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COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

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Terms of office of Council Members

I. Introduction

1. This document addresses questions regarding a recent development that has emerged whereby seats on the Council are shared among Members of the same regional group through the partial exercise of a three-year mandate as Member of the Council. This matter is referred to the Committee in accordance with Rule XXXIV(7), paragraphs (a) and (j), of the General Rules of the Organization (“GRO”).

2. During its 39th (2015) and 40th (2017) Sessions, the Conference accepted a number of “seat sharing” arrangements when electing Members of the Council. However, at both Sessions of the Conference, these arrangements generated some discussion at meetings of the General Committee. In particular, the discussions in 2017 revealed a need for review and clarification. Subsequently, the 40th Session of the Conference accepted seat sharing arrangements, however, on the understanding expressed in its Plenary Session that the question of seat sharing would be reviewed during the inter-sessional period and that, possibly, the rules regarding tenure in the Council be reconsidered¹. Thus, seat sharing has raised questions amongst the membership of the Organization and there is a need for clarification. It is also a duty of the Secretariat to raise the matter with the membership. This document seeks to initiate the review contemplated by the Conference by offering some background on the matter, as well as reflections from a legal and institutional perspective.

II. Background

3. The Council consists of 49 Members, which is the number of seats set in 1977². At each Session, the Conference elects Members of the Council, by geographic region, for periods of three years. Elections take place by groups of one third of the membership of the Council, one group taking office

¹ Verbatim, C 2017/PV/6.

² However, the number of members of the Council has evolved over time. On a substantial number of past occasions, the Conference increased the number of seats.

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immediately after the Session of the Conference, and another group taking office one year after the end of the Conference session. This mechanism of staggered expiry of tenure ensures the annual renewal of one-third of Council membership, as provided in Rule XXII of the General Rules of the Organization (GRO) (see below).

4. During the Conference Sessions in 2015 and 2017, some regional groups made informal arrangements whereby Members of the same regional group agreed among themselves to resign their seats, either after year one or year two of their term of office, in favour of another Member of the same regional group. These arrangements were accepted by the Conference.

5. The acceptance by the Conference of such seat sharing arrangements has taken one of two forms. In the first, a Member has resigned at some point after it has taken office, and the Conference has been subsequently asked to agree to a replacement Member drawn from the same regional group, with reference to paragraph 6 of Rule XXII of the GRO, requiring the Conference to fill vacancies “*which may have occurred*” (see below). Another approach is that the seat sharing arrangement is anticipated at the time of election, and the Conference elects two Members of the same regional group to the same seat, each to serve for specified portions of the relevant term of office. A variation of this version is that Members announce, in advance, their resignation to take place at some future date, and the Conference, at the same session, elects a substitute Member from the same region as of the date of the future resignation for the remainder of the term. Despite some differences in the manner in which they operate, the outcome of these arrangements are substantially the same.

6. The 39th session of the Conference accepted three seat sharing arrangements. It elected Thailand and the Philippines to one of the seats of the Asian region, each for one and a half years of the term of office for that seat. It further elected Spain and the United Kingdom to one seat of the European Group, with Spain occupying the seat for one year, and the United Kingdom to serve the remainder of the term. In addition, the Conference noted the future resignation of Italy as of 30 June 2016 from a seat of the European Group that it had occupied since June 2014, and agreed to the Russian Federation replacing Italy for the remainder of the term of office, until the end of the 40th Conference session³.

7. In a similar manner, the 40th Session of the Conference elected Thailand and Malaysia to one seat of the Asia region, each to occupy the seat for one year and a half. In the same way, the Conference elected, respectively, the Philippines and Myanmar, and Viet Nam and Indonesia, in respect of two further seats of the Asia region. The Conference elected Chile and Peru to one seat of the Latin America and Caribbean region; Chile to occupy the seat for one year, and Peru for two years. In respect of the European region, the Conference elected Estonia and the Former Yugoslav Republic of Macedonia to complete the remainder of the terms of two seats from which Cyprus and San Marino would resign. It also elected Austria and France to two seats of the European region for the period 1 July 2018 until the end of the 41st Session of the Conference, since the current occupants, Germany and Montenegro, announced their resignation, to take effect in July 2018, one year in advance.⁴ As noted above, the 40th Session of the Conference accepted these seat sharing arrangements on the understanding that such mechanisms would be reviewed by the appropriate Governing Bodies and that, possibly, rules regarding tenure in the Council be reconsidered.

III. Legal Framework for the Election of Council Members

8. The legal framework for the election of Council Members is established by Article V of the FAO Constitution, which provides for the election, by the Conference, of the Council. Article V also establishes that “*the tenure and other conditions of office of the Members of the Council shall be subject to rules made by the Conference.*”

³ C 2015/LIM/17; C 2015/REP, paras 91-92.

⁴ C 2017/LIM/23; C 2017/REP, paras 91-92.

9. Further conditions on elections and terms of office of Council Members are provided by Rule XXII of the GRO, “*Election of the Council*”. Provisions of Rule XXII relevant to seat sharing are:

Rule XXII Election of the Council

1.

(a) *Except as provided in paragraph 9 of this Rule, the Council shall be elected for a term of three years.*

(b) *The Conference shall make such provisions as will ensure that the terms of office of sixteen Members of the Council shall expire in each of two successive calendar years and seventeen in the third calendar year.*

(c) *The terms of office of all members of any one group shall expire simultaneously either on the termination of the regular session of the Conference in a year in which such a session is held, or on 30 June in other years.*

2. [..]

3. *In selecting Members of the Council, the Conference shall give due consideration to the desirability of:*

(a) *including in its membership a balanced geographical representation of nations interested in the production, distribution and consumption of food and agricultural products;*

(b) *ensuring the participation in the work of the Council of such Member Nations as contribute in a large measure towards the success of the Organization;*

(c) *giving to the greatest possible number of Member Nations an opportunity, by rotation of membership, to serve on the Council.*

4. *Member Nations shall be eligible for re-election.*

5. [..]

6. *The Conference shall, at any regular or special session, fill all other vacancies on the Council which may have occurred since the last regular session. In the case of a special session, the General Committee shall recommend to the Conference such readjustments as circumstances may warrant to the time limits provided for in paragraph 10(a) and (d) below.*

7. *A Member of the Council 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, or if it has not been represented at two consecutive sessions of the Council.*

8. *Any Member Nation on the Council that withdraws from the Organization shall cease to be a Member of the Council when its notice of withdrawal from the Organization takes effect under Article XIX of the Constitution.*

9. *The term of office of a member elected to take the place of a member who has resigned or withdrawn from the Council before the expiration of its term of office shall be for the remainder of the term of office of the member replaced.*

10. [..]

(d) *The General Committee shall, at least three working days before the date selected for the election, communicate to the Conference in English alphabetical order the valid nominations*

received for each region and term of office, formally drawing the attention of the Conference to the provisions of paragraphs 3 and 4 of this Rule. The names of the nominators shall not be communicated by the General Committee to the Conference.”

IV. Seat Sharing in FAO

A. Legal considerations

10. At the outset, it is noted that the question of seat sharing pertains to the governance of the Organization. As such, it is a matter to be determined primarily by the membership of FAO as a whole. Nevertheless, the recent implementation of seat sharing arrangements by the Conference is not in strict conformity with the literal meaning of Rule XXII of the GRO.

11. A first observation from a legal perspective is that paragraph 1 of Rule XXII requires the Conference to elect Members of the Council “*for a term of three years*”. In so doing, the Conference is required to ensure that the terms of office of sixteen Members of the Council expire in each of two successive calendar years and seventeen in the third calendar year (Rule XXII, paragraph 1(b)). The terms of office of all Members of any one group expire “*simultaneously*” either on the termination of the regular session of the Conference in a year in which a session is held, or on 30 June in other years (Rule XXII, paragraph 1 (c)).

12. The recent practice of electing more than one Member to serve partial terms of office of less than three years does not seem to be compatible with the plain meaning of Rule XXII, paragraph 1. Furthermore, the practice of electing Council Members for periods of less than three years is not foreseen in Rule XXII.

13. In the same vein, Rule XXII does not foresee a planned, pre-agreed system of resignation of Council Members prior to the expiry of the term of office to allow for the election of other Members for the purpose of seat sharing. Rule XXII only foresees the resignation of Members from the Council in a few well-defined exceptional situations. A Member of the Council is considered to have resigned if it is in arrears in payment of its financial contribution to the Organization in an amount equal to or exceeding the contribution due from it for the two preceding calendar years, or if it has not been represented at two consecutive Sessions of the Council (paragraph 7). Furthermore, under paragraph 8 of Rule XXII, any Member Nation on the Council that withdraws from FAO ceases to be a Member of the Council when its notice of withdrawal takes effect under Article XIX of the Constitution (i.e. one year after its communication to the Director-General).

14. As such, the framework established under Rule XXII clearly anticipates that a Council Member will serve a full three-year mandate, unless events occur as anticipated in the GRO. A Member would in all cases be free to resign from a Council seat, in the exercise of an - inalienable - sovereign right to do so. However, in a context where the circumstances that may give rise to resignation are carefully described, the triggers for resignations would normally be limited to circumstances that are exceptional and unforeseen at the time of election. This might include any unforeseen development that affects a Member’s representation in the Council and which may force it to resign its seat. It would not include a resignation for the sole or primary purpose of allowing a seat sharing arrangement to take effect. On the basis of Rule XXII, the normal course of events would be that a Member, following its nomination and election, would commit to fulfil the full term of Council membership.

15. In this context, an observation should be made on paragraphs 6 and 9 of Rule XXII. Paragraph 6 provides for the filling of “*other vacancies on the Council which may have occurred since the last regular session*”. Paragraph 9 regulates the term of office of Council Members “*elected to take the place of a member who has resigned or withdrawn from the Council before the expiration of its term of office*”. This term of office shall be for the remainder of the term of office of the Member so replaced. Paragraphs 6 and 9 are necessary elements of Rule XXII to ensure the continuity in the work of the Council by providing for the eventuality that a substitution of a Member is necessary following a resignation or

withdrawal, as prescribed in Rule XXII. However, paragraphs 6 and 9 could not be interpreted so broadly as to constitute an authorization for seat sharing mechanisms.

16. From a legal viewpoint, arrangements whereby Conference would, at each of its Sessions, elect Council Members for terms of less than three years does not appear to be consistent with the letter and the spirit of the carefully designed legal framework described here.

B. Institutional, policy and governance considerations

17. The matter raises broader issues of a policy nature, as evidenced by some of the discussions held so far. Various inter-related considerations concerning, *inter alia*, effective governance and broad participation in the Council have been raised, which are at times of a contradictory nature.

(a) Governance related aspects

18. An important consideration regarding the terms of office of Council Members is the interest of the Organization that the Council operates efficiently, and in accordance with the principles of broad and effective representation. The Council is tasked with addressing a broad range of topics, including policy, planning, programme, administrative, financial and legal matters. The complexity of these topics requires a high degree of familiarity of Members with matters under consideration in order to contribute effectively to the discharge of governance functions by the Council. The functions of the Council were enhanced following the recent reforms through the Independent External Evaluation and the implementation of the Immediate Plan of Action for FAO Renewal. These reforms placed significant emphasis on the need for an effective Council and included important initiatives to this end. They also made the Council the final decision-making body on a range of matters, to enhance the efficiency of the Organization at large.

19. Experience suggests that around one year is normally required for newly elected representatives of Members serving on the Council to achieve sufficient familiarity with matters under consideration by the Council to contribute effectively. This being so, the three-year term of Council Members reflects a duration necessary to ensure Council Members not only develop the requisite familiarity but are also, in turn, able to use it to contribute to the ultimate purpose of effective governance. In addition, a three-year term would be consistent with the principle that Council Members are able to “*contribute in a large measure to the success of the Organization*” as is explicit in Rule XXII, paragraph 3(b) of the GRO. A similar requirement is reflected in the Constitutions of WHO and UNESCO in respect of their Executive Boards, but in enhanced, more explicit versions. Relevant provisions of the Constitutions of UNESCO and WHO emphasize the need for technical competence of Board representatives, and continuity of the work of the Boards.⁵

⁵ Article V 2.(b) of the Constitution of UNESCO prescribes that “*In selecting its representative on the Executive Board, the Member of the Executive Board shall endeavour to appoint a person qualified in one or more of the fields of competence of UNESCO and with the necessary experience and capacity to fulfil the administrative and executive duties of the Board. Bearing in mind the importance of continuity, each representative shall be appointed for the duration of the term of the Member of the Executive Board, unless exceptional circumstances warrant his replacement.*” [emphasis added] The Rules of UNESCO further suggest that candidate Members of the Board communicate the resumes of their prospective representatives to the members of UNESCO before the election of Board members (“*..candidate Member States may at the same time communicate to the other Member States and to the Director-General any information they consider relevant, including the name and curriculum vitae of the person they intend, if elected, to designate as their representative on the Board.*”); Rule 1 of the Provisions governing the procedure for the election of Member States to the Executive Board. In connection with the Executive Board of WHO, Article 24 of the WHO Constitution requires that “*Each of these [Executive Board] Members should appoint to the Board a person technically qualified in the field of health, who may be accompanied by alternates and advisers.*”

20. The fundamental importance of effective governance is underscored by the staggered expiry of terms of office. The renewal of one third of the membership each year ensures the presence of experience in the membership of the Council at all times.

21. In light of the above, the compatibility of seat sharing arrangements with the interest in having an effective Council may be questioned, considering the substantial governance functions placed upon it. Seat sharing evidently contradicts the three-year term of office, and the related mechanism of staggered expiry of those terms, which were put in place to ensure the continuous presence of expertise and experience in the Council and, in this way, enhance its effectiveness.

(b) Broad representation

22. The importance of the principle of broad representation is underscored in paragraph 3 of Rule XXII, by the requirement that the Conference “*shall give due consideration*” to principles of broad representation through a balanced geographical representation. It is also underscored by requiring that Members be granted the greatest possible opportunities to serve on the Council through rotation of membership.

23. Evidently, seat sharing could provide additional opportunities for Members to participate in the work of the Council and, in a quantitative sense, seat sharing would respond to some concerns regarding participation and inclusiveness. Arguably, however, for the reasons set out above, the quality of participation in the work of the Council could diminish due to the shorter period in office and the diminished opportunity to gain sufficient experience to contribute meaningfully. As such, sharing a Council seat could represent a degree of downgrading of the opportunity to effectively participate in the work of the Council - and, thus, the governance of the Organization – for those Members involved in seat sharing.

24. Nevertheless, it is noted that, irrespective of any considerations of the potential consequences of seat sharing, the question appears to be inherently linked to broader questions of equitable representation in the Council, as well as questions regarding the number of Council seats.

25. In the past, the Conference has considered more concrete ways, through amendments of the General Rules or by other means, to ensure equitable representation, broad participation and rotation. However, it has stopped short of specifying concrete measures in this regard. The Conference has considered it sufficient to task the General Committee to ‘*formally draw the attention of the Conference*’ to ensure the application of the principles of, *inter alia*, broad representation, participation and rotation of membership (Rule XXII, paragraph 10. (d))⁶. In essence, these principles are reflected in the elections held for Council Members. The extent to which “*due consideration*” is given to the principles of paragraph 3 of Rule XXII remains a matter exclusively in the hands of Members.

26. More recently, the question of membership of the Council and, in particular, equitable representation was discussed in relation to a possible increase in the number of Council seats. The matter was addressed by the Open-ended Working Group on measures designed to increase the efficiency of Governing Bodies, including representation (OEWG). In its Final Report to the Conference at its 37th Session in 2011⁷, the OEWG reported that the desired broad consensus could not be reached on the matter of expanding the number of Council seats. Members in favour of increasing the number of seats from its current level of 49 (established in 1977) considered that such an increase would be in line with the expansion of the membership of the Organization since 1977, thus ensuring wider participation, inclusiveness and representation, and leading to a more effective Council. Members opposing Council enlargement considered that an increase in the number of seats would adversely affect the efficiency and effectiveness of the Council in discharging its executive function, and that a more equitable

⁶ CL 20, paras 141-146; Conf 8, paras 340-343; Conference Resolution No. 29/55.

⁷ C 2011/28, paras 5-9.

representation in the Council could be better achieved by ensuring regular rotation among Members within the Regional Groups.

27. The OEWG further noted that other ways of addressing the issue of equitable representation in the Council included the possibility of: (1) reducing the length of the term of office from three to two years; and (2) limiting the number of allowable consecutive terms of office to two. The 37th Session of the Conference noted that the matter would remain under review during the inter-sessional period.⁸

V. Seat Sharing in the United Nations System

28. There is occasional seat sharing in other entities of the United Nations System; particularly in the Executive Boards of a number of funds and programmes. It is observed, nevertheless, that the institutional environment in which the concerned entities operate is usually significantly different from that of FAO.

29. The Security Council of the United Nations has seen two seat sharing arrangements, one in 1960 and one more recently in 2016. In the case of the Security Council, seat sharing arrangements have been accepted in exceptional cases, and in response to inconclusive voting leading to stalemate. As such, they can be seen as emergency measures.⁹ In the Economic and Social Council (ECOSOC), there have been 12 seat sharing arrangements between 2000 and 2013. Eleven of these arrangements have taken place within the Western European and Other States regional group of the United Nations, and one within the Eastern European regional Group.

30. Seat sharing has taken place in the Executive Boards of UNICEF, UNDP/UNFPA/UNOPS, and the Programme Coordinating Board of the Joint United Nations Programme on HIV/AIDS. In all cases, these arrangements have been limited to the Western Europe and Other States regional group, although not all members of this group participate in such arrangements.

31. In the case of the World Food Programme, its Executive Board has a practice of seat sharing. This was initially limited to the Western European and Other States group for the purpose of Members elected by ECOSOC, and the European region in FAO for the purpose of the FAO-elected Members. However, gradually, more regions have entered into such arrangements. For example, the present Executive Board of WFP (36 members) includes ten seat sharing arrangements, involving the regions of Europe (4), Latin America and the Caribbean (3) and Africa (3). Such arrangements have been accepted shortly after the establishment of the Board, following extensive consultations between the United Nations and FAO, in response to requests from European Members. The practice of WFP seems to have greatly influenced the developing practice in FAO.

32. By contrast, the Specialized Agencies do not have seat sharing arrangements within their respective limited-membership bodies. This includes, in particular, the Executive Board of UNESCO and the Executive Board of WHO. Similarly, there is no practice of seat sharing in the Board of Governors of the International Atomic Energy Agency. The position in these organizations is well established.

33. When having regard to the practice of other United Nations System entities, it is important to consider that the institutional framework under which the Organization operates is very comprehensive, particularly in comparison with the funds and programmes of the United Nations, as evidenced by Rule XXII of the GRO. Other entities generally operate in a relatively low-regulation environment, reflective of their more restrictive, highly focused and operational mandates, where there is considerable room for

⁸ C 2011/REP, para 118.

⁹ One case occurred in 1960, when Poland and Turkey agreed to split a Security Council seat after fifty-two rounds of voting. In 2016, Italy and the Netherlands agreed to share a seat on the Security Council when five rounds of voting were inconclusive, with the last round of voting resulting in an even 95-95 split of the votes. This would seem to clearly indicate that seat sharing at the Security Council was exceptional. It does not reflect a practice.

practices to develop that may not be contemplated in formal rules. FAO, however, is more regulated with a detailed procedural framework, presumably as a reflection of the normative and broad strategic aspects of its mandate. This latter characteristic is generally shared with other Specialized Agencies.

VI. Possible Way Forward

34. Current seat sharing arrangements do not seem to be compatible with the letter and spirit of the rules laid down in the Basic Texts. On that basis, the Committee could recommend that consideration be given to discontinuing the emerging practice, or that it be introduced into the formal procedural framework of FAO through amendments to the GRO. However, it is recognized that the matter raises broader issues of a policy nature, is potentially divisive, and would require substantive consultations amongst the Members.

35. Presumably, any decision leading to the endorsement of seat sharing practices might require consideration of other relevant aspects in connection with the representation and functioning of the Council, including related options, such as a possible expansion of the number of Council seats and/or reducing the term of office of Council Members¹⁰.

VII. Suggested Action by the Committee

36. The Committee is invited to review this document and make such comments and observations thereon as appropriate. The document, together with such observations as the Committee may wish to make, could be forwarded to the Council, and provide a basis for consultations through the Independent Chairperson of the Council.

¹⁰ An increase in the number of members of the Council would require an amendment to Article V of the FAO Constitution.