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# COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

## Hundred and Third Session

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### Decision-making procedures in Bodies under Article XIV of the FAO Constitution

#### I. Background

1. This document is being submitted to the Committee on Constitutional and Legal Matters (CCLM) by the Director-General under Rule XXXIV, paragraphs 3 and 4 of the General Rules of the Organization (GRO). It concerns two sets of working procedures that have been developed by some bodies under Article XIV of the Constitution.

2. The first is related to the holding of closed meetings by some of these bodies; typically these meetings are open only to heads of delegations. The decision-making process of some bodies is characterized by a substantial number of alternating standard open meetings of the plenary (convened in accordance with the established rules for decision-making) and closed meetings. The second is related to the fact that some of these meetings are held in the absence of the representatives of the Organization.

3. The Organization seeks the guidance of the CCLM on the approach to be taken in respect of these issues.

#### II. General Status of Bodies under Article XIV of the Constitution

4. The status of bodies under Article XIV of the Constitution ("Article XIV bodies") has been under review by some Governing Bodies in FAO. These are established by treaties negotiated within the Organization and adopted by the Conference or Council, depending on whether they have worldwide or regional scope.

5. In the past, concerns were expressed regarding some lack of clarity in the relationship between Article XIV bodies and FAO. In particular, the extent of the responsibilities of FAO and of its Members *vis-à-vis* those bodies was, at times, considered to be unclear. It is unlikely that there could

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be a conclusive position on this issue insofar as each treaty is the result of a negotiation process and may have specific distinct features. With a view to establishing some juridical and administrative norms, in 1957, the FAO Conference adopted “*Principles and Procedures which should Govern Conventions and Agreements Concluded under Articles XIV and XV of the Constitution, and Commission and Committees Established under Article VI of the Constitution*” (“the *Principles*”). In general, there has been recognition that bodies established by treaty under Article XIV of the Constitution should enjoy a measure of functional and operational autonomy, allowing them to attain their statutory objectives.

6. However, irrespective of their functional characteristics, Article XIV bodies remain very closely associated with FAO and this is so in many respects. In general, they operate under the framework of FAO and commit the Organization in all their activities. There are many manifestations of this situation, as also described in another document presented to this Session of the CCLM:

- a) As confirmed by the Council of FAO<sup>1</sup>, their constituent instruments do not vest the Article XIV bodies with legal personality, i.e. the capacity to enjoy rights and assume obligations of their own and, therefore, they have to act through FAO or draw on the legal capacity of FAO.
- b) Agreements under Article XIV of the Constitution are negotiated and concluded within FAO, in accordance with procedures set forth in the Constitution, the General Rules of the Organization and the above-mentioned *Principles*. Membership is open only to Members of the Organization or to Members of the United Nations, any of its Specialized Agencies or the International Atomic Energy Agency, as set out in the Constitution and in the General Rules of the Organization.
- c) Article XIV bodies may adopt and amend their Rules of Procedure and Financial Regulations, but these must be consistent with the general institutional framework of the Organization. In general, they operate under, and in accordance with, the general policies of the Organization.
- d) Any contributions, donations or assistance received for Article XIV bodies are administered in accordance with the financial rules and procedures of the Organization and all financial and administrative transactions are carried out through the accounts of the Organization. FAO is accountable to donors for the management and use of any contributions received.
- e) Any amendments to the constituent agreements must be reported to the Council or the Conference, which have the power to disallow them if they find that the amendments are inconsistent with the objectives and purposes of FAO or the provisions of the Constitution.
- f) Staff of Article XIV bodies are officials of FAO appointed by the Director-General and are subject to the Staff Regulations and Rules of the Organization, as well as to the authority of the Director-General, notwithstanding any autonomy which they may enjoy in functional and technical matters. Similarly, other personnel employed for such bodies are recruited by the Organization, and in accordance with its rules and procedures.
- g) Any grievances which staff may allege in connection with their terms and conditions of employment are referred to the FAO Appeals Committee and the Administrative Tribunal of the International Labour Organization, where FAO is the respondent party and the Director-General its legal representative.
- h) Similarly, it is FAO and the Director-General as its legal representative, that would have to address any liabilities arising from the activities of Article XIV bodies, for instance, in connection with arbitration proceedings which could be brought against those bodies. The privileges and immunities enjoyed by Article XIV bodies and their personnel are the privileges and immunities of the Organization, as foreseen in the FAO Constitution, the Convention on the Privileges and Immunities of the Specialized Agencies and such

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<sup>1</sup> CL127, paragraph 90.

additional agreements as may be concluded (for example, bilaterally by FAO with individual Members).

7. Thus, while Article XIV bodies may enjoy a variable measure of functional autonomy for the purpose of discharging the programme of work approved by them, administratively they are fully integrated with and in FAO. As foreseen in the treaties, the Rules of Procedure and related working procedures of these bodies should not be inconsistent with the Constitution of FAO and the operating procedures of the Organization.

### III. Practice of Holding Closed Meetings

#### A. The issue

8. In a few bodies established by treaty under Article XIV of the Constitution a practice has developed whereby particular topics are examined in the normal meetings of the body in question, but also in closed meetings restricted to Heads of Delegation. There is thus a process where the decision-making process on a particular matter takes place in an institutional context characterized by both the normal open, plenary, meetings of a body, and closed, restricted, meetings of Heads of delegations. Recourse to these mechanisms, which is increasingly frequent, blurs, if not undermines, the regular decision-making processes of these Article XIV bodies.

#### B. Relevant considerations

9. As a matter of principle, meetings of the main organs of all organizations of the United Nations System are public as these organizations are rooted in a concept of public diplomacy, going back to the first efforts to establish and develop intergovernmental organizations. Thus the statement of principles on the basis of which the world was organized after the First World War, the so-called “Fourteen Points” articulated by President Woodrow Wilson of the United States of America, included, as its very first principle, that of public diplomacy<sup>2</sup>. The general position throughout the United Nations System is that plenary meetings of the main bodies should be public meetings<sup>3</sup>. This is the position throughout the multilateral system, in organizations such as the United Nations itself and all its main programmes and funds, IAEA, ICAO, ILO, UNIDO, WHO, UNESCO and WIPO. This is evidenced by research that FAO has conducted over a number of years, in a variety of contexts.

10. Some organizations have made adjustments to these procedures in order to take into consideration growing concerns of a security nature. However, a distinction has been made between the public and open nature of meetings, on the one hand, and security arrangements and related restrictions, on the other hand. In general, it was made clear that any such adjustments should be without any prejudice to the principle that meetings continue to be public. FAO’s adherence to this fundamental principle was re-affirmed in 2005. When considering the matter, the relevant Governing Bodies agreed that access by the public to meetings could be subject to some restrictions and the implementation of precautionary measures (such as prior notice of attendance, special areas, etc...) but stressed that the integrity of the principle that meetings are public remained. The Conference of FAO approved amendments to the General Rules of the Organization clarifying that the Director-General, taking into account all relevant security concerns, should make arrangements for the admission of the public to meetings. In fact, the Conference Resolution which adopted these amendments stressed “*the ‘overarching principle’ that plenary meetings of the Conference and the Council shall continue to be*

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<sup>2</sup> The first Statement of Principles called for “*open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view*”.

<sup>3</sup> This applies even in the case of the United Nations Security Council, for which Rule 48 of the Provisional Rules of Procedure establishes that “*unless it decides otherwise, the Security Council shall meet in public*”.

*held in public and the amendments are intended to clarify the extent of the responsibilities of the Director-General on security matters in connection with exceptional situations that may arise”<sup>4</sup>.*

11. Also in line with a general policy followed in the United Nations System, bodies consisting of a limited number of Members or performing specific functions, such as executive committees, bureaux and drafting committees are not open to observers and hold private meetings. In general, these are private meetings. This continues to be reflected in the Basic Texts of the Organization<sup>5</sup>. This is generally due to the fact that these organs are not entrusted with decision-making authority and work under the mandate provided by, and report to, a plenary body. However, even in these cases an evolution has taken place over the years and there has been a definite trend towards opening up a range of meetings which used to be closed so as to ensure transparency of proceedings.

12. Thus, the reform of FAO prescribed that a number of committees which used to hold closed, private meetings should be open to silent observers<sup>6</sup>. This was reflected in the General Rules of the Organization which now make provision for the participation of silent observers in such meetings.

13. There are a few situations – which are currently of a residual nature – where meetings may be held in private. For instance, the General Rules of the Organization allow the Council of FAO to hold a private meeting. However, it is extremely rare that private meetings of plenary bodies are held in FAO. For instance, the last time the Council of FAO held a private meeting, for the consideration of a matter related to the appointment of the External Auditor, goes back to more than 20 years ago. In fact, provisions on private meetings of the main bodies of the Organization may simply have become obsolete.

14. In conclusion, it is questionable whether the current reliance of some statutory bodies under Article XIV of the Constitution on private, closed meetings are consistent with the underlying principles of the United Nations System and the established rules and practices of the Organization. These is especially so as a significant number of such meetings are held in parallel with the normal, open, meetings of the bodies in question.

#### **IV. Holding of Meetings in the Absence of a Representative of the Organization**

15. Under Article VII, paragraph 5 of the FAO Constitution, *“the Director-General or a representative designated by him shall participate, without the right to vote, in all meetings of the Conference and of the Council and shall formulate for consideration by the Conference and the Council proposals for appropriate action in regard to matters coming before them”*.

16. While the provisions of Article VII, paragraph 5 of the Constitution refer to the Conference and the Council, these provisions are considered to be of general application and apply to all meetings of Governing and Statutory bodies of the Organization, including meetings of Article XIV bodies. The principle has been restated on a number of occasions before meetings of the Organization. It is also a principle of general application throughout the United Nations System and, in fact, Article VII, paragraph 5 of the Constitution mirrors Article 98 of the Charter of the United Nations. In substance, this principle is also found in the constituent instruments of other organizations of the United Nations System. Indeed, it is arguably applicable in the absence of explicit provisions to that effect, bearing in mind that this principle – enunciated as early as 1918 – forms a cornerstone of the multilateral system that has developed over the years.

<sup>4</sup> Cf. Resolution 8/2005 “Amendment to Rule V, paragraph 3 and Rule XXV, paragraph 9(a) of the General Rules of the Organization”. The matter was the subject of a discussion from the perspective of the important principles of transparency, openness and access by the public to the main bodies of the Organization. C 2005/REP, paragraphs 105 to 107.

<sup>5</sup> See Part I of the Basic Texts, Appendix – Statement of Principles Relating to the Granting of Observer Status to Nations, paragraph 4.

<sup>6</sup> See C2008/REP and Immediate Plan of Action for FAO Renewal.

17. This matter was discussed by the CCLM in 2004 in a slightly different context and from a different perspective. At that time, the Chairperson of the Indian Ocean Tuna Commission (IOTC) had requested the preparation and the circulation of documents having important implications for the Organization and its Membership without review by the Organization<sup>7</sup>. The matter was discussed by the CCLM and the Council which confirmed that any document or decision having policy, programme or financial implications for FAO must be reported to the Organization and the Organization must be given a timely opportunity to express its views. The Council observed that such a requirement was without prejudice to the functional autonomy of bodies under Article XIV of the Constitution<sup>8</sup>. In fact, as a matter of practice, the Organization does not systematically review all documents prepared for the meetings of Statutory Bodies but only those that may have implications for the Organization as a whole.

18. In the same vein, it is considered essential that a representative of the Director-General should be present at all meetings of the Organization, including meetings of its statutory bodies, and be able to express the views of the Director-General on any matter under discussion. This is a fundamental principle throughout the United Nations System<sup>9</sup>. Of course, this principle is without any prejudice to the decision that the Members attending the meeting in question may wish to take.

19. In conclusion, the CCLM is invited to recall the principle that a representative of the Director-General should attend all meetings of the Organization, including meetings of Article XIV bodies and other statutory bodies, and should be able to express the Director-General's views on any matters under discussion. The CCLM is also invited to advise whether this principle should be reflected as appropriate in the Rules of Procedure of statutory bodies.

## V. Suggested Action by the Committee

20. The CCLM is invited to review this document and make such observations thereon as appropriate.

21. The CCLM is in particular invited:

- a) to restate the position of the Organization, in light of the established practice throughout the United Nations System, in respect of private meetings and to underline the exceptional character of such meetings;
- b) to recall, also in light of the established practice throughout the United Nations System, the principle that a representative of the Director-General should be present at all meetings of statutory bodies and be able to express the views of the Organization and of the Director-General on any matters under discussion;
- c) to advise whether the Rules of Procedure of statutory bodies of the Organization should be amended to reflect the principle set out in paragraph (b) above.

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<sup>7</sup> In the case at issue, one of the documents concerned relations with an entity that was not recognized by the United Nations. The document concerned not only FAO but the United Nations System as a whole and triggered a series of debates and controversy over a period of some two years.

<sup>8</sup> CL 127, page 35.

<sup>9</sup> Thus, for example, consistent with Article 98 of the UN Charter, Rule 45 of the Rules of Procedure of the UN General Assembly establishes that the "*Secretary-General shall act in that capacity in all meetings of the General Assembly, its committees and its subcommittees. He may designate a member of the Secretariat to act in his place at these meetings*".