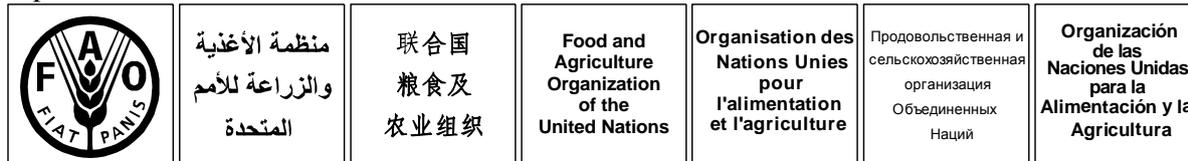


September 2013



# COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

## Ninety-seventh Session

Rome, 21 - 23 October 2013

### REVIEW BY THE FINANCE COMMITTEE OF THE SITUATION OF MEMBER NATIONS IN ARREARS PRIOR TO A CONFERENCE SESSION - AMENDMENT TO THE BASIC TEXTS

#### I. INTRODUCTION

1. The Finance Committee, at its 148<sup>th</sup> Session in March 2013, requested the Committee on Constitutional and Legal Matters (CCLM) to examine whether the implementation of the recommendation made by the Conference, at its 33<sup>rd</sup> Session in November 2005, regarding restoration of voting rights of Members in arrears<sup>1</sup> involved changes to the Basic Texts of the Organization. The request by the Finance Committee followed a review of the matter by the CCLM at its 95<sup>th</sup> Session in October 2012.

#### II. GENERAL BACKGROUND

2. The issue of the treatment of the voting rights of Member Nations that are in arrears has been examined many times by the Council and the Finance Committee. Recently, in October 2012, the CCLM considered a document describing the main legal provisions and practice regarding restoration by the Conference of voting rights of Member Nations in arrears. Document CCLM 95/14 “*Legal aspects of the treatment of arrears (restoration by the Conference of the voting rights of Member Nations in arrears)*” is attached as Appendix 1.

3. Document CCLM 95/14 presented in detail the main provisions of the Basic Texts on sanctions applicable to Member Nations in arrears, including loss of voting rights at the Conference, ineligibility for election to the Council and loss of seats at the Council. The document dealt more

<sup>1</sup> At that session, “[t]he Conference recommended that consideration be given in future that requests for restoration of Voting Rights should be referred to the Director-General for submission to the Autumn Session of the Finance Committee, in Conference years, which would submit its views to the Conference, through the Council, for consideration by the General Committee, without prejudice to the authority of the Conference to make autonomous determinations under Article III, paragraph 4 of the Constitution.” C 2005/REP, paragraph 33.

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specifically with the implementation of Article III, paragraph 4 of the Constitution, whereby “*a Member Nation which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the Conference if the amount of its arrears equals or exceeds the amount of the contributions due from it for the two preceding calendar years. The Conference may, nevertheless, permit such a Member Nation to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member Nation*”.

4. The document explained that, in the absence of explicit provisions on the procedure for the restoration of voting rights of Member Nations in arrears, the Conference has relied on the advice of the General Committee of the Conference for the implementation of Article III, paragraph 4 of the Constitution. The General Committee examines requests for restoration of voting rights by Member Nations in arrears, including any reasons provided therefor. Traditionally, the General Committee has recommended restoration of voting rights on the basis of a request and the reasons provided by the concerned Member. In some cases, Member Nations have accepted or requested installment plans to settle arrears, which were reviewed by the General Committee and approved by Conference Resolution<sup>2</sup>. From time to time, dissatisfaction was expressed at the procedure followed by the General Committee mainly because the Committee holds short meetings on the occasion of the session of the Conference, but also in view of its mandate and composition.

5. The Conference, at its 33<sup>rd</sup> Session in November 2005, recommended that the normal course of action in respect of Member Nations in arrears should consist in actively encouraging them to submit an installment plan for the settlement of such arrears, as a condition for the restoration of their voting rights, without prejudice, however, to the authority of the Conference to make autonomous determinations under Article III, paragraph 4 of the Constitution. The Conference also recommended that, in future, requests for restoration of voting rights be referred to the Director-General for submission to the Autumn Session of the Finance Committee in Conference years. The Finance Committee would submit its views to the Conference, through the Council for consideration by the General Committee. The CCLM, at its 95<sup>th</sup> Session in October 2012, recommended that the Finance Committee should examine again this recommendation, which would need to be adjusted to take into account the new calendar of sessions of the Conference and other Governing Bodies<sup>3</sup>.

6. In March 2013, the Finance Committee submitted a report of its 148<sup>th</sup> Session to the Council, in which it “*supported the recommendation of the Conference at its 33rd Session, adjusted for the new calendar of sessions of the Governing Bodies, that requests for restoration of voting rights be referred to the Director-General for submission to the Spring Session of the Finance Committee in Conference years; and requested the CCLM to examine the legal aspects of this matter, including whether this would require any changes to the Basic Texts of the Organization*”<sup>4</sup>.

### III. POSSIBLE OPTIONS

7. The CCLM may wish to consider two options to implement the recommendation made by the Conference at its 33<sup>rd</sup> Session: an amendment to the General Rules of the Organization (GRO), as set out in Appendix 2, or the adoption of a Conference Resolution, as set out in Appendix 3. Both options are outlined below.

8. Under one option, a formal amendment to the GRO could be considered. A subparagraph could be added to Rule XXVII, paragraph 7 of the GRO, providing for the Finance Committee at its

<sup>2</sup> The Finance Committee has, over the years, developed criteria for the assessment of whether conditions are beyond the control of a Member Nation; such assessments are referred to the General Committee.

<sup>3</sup> CL 145/2, paragraph 32. The CCLM expressed its readiness to examine the legal aspects of the matter, including whether it would be appropriate to reflect in the Basic Texts of the Organization the requirement that requests for restoration of voting rights or approval of instalment plans be submitted to the Organization in a timely manner, in accordance with the guidance of the Conference. CL 145/2, paragraph 33.

<sup>4</sup> CL 146/3, paragraph 10(b).

Spring Session in Conference years to review, ahead of the Conference, requests for restoration of voting rights of Member Nations in arrears, in light of the provisions of Article III, paragraph 4 of the Constitution. The Finance Committee would, accordingly, advise the General Committee of the Conference through the Council. This would be without prejudice to the authority of the Conference to make autonomous determinations under Article III, paragraph 4 of the Constitution. Such requests by Member Nations may or may not include requests for approval of installment plans for settlement of arrears. The subparagraph would be drafted in general terms to maintain the level of abstraction appropriate for the GRO.

9. Another option would consist in the adoption of a Conference Resolution defining the above process. This option would allow for the procedures to be defined in greater detail. It would also offer the Governing Bodies the opportunity to put into practice the proposed procedure for reviewing requests for restoration of the voting rights of Member Nations in arrears and improving such procedure as may be necessary before formally amending the GRO. This Conference Resolution could be included in Volume II of the Basic Texts of the Organization.

10. A related legal and practical issue arises, which is that of the entry into force of the proposed procedure. As a matter of principle, the procedures established in amended Rule XXVII of the GRO or in a Conference Resolution would apply prospectively, i.e. only from the date of adoption of the amendment or the Conference Resolution. Taking into account the views of the CCLM and the Finance Committee, the Council could recommend that the procedure apply on a voluntary basis prior to the forthcoming session of the Conference.

#### **IV. SUGGESTED ACTION BY THE COMMITTEE**

11. The CCLM is invited to review this document and make such comments thereon, as appropriate.

12. In particular, the CCLM is invited:

- 12.1) to examine the two proposed options contained in this document and recommend one of them to the Finance Committee and the Council for subsequent approval by the Conference; and
- 12.2) to offer its views on the possibility that the procedure could apply on a voluntary basis prior to the forthcoming session of the Conference in June 2015.

## Appendix 1

### Legal aspects of the treatment of arrears (restoration by the Conference of the voting rights of Member Nations in arrears)

[Extract from document CCLM 95/14]

#### I. INTRODUCTION

1. This document contains a summary review of the main legal provisions and practice regarding restoration by the Conference of voting rights of Member Nations which are in arrears of their contribution to the budget of the Organization.

#### II. MAIN PROVISIONS OF THE BASIC TEXTS ON RESTORATION OF VOTING RIGHTS AND TREATMENT OF ARREARS

2. Under Article XVIII, paragraph 2 of the Constitution of FAO each Member Nation is under a legal obligation to contribute annually to the Organization its share of the budget, as apportioned by the Conference (i.e. in accordance with a scale of contributions approved by the Conference). The Financial Regulations clarify that, at the beginning of each calendar year, the Director-General shall inform Member Nations of their obligations in respect of their annual contributions to the budget (cf. Financial Regulation 5.4). Contributions are due and payable in full within 30 days of receipt of the communication of the Director-General, or as of the first day of the calendar year to which they relate whichever is the later. As of 1 January of the following calendar year, the unpaid balance of such contributions shall be considered to be one year in arrears (cf. Financial Regulation 5.5).

3. The Basic Texts of FAO foresee three measures that apply to Members which are in arrears of payment of their contributions.

3.1. First, under Article III, paragraph 4 of the Constitution, *“each Member Nation shall have only one vote. A Member Nation which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the Conference if the amount of its arrears equals or exceeds the amount of the contributions due from it for the two preceding calendar years. The Conference may, nevertheless, permit such a Member Nation to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member Nation”*.

3.2. Second, under Rule XXII, paragraph 5 of the General Rules of the Organization (GRO) no Member Nation shall be eligible for election to the Council if it is in arrears in payment of its financial contributions to the Organization in an amount equal to or exceeding the contributions due from it for the two preceding calendar years.

3.3. Third, under Rule XXII, paragraph 7 of the GRO, a Member Nation shall be considered to have resigned if it is in arrears in payment of its financial contributions to the Organization in an amount equal to or exceeding the contributions due from it for the two preceding calendar years.

#### III. PRACTICE CONCERNING RESTORATION BY THE CONFERENCE OF VOTING RIGHTS OF MEMBERS IN ARREARS

4. As regards the implementation of Article III, paragraph 4 of the Constitution, a practice has developed over the years whereby the General Committee of the Conference makes a recommendation to the Conference on whether lost voting rights should be restored. A list of Member Nations with potential voting rights at a forthcoming session of the Conference is made available and the concerned countries are informed that they will not have the right to vote at the Conference unless regularize

their situation. The Finance Committee is also informed of the situation of these countries as part of its functions.

5. While this has not been formally reflected in the GRO, or in any other legal text, the General Committee has, on the basis of long standing practice, examined requests for restoration of voting rights by Member Nations in arrears. In practice this has taken several forms. The General Committee at the beginning of a session of the Conference is informed of the situation of the Member Nations which are in arrears and is invited to make a recommendation to the Conference as to whether the voting rights of these Members should be restored. These Members are invited to make requests for restoration of voting rights, including on the reasons for which they are in arrears, which are examined by the General Committee.

6. Past practice reveals some differences in the manner in which the Committee carries out this function. In many cases, the General Committee has not examined requests for restoration of voting rights at the beginning of a session and has recommended that all Members be allowed to take part on the votes that are held during the first days of a session of the Conference. Subsequently, the General Committee reviews the requests made in detail and makes a recommendation to the Conference. Only Member Nations in arrears which have made requests for restoration of voting rights which are entertained by the Committee are allowed to take part in the votes that take place towards the end of the Conference (including the vote on the level of the budget, the election of the Independent Chairperson of the Council and any ballots which may be held for the election of Members of the Council). However, there were also occasions where the General Committee has examined requests for restoration of voting rights at the beginning of the Conference.

7. In general, the General Committee has recommended the restoration of voting rights of Members which have made a request to that effect providing the reasons for that.

8. There were situations in the past where Members have accepted or requested installment plans for the settlement of their arrears. These plans were reviewed by the General Committee and approved by Conference Resolution. The Conference Resolutions conform to a standard format which identifies the number and amount of annual installments to be paid. It is foreseen that the annual payment of these installments, together with the payment of each contribution in the calendar year of assessment (and any advances to the Working Capital Fund) shall be considered as fulfillment of the financial obligations of the country towards the Organization. It is also foreseen that default in payment of two installments renders the installment plan null and void.

9. At its Thirty-third Session in November 2005, the Conference restored the voting rights of a number of Members and approved some installment plans. On that occasion,

*“32. The Conference expressed its concern at the high number of Member Nations in arrears and held the view that any past recommendations that voting rights be restored for all Member Nations on the first day of the Conference, or upon submission of a letter to that effect, should not be regarded as preventing the Conference from taking a different position in future. While taking note of Article III, paragraph 4 of the Constitution whereby the Conference may permit a Member Nation in arrears to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member Nation, the Conference recommended that, in future, the normal course of action in respect of Member Nations in arrears should consist in actively encouraging them to submit an Installment Plan for the settlement of such arrears, as a condition for the restoration of their voting rights.*

*33. The Conference recommended that consideration be given in future that requests for restoration of Voting Rights should be referred to the Director-General for submission to the Autumn Session of the Finance Committee, in Conference years, which would submit its views to the Conference, through the Council, for consideration by the General Committee, without*

*prejudice to the authority of the Conference to make autonomous determinations under Article III, paragraph 4 of the Constitution”.*

10. Discussions took place within the Finance Committee on the how to improve the cash shortage situation of the Organization throughout the biennium 2006-2007 which led to the adoption by the Conference, at its Thirty-fourth Session in November 2007 of two Resolutions containing a number of measures to encourage prompt payment of contributions and decided to keep the matter under review. The matter was again examined by the Finance Committee throughout the biennium 2008-2009 but no concrete measures were proposed. The Conference, at its Thirty-Sixth Session in 2009 requested that the matter should remain under review. However, presumably in view of a comparative reduction in the number of countries in arrears as compared to the situation which prevailed in 2005 and the reform process that was under way, the particular recommendations made by the Conference in 2005 regarding restoration of voting rights were not implemented.

11. It is important to emphasize that although the issue of the treatment of arrears may be examined by the CCLM from a legal perspective, the matter is primarily one for the Finance Committee.

## **VI. SUGGESTED ACTION BY THE COMMITTEE**

12. The Committee is invited to review this document and make such comments and observations thereon as appropriate.

13. Taking into account the fact that matters pertaining to the treatment of arrears are traditionally examined by the Finance Committee, the CCLM may wish to recommend that the Finance Committee should examine the matter.

**Appendix 2****RESOLUTION \_\_/2013****Amendment of Rule XXVII, paragraph 7 of the General Rules of the Organization****THE CONFERENCE,**

**Recalling** that under Article III, paragraph 4 of the Constitution the Conference may permit a Member Nation in arrears to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member Nation;

**Considering** that, at its 33<sup>rd</sup> Session in November 2005, the Conference expressed its concern at the high number of Member Nations in arrears at that time and held the view that any past recommendations that voting rights be restored for all Member Nations on the first day of the Conference, or upon submission of a letter to that effect, should not be regarded as preventing the Conference from taking a different position in future;

**Noting** its recommendation that the normal course of action in respect of Member Nations in arrears should consist in actively encouraging them to submit an instalment plan for the settlement of such arrears, as a condition for the restoration of their voting rights;

**Noting further** its recommendation that consideration be given that requests for restoration of voting rights should be referred to the Director-General for submission to the Finance Committee, which would submit its views to the General Committee of the Conference, through the Council, without prejudice to the authority of the Conference to make autonomous determinations under Article III, paragraph 4 of the Constitution;

**Noting further** that in October 2012 the Committee on Constitutional and Legal Matters (CCLM) considered a document describing the main legal provisions and practice regarding restoration by the Conference of voting rights of Member Nations in arrears;

**Acknowledging** that the Finance Committee submitted a report of its 148<sup>th</sup> Session in March 2013 to the Council, in which the Committee supported the recommendation of the Conference at its 33<sup>rd</sup> Session that requests for restoration of voting rights be referred to the Director-General for submission to the Spring Session of the Finance Committee in Conference years;

**Having considered** the recommendation of the Council at its 148<sup>th</sup> Session on the basis of reports of the 97<sup>th</sup> Session of the CCLM and the 150<sup>th</sup> Session of the Finance Committee;

**Decides** to amend Rule XXVII of the General Rules of the Organization as follows<sup>5</sup>:

**“Rule XXVII  
Finance Committee**

(. . .)

7.

(b) *At its regular Spring Session in a Conference year, the Finance Committee shall examine requests for restoration of voting rights of Member Nations that are in arrears of their contribution to the budget of the Organization under Article III, paragraph 4 of the Constitution. The Finance Committee*

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<sup>5</sup> Deletions are indicated using ~~strikethrough text~~ and insertions are indicated using *underlined italics*.

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*shall advise the Conference, through the Council on such requests, including the approval of installment plans, without prejudice to the authority of the Conference to make autonomous determinations under Article III, paragraph 4 of the Constitution.*”

(subparagraphs 7(b), 7(c) and following to be re-numbered consecutively as 7(d), 7(e), etc.)

(Adopted . . . 2013)

**Appendix 3****RESOLUTION \_\_/2013****Restoration of Voting Rights of Member Nations in Arrears  
pursuant to Article III, paragraph 4 of the Constitution****THE CONFERENCE,**

**Recalling** that under Article III, paragraph 4 of the Constitution the Conference may permit a Member Nation in arrears to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member Nation;

**Considering** that, at its 33<sup>rd</sup> Session in November 2005, the Conference expressed its concern at the high number of Member Nations in arrears at that time and held the view that any past recommendations that voting rights be restored for all Member Nations on the first day of the Conference, or upon submission of a letter to that effect, should not be regarded as preventing the Conference from taking a different position in future;

**Noting** its recommendation that the normal course of action in respect of Member Nations in arrears should consist in actively encouraging them to submit an instalment plan for the settlement of such arrears, as a condition for the restoration of their voting rights;

**Noting further** its recommendation that consideration be given that requests for restoration of voting rights should be referred to the Director-General for submission to the Finance Committee, which would submit its views to the General Committee of the Conference, through the Council, without prejudice to the authority of the Conference to make autonomous determinations under Article III, paragraph 4 of the Constitution;

**Noting further** that in October 2012 the Committee on Constitutional and Legal Matters (CCLM) considered a document describing the main legal provisions and practice regarding restoration by the Conference of voting rights of Member Nations in arrears;

**Acknowledging** that the Finance Committee submitted a report of its 148<sup>th</sup> Session in March 2013 to the Council, in which the Committee supported the recommendation of the Conference at its 33<sup>rd</sup> Session that requests for restoration of voting rights be referred to the Director-General for submission to the Spring Session of the Finance Committee in Conference years;

**Having considered** the recommendation of the Council at its 148<sup>th</sup> Session on the basis of reports of the 97<sup>th</sup> Session of the CCLM and the 150<sup>th</sup> Session of the Finance Committee;

**Decides** to implement the following procedures for reviewing requests for restoration of voting rights of Member Nations in arrears:

- 1) No later than ten days before the Spring Session of the Finance Committee in a Conference year, Member Nations that are in arrears of their contribution to the budget of the Organization under Article III, paragraph 4 of the Constitution may present to the Director-General for submission to the Finance Committee:
  - a) a request for the restoration of voting rights in a letter setting forth the conditions beyond the control of the Member Nation that explain the inability to pay its contribution; or

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- b) a letter proposing an installment plan, including, *inter alia*: the total amount of arrears of contributions; the number of years over which payments will be made; the amount to be paid each year; and the date on which the payments will commence.
  - 2) The Finance Committee shall examine the Member Nations' requests and submit its views to the General Committee of the Conference, through the Council.
  - 3) The Secretariat may take such practical measures as may be necessary to facilitate the implementation of this resolution.
  - 4) The procedure set out in this resolution shall be without prejudice to the authority of the Conference to make autonomous determinations under Article III, paragraph 4 of the Constitution.

(Adopted . . . 2013)