, the decision on such proposed amendments lies with the Council or Conference.<sup>8</sup>

19. Article XIV agreements and conventions are separate instruments of international law which need to be ratified by their Members. However, such agreements and conventions also need to be approved by the FAO Conference or Council, as provided for in Article XIV of the FAO Constitution and Rule XXI of the General Rules of the Organization, which deal in great detail with all procedural aspects involved in the formulation and conclusion of such conventions and agreements. Thus, while Article XIV bodies are created by a separate instrument of international law, they are clearly placed and operate within the framework of the Organization as explicitly stated in those Articles and Rules.

20. In this context, it is important to recall the observations put forward by the Conference of FAO at its Ninth Session, 1957.

21. On that occasion:

*“503. The Conference, after considering the report of the Council (C 57/38) came to the conclusion that it was necessary to lay down principles to be adhered to in future whenever the provisions of Articles VI, XIV or XV of the Constitution were being applied. The intention was not to lay down too rigid rules since obviously the text of the various conventions and rules of procedure must be drafted in the light of the desired objectives. The Conference, however, wished to establish*

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<sup>8</sup> Part R, paragraph 34.

*a framework, i.e. juridical and administrative norms to govern in future the drafting of new texts or of amendments to existing agreements and of the constituent rules of commissions and committees.*

#### *Basic considerations*

504. *In accordance with the provisions of Article VI of the Constitution, the Conference and the Council may establish general or regional commissions as well as committees and working parties, and may convene general, technical, regional or other meetings. For the necessary juridical act to be accomplished, all that is required is a decision of the Conference or Council.*

505. *Article XIV of the Constitution applies to conventions and multilateral agreements concluded under the aegis of the Organization. These are agreements concluded between States with respect to which, in conformity with the principles of public international law, the expressed consent of sovereign entities constitutes the required juridical act.*

506. *However, the procedure of multilateral agreements has been used on several occasions to establish commissions and committees entrusted with specific tasks which fall within the general terms of reference of the Organization.*

507. *It must be borne in mind that the express purpose of multilateral agreements is to create contractual obligations to those who become parties to them. Contracting parties undertake to do or not to do certain things, such obligations being generally assumed for a given period. It follows directly from this principle that any agreement concluded under Article XIV of the Constitution amongst Member Nations of the Organization should entail financial or other obligations going beyond those already assumed under the Constitution of the Organization. Failing this, there would be no grounds for such an agreement, at least not in the legal form prescribed under Article XIV of the Constitution.*

508. *Hence, any multilateral agreement between Member Governments may undoubtedly provide for the establishment of a commission or an executive body, but this should not be an end in itself since under Article VI the Conference and the Council are empowered to establish such bodies merely by a decision on their part. Consequently, the setting up of a commission or a committee by a multilateral agreement is justified only when such agreement presupposes the assumption of specific obligations going beyond mere participation in the work of the body thus established”.*

22. Thus, should the Members of the Commission wish to re-establish the Commission as an Article XIV body, the multilateral convention or agreement that would need to be negotiated and ratified for this purpose, should normally provide for specific rights and obligations for its Members extending beyond those provided for in the Constitution of the Organization and also going beyond mere participation in the work of the re-established Commission. Otherwise there would be no justification for the establishment of the Commission on a different legal basis, as a body under Article XIV of the Constitution.

#### *Administrative and financial matters*

23. In general, Article VI bodies are entirely financed by the Organization. The Commission's Statutes provide that the expenses of the Secretariat of the Commission shall be determined and paid by the Organization within the limits of the relevant appropriations in the

approved budget of the Organization.”<sup>9</sup> Article XIV bodies, on the other hand, may have their own autonomous budgets and adopt and amend their own financial regulations. Article XIV bodies fall into one of the following three categories:

- (a) bodies entirely financed by the Organization;
- (b) bodies that, in addition to being financed by the Organization, may undertake cooperative projects financed by members of the body; and
- (c) bodies that, in addition to being financed by the Organization have autonomous budgets.<sup>10</sup>

24. The financial regulations adopted by Article XIV bodies need to be consistent with the principles embodied in the Financial Regulations of the Organization and be reported to the Finance Committee of FAO, which has the power to disallow them or amendments thereto if it finds that they are inconsistent with the principles embodied in the Financial Regulations of FAO.

25. Although both Article VI and article XIV bodies may receive resources other than those provided under the regular programme of the Organization, Members of Article XIV bodies may exercise budgetary control through the adoption of own autonomous budgets. Bodies established under Article VI, on the other hand, do not have autonomous budgets and do not exercise control in respect of such budgets. In this context, it is important to note that the review of statutory bodies foreseen in Action 2.69 of the IPA is undertaken with “a view to making any necessary changes to enable those statutory bodies which wish to do so to exercise financial and administrative authority and mobilise additional funding from their members, while remaining within the framework of FAO and maintaining a reporting relationship with it.”

### ***Legal personality***

26. Despite their functional autonomy, the constituent instruments do not entrust Article XIV bodies with legal personality, i.e. capacity to hold rights and obligations of their own, and therefore they have to act, just like Article VI bodies, through the Organization and draw on the legal personality of FAO. Thus, a change of the Commission’s status to an Article XIV body would not give the Commission legal personality.

### ***Capacity of entering into agreements***

27. Although it is fully recognized that in order to fulfil effectively their functions, bodies established under Article VI or XIV have some capacity to perform liaison international functions, *„the relations between commissions or committees established under Article VI and other international organizations shall be governed by Article XIII of the Constitution and Rule XXIV.4 (c) of the General Rules of the Organization, as well as by the rules adopted by the Conference on the matter of relationship with international organizations. These provisions shall likewise govern the relations between commissions and committees established by conventions and agreements under Article XIV of the Constitution and other international organizations.”*<sup>11</sup>

28. In this connection it may also be of interest that, under paragraph 29 of Part R, *“commissions and committees established under Article VI and Article XIV of the Constitution should, in principle, not be empowered to enter into arrangements with governments which are not members of the commission or committee. When this, however, is found desirable, a specific provision shall be incorporated in the statutes, convention or agreement, as the case may be,*

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<sup>9</sup> CGRFA-12/09/Inf.2, Section 8i.

<sup>10</sup> Principles and procedures which should govern conventions and agreements concluded under articles XIV and XV of the constitution, and commissions and committees established under article VI of the constitution (Part R of Basic Texts of the Food and Agriculture Organization of the United Nations), paragraph 33.

<sup>11</sup> Part R, paragraph 28.



*indicating the scope of such authority and specifying that all such arrangements shall be made by the Director-General of the Organization.”*

### **Secretary**

29. The Secretary and the staff of Article VI and Article XIV bodies are officials of FAO, appointed by the Director-General and subject to the Staff Regulations and Rules of the Organization as well as to the disciplinary authority of the Director-General. Moreover, the Secretaries of Article VI and Article XIV bodies are appointed by the Director-General and are administratively responsible to him. However, the basic texts of Article XIV bodies which, in addition to being financed by the Organization, have autonomous budgets, may specify that the Secretary shall be appointed by the Director-General after consultation with, or with the approval or concurrence of the members of the body concerned.<sup>12</sup> No such possibility exists for the appointment of Secretaries of FAO bodies established under Article VI.

### **Agenda**

30. While the rules of procedure of all bodies under Article VI must specify that the agendas of their meetings shall be drawn up by the Director-General in consultation with the Chairman, no such requirement exists for Article XIV bodies.

## **V. RAISING THE STATUS OF THE COMMISSION WITHIN THE CONSTITUTIONAL FRAMEWORK OF FAO**

31. There are, in principle, possibilities to raise the status of the Commission within the constitutional framework of FAO by either qualifying it as a “Governing Body” of the Organization or by re-establishing it through a multilateral agreement or convention under Article XIV of the Constitution. It should be noted that the first option which would require amendments to the Constitution and to the General Rules of the Organization<sup>13</sup> was not considered by the Members of FAO in the course of the discussions on the FAO reform.

32. Although the Commission’s request to explore ways in which the status of the Commission might be raised, is not unique, few Article VI bodies have seriously considered to re-establish themselves as Article XIV body. The Committee for the Eastern Central Atlantic Fisheries (CECAF), for example, considered such a step because it had been constrained by a number of difficulties which it initially hoped to resolve by taking this step. Reference to the experience of this Committee may be useful in order to understand the reasons which have led some Article VI bodies to consider their re-establishment on a different legal basis and limits inherent in such an exercise. The Committee considered becoming an Article XIV body because its activities had been constrained by difficulties, such as:

- lack of funding;
- a complacent attitude and lack of commitment to CECAF of some Members;
- low participation and attendance at the sessions of the Committee and meeting of its subsidiary bodies;
- inadequate implementation of its recommendations;
- problems of communication and inadequate Secretariat work;
- emergence of other fishery management and advisory organizations or arrangements in the region; and
- inadequate collaboration between CECAF and these bodies.<sup>14</sup>

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<sup>12</sup> Part R, paragraph 32 (iii).

<sup>13</sup> See the amendments proposed for the up-grading of the Regional Conferences to Governing Bodies: *Future Structure and Organization of the Basic Texts of FAO and Related Matters*, CCLM 88/4, pp. 6 & 23.

<sup>14</sup> *Options for future arrangements for cooperation in fisheries management in the area of competence of the Fishery Committee for the Eastern Central Atlantic*, CECAF/XVI/2002/7.

33. Interestingly, in the case of CECAF, the Committee after having explored the relevant procedures and the differences in status and competence of Article VI and Article XIV bodies, came to the conclusion that it could continue to operate as an advisory body set up under Article VI of the FAO Constitution. In general, the Committee was of the view that a functional improvement in the work of the Committee, as well as increased support from its Members, should be sought actively, rather than a change in its current status. The Committee noted that its mere transformation into a body established by agreement under Article XIV of the FAO Constitution would not in itself, remove any of the constraints with which it is faced.<sup>15</sup>

34. The Commission's request to the Director-General to consider ways in which the status of the Commission within the constitutional framework of FAO could be raised, does not specify any difficulties the Commission's status created in the past, nor does it reveal any possible future ambitions that could be constrained by the Commission's status. It is therefore difficult to consider and assess, at this stage, the need for a change of the Commission's status.

## VI. GUIDANCE SOUGHT

35. The Commission may wish to:

- i) Recommend that no decision that may directly or indirectly affect the Commission's status be taken pending further review of the matter by the Commission and request the Director-General to bring this recommendation to the attention of the Conference through the Council;
- ii) Request the Secretariat to identify potential constraints related to the Commission's current status as an Article VI body, taking into account the on-going review of statutory bodies and reform of FAO;
- iii) Request the Secretariat to analyse the implications of re-establishing the Commission as an Article XIV body or recognising it as a Governing Body of FAO with regard to any constraints identified; and
- iv) Consider the advantages and disadvantages of a change of the status of the Commission within the constitutional framework of FAO, at its next Session, in the light of the information provided by the Secretariat.

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<sup>15</sup> *Report of the Sixteenth Session of the Fishery Committee for the Eastern Central Atlantic*, FAO Fisheries Report No. 693, paragraph 38 (<ftp://ftp.fao.org/docrep/fao/006/y4693b/y4693b00.pdf>).