

# codex alimentarius commission



FOOD AND AGRICULTURE  
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Agenda Item 11

CX/GP 04/21/12

## JOINT FAO/WHO FOOD STANDARDS PROGRAMME CODEX COMMITTEE ON GENERAL PRINCIPLES

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Twenty-first (Extraordinary) Session  
Paris, France, 8-12 November 2004

### INTERPRETATION OF THE TERM "DELEGATE" UNDER RULE IV.1 OF THE RULES OF PROCEDURE

#### I. BACKGROUND

1. The Codex Committee on General Principles (hereafter "CCGP" or "the Committee") at its 20<sup>th</sup> session held in May 2004, considered agenda item 9e), entitled "Particular situation of the North America Region in the Context of Rule IV.1". Discussion on this item had been postponed from the 19<sup>th</sup> (extraordinary) session of the Committee due to lack of time. On a proposal by the Delegation of the United States, the Committee agreed to request the Legal Counsels of FAO and WHO to submit to its 21<sup>st</sup> (extraordinary) session a document providing further clarification as to whether the Chairperson and Vice-Chairpersons of the Executive Committee could be considered "delegates" for the purposes of Rule IV.1 of the Rules of Procedure of the Codex Alimentarius Commission. The present document has been prepared by the Legal Counsels in response to that request.

2. The overarching issue that has led the CCGP to seek the views of the Legal Counsels is the particular situation of the representation of the North America region in the Executive Committee, in particular in the light of the pending amendment to Rule IV, which will *inter alia* expand the membership of the Executive Committee by adding the Coordinators as full members. That issue was debated during the consideration of the proposed amendment to Rule IV by the CCGP at its 19<sup>th</sup> session. The Committee considered possible solutions but could not reach a consensus on this matter. It should also be recalled that the Legal Counsel of WHO provided the provisional views of the Legal Counsels of FAO and WHO on the interpretation of the term "delegate" in Rule IV.1 to the 53<sup>rd</sup> session of the Executive Committee in February 2004, at the latter's request<sup>1</sup>.

#### II. CONTEXT OF THE QUESTION

3. The interpretation of the term "delegate" concerns the current text of the first sentence of Rule IV.1, reading as follows and with emphasis added to the relevant passage:

"The Executive Committee shall consist of the Chairperson and Vice-Chairpersons of the Commission together with seven further members, elected by the Commission at regular sessions from among the Members of the Commission, one each coming from the following geographic locations: Africa, Asia, Europe, Latin America and the Caribbean, Near East, North America, South-West Pacific; **it being understood that not more than one delegate from any one country shall be a member of the Executive Committee.**"

<sup>1</sup> ALINORM 04/27/3, paragraphs 92-96.

4. At the same time, the debate at the 19<sup>th</sup> session of the CCGP revolved around the consequences for the representation of the North America region in the Executive Committee, of the expansion of its membership through an amendment to the above-quoted provision. Rule IV, moreover, will become a new Rule V as a result of the introduction of a dedicated Rule on Coordinators. That amendment could not be adopted by the Commission at its 27<sup>th</sup> session due to lack of quorum. However, its implications should be considered for the purpose of the present legal opinion since the fundamental reason for the request made by the CCGP lies, as just noted, in the consequences of that amendment on the composition of the Executive Committee. Paragraph 1 of the amended Rule V reads as follows in relevant part:

"The Executive Committee shall consist of the Chairperson and the Vice-Chairpersons of the Commission, and the Coordinators appointed on the basis of Rule IV together with seven further Members elected by the Commission at regular sessions from among the Members of the Commission, one each coming from the following geographic locations: Africa, Asia, Europe, Latin America and the Caribbean, Near East, North America, South-West Pacific. Not more than one delegate from any one country shall be a member of the Executive Committee."

5. The clarification required by the CCGP thus should be framed in the broader context of the membership of the Executive Committee as provided in the Rules of Procedure. It should be recalled that the Executive Committee, on the basis of the provisions of Rule IV.1, is composed of the Chairperson and the Vice-Chairperson of the Commission and seven further Members elected by the Commission from among its Members, one each coming from the geographic locations listed in Rule IV.1. The Coordinators appointed by the Commission, who are participating in the Executive Committee as observers pursuant to Rule III.4.(d), will become full members after the adoption by the Commission of the aforementioned amendment. The language of the Rules of Procedure and of the aforementioned arrangement make it quite clear that both the Coordinators and the Members elected on a geographic basis are countries and not individuals. The Chairperson and the Vice-Chairpersons, as will be better explained in the next section, are elected from among the delegates of the Members of the Commission but do not act as representatives of those Members while serving as officers of the Executive Committee. This distinction appears to be confirmed by point (i) of the arrangement agreed upon by the Commission at its 18<sup>th</sup> session in 1989 regarding the composition of the Executive Committee<sup>2</sup>.

6. The question of interpreting the term "delegate" for the purposes of Rule IV.1 should be addressed keeping in mind both the structure of the Executive Committee as explained in the preceding paragraph and the specific consideration that the North America region only comprises two Members. If the term "delegate" encompasses the officers of the Commission, should the representative, alternate or advisor of one of the two Members of the North America region be elected as Chairperson or Vice-Chairperson, that same Member cannot at the same time be a member of the Executive Committee either as a Member elected on a geographic basis or, after Rule IV has been amended, as a Coordinator. Since the North America region is only composed of two Members, that may lead to the result that the region in question would be unable to be represented in the Executive Committee through the Member elected on a geographic basis, particularly if the other of the two Members of the North America region is ineligible to hold such office, due to the provision of Rule IV.1, after having served for two consecutive terms. If, conversely, the term "delegate" were to be interpreted as only referring to the representatives of the Coordinators and the Members elected on a geographic basis, that result would be avoided in most cases because the fact that the representative of one Member of the North America region is elected as Chairperson or Vice-Chairperson would not preclude that same Member from being a member of the Executive Committee either as a Coordinator or as a Member elected on a geographic basis, and it is unlikely that, when one of the two Members of the North America region is ineligible to hold the office of Member elected on a geographic basis due to the provision of Rule IV.1, the other Member is to be nominated as or is serving as Coordinator.

### **III. POSSIBLE USES OF THE TERM "DELEGATE"**

7. The clarification requested by the CCGP should be provided on the basis of the Rules of Procedure of the Commission, in the light of their object and purpose as well as of the established practice followed by the Commission in implementing those Rules. As noted above, the Legal Counsel of WHO already

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<sup>2</sup> "(i) Except for the Chairman and the three Vice-Chairmen, the (seven) further members of the Executive Committee elected by the Commission to represent the geographic locations are countries, not individuals;"

expressed a provisional view on this matter, and the considerations that follow take into account the substance of his statement.

8. The term "delegate" as normally used in Rules of Procedure designates the representative of a State, acting in that capacity within the organ concerned. Rule III.1 uses the term in that manner ("...the representatives, alternates and advisers (hereinafter referred to as "delegates") of the Members of the Commission..."). The term is used in the same manner in the Constitutions and Rules of Procedures of the parent organizations (e.g. in Article 10 of the WHO Constitution, Article III.1 of the FAO Constitution, Rule 19 of the WHA Rules of Procedure and Rule III of the FAO General Rules of the Organization).

9 Taking the common use of the term "delegate" into account, it may be observed that, as noted above with reference to the Rules of Procedure of the Commission and the 1989 arrangement referred to in paragraph 5 above, the Coordinators and the Members elected on a geographic basis are elected as countries and their representatives therefore act within the Executive Committee as "delegates" of those countries. As noted by the Legal Counsel of WHO in his statement to the Executive Committee, pursuant to Rule III.1, the Chairperson and Vice-Chairpersons are elected from among the delegates of the Members of the Commission but serve in their elective capacity as individuals, not as representatives of their countries. From the point of view of their roles and functions, they are thus supposed to reflect the position and interests of the Commission and Executive Committee as a whole rather than those of their respective countries. Consequently, even though the plain language of current Rule IV.1 and of the proposed amendment thereto point to them as "Members" of the Executive Committee<sup>3</sup>, there is a clear difference between them on the one hand, and the Coordinators and the Members elected on a geographic basis, on the other hand. Taking the foregoing into account, it could be argued that the term "delegate" properly applies only to the Coordinators and the Members elected on a geographic basis, and that the objective of avoiding overlapping representation of the same country in the Executive Committee is not served by applying that term to the Chairperson and Vice-Chairpersons in view of the different nature of their "membership" in the Executive Committee and of their different functions.

10. On the other hand, Rule III.1 makes it clear that the Chairperson and the Vice-Chairpersons do not lose their connection to their delegations by virtue of their election. Indeed, besides stating that they are elected from among the delegates of the Members of the Commission, the Rule provides that "no delegate shall be eligible without the concurrence of the head of his delegation", and that the Chairperson and Vice-Chairpersons "may remain in office only with the continuing endorsement of the respective Member of the Commission of which they were a delegate at the time of the election". The officers thus retain a continuing link with their respective delegations and remain members thereof, entitled as such to act as representatives when they are not exercising their elective functions. It could therefore be argued that the officers of the Executive Committee, even though they have to act as individuals when they are exercising their elective functions, do not lose their essential relationship with their own country, such that they could not be considered as "delegates" thereof.

11. What is particularly relevant, moreover, is the manner in which the Commission has consistently addressed the question of the membership of the Executive Committee, in order to ensure its representative nature as an executive body and the diversity of views reflected by its Members. Reference can be made in particular to the practice consistently followed within the Commission, to stagger the election of the Chairperson, Vice-Chairpersons and Members elected on a geographic basis, so that no two members of the Executive Committee came from the same country. While this procedure does not appear to have been always applied to the Coordinators<sup>4</sup>, it is likely that the Commission may decide to extend the same principles to them after Rule IV has been amended since they will then become full members of the Executive Committee.

12. Equally significant is the fact that, at the Twenty-Second session of the Commission in 1997, a Member elected on a geographic basis resigned following the election of one its nationals as a Vice-Chairperson<sup>5</sup>.

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<sup>3</sup> Pursuant to current Rule IV.1, "The Executive Committee shall consist of the Chairperson and Vice-Chairpersons of the Commission together with seven **further members**" (emphasis added).

<sup>4</sup> For example, at the Twenty-Fifth session of the Committee in 2001, Canada served both as a Member elected on a regional basis and as the Coordinator for the North America and South-West Pacific regions.

<sup>5</sup> ALINORM 97/37, paragraph 7.

13. It appears, in the light of the foregoing practice, that the Commission has implicitly interpreted the term "delegate" in Rule IV.1 as including the Chairperson and Vice-Chairperson, so that a particular sequence of elections was required to ensure that no two members of the Executive Committee would come from the same country. In other words, the Commission has implicitly interpreted the term "delegate" as overlapping with the term "member" for the purposes of Rule IV.1, inclusive of the Chairperson and Vice-Chairpersons of the Commission. The Member referred to in the previous paragraph aligned its behaviour to that interpretation.

#### **IV. CONCLUSIONS**

14. The foregoing analysis of the meaning of the term "delegate" as employed in Rule IV.1, and in the pending amendment thereto, within the more general context of the Rules of Procedure and with regard to the practice of the Commission, points in the view of the Legal Counsels to the following general considerations:

- There are arguments both in favour and against including the Chairperson and Vice-Chairpersons under the term "delegate" when interpreting the language of the Rules of Procedure in the light of both their functions as officers and their continuing relationship with the Member from whose delegation they were elected;
- The practice of the Commission summarized above appears to support the view that the term "delegate" has been at least implicitly interpreted as encompassing the Chairperson and Vice-Chairpersons for the purpose of determining the composition of the Executive Committee;
- At the same time, the degree of stringency of the language would not prevent the Commission from choosing the other interpretation from that applied in its practice.

15. If the Commission wishes to consider reviewing its practice in implementing Rule IV.1, especially in view of the forthcoming amendment of that Rule and the addition of the Coordinators to the membership of the Executive Committee, there are several ways in which this could in principle be achieved. As noted by the Legal Counsel of WHO, the Commission could choose to adopt an interpretative statement or an arrangement similar to that agreed upon at its 18<sup>th</sup> session in 1989 concerning the composition of the Executive Committee, to the effect that the restriction on overlapping country membership currently imposed by Rule IV.1 should not be interpreted as applying to the officers of the Executive Committee. Such a statement or arrangement could be agreed upon at the same time of adopting the aforementioned amendment to Rule IV. The Commission may also wish to consider a further amendment to Rule IV.1 so as to make its language less ambiguous in this particular respect. Alternatively, the Committee may wish to request the Secretariat to explore alternative approaches and possible solutions to the issues discussed in this document, and report back to it.

#### **V. POSSIBLE ACTION BY THE COMMITTEE**

16. The Committee is invited to review the present document and provide such guidance to the Secretariat and the Legal Counsels as deemed appropriate.