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COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

Hundred and Second Session

Rome, 14 - 16 March 2016

FAO Constitution - Request from the United Nations Treaty Section for filing and recording

I. INTRODUCTION

1. This item has been placed in the Provisional Agenda of the Committee on Constitutional and Legal Matters (hereinafter “CCLM or “the Committee”) under Rule XXXIV(7)(a), whereby the Committee may consider specific items referred to it which may arise out of “*the application or interpretation of the Constitution [...]*”, and Rule XXXIV(8), whereby the Committee may also consider “*the legal and constitutional aspects of any other matters submitted to it by the Council or the Director-General*”.

II. BACKGROUND

2. The Treaty Section of the United Nations (hereinafter “the UN Treaty Section”), which discharges the functions of the UN Secretariat under Article 102 of the Charter of the United Nations (hereinafter “UN Charter”), recently drew the attention of the Organization, in particular the Legal Counsel, to the fact that the FAO Constitution of 16 October 1945 “*has not been published*” in the UN Treaty Series (“UNTS”).

3. While recognizing that the FAO Constitution could not be registered, the UN Treaty Section has indicated that it could be filed and recorded, stating that this is the practice with treaties concluded prior to entry into force of the UN Charter. It requested the Organization to provide “*a certified, true copy of the FAO Constitution in all authentic languages, together with the usual information (date/place of conclusion, date and method of entry into force), as well as a list of all States parties with the dates of deposit of their instrument, the type of instrument (ratification, accession etc) and the date of entry into force for each party, and the text of any reservations/declarations made by any of the parties.*”

4. This matter was initially addressed between the UN and FAO in 1954. At that time, it was noted that FAO found itself in a peculiar position with respect to registration of its Constitution as a

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result of the procedures followed at Quebec City where the FAO Constitution was signed by 34 nations and entered into force and, subsequently, concerning signatures, adherences and ratifications.¹

5. In 1961, the matter was again raised.² However, on this occasion, the UN and FAO agreed that the issue related to recording and filing, and not registration. They also agreed that, in order for the FAO Secretariat to submit the FAO Constitution for filing and recording, approval of the FAO Conference would be needed. However, no further steps were taken in this regard.

6. Further to the request of the UN Treaty Section, and upon review of the relevant practice of the UN, it has been considered appropriate to bring the matter to the attention of the CCLM. In particular, questions arise as to whether the FAO Constitution should be recorded and filed and, if so, who should submit the FAO Constitution to the UN Treaty Section for this purpose.

III. THE PRACTICE OF THE UNITED NATIONS ON THE REGISTRATION, RECORDING AND FILING OF TREATIES OR INTERNATIONAL AGREEMENTS

7. The subject matter is governed by Article 102 of the Charter of the United Nations and Article 80 of the Vienna Convention on the Law of Treaties. As further described below, “registration” is a mandatory action under the UN Charter, whereas “filing and recording” is a voluntary action, introduced by the UNGA Regulations described below.³ Bearing in mind that the UN has acknowledged that there is no requirement to register the FAO Constitution, this analysis focusses on recording and filing. Nevertheless, the rules and practice governing registration may provide some guidance on the question of which entity may submit instruments to the UN Treaty Section for recording and filing.

8. Article 102 of the UN Charter⁴ requires that “*every treaty and every international agreement entered into*” by any Member of the UN after the Charter comes into force be registered with the UN Secretariat as soon as possible, and then published by it.

9. Article 80 of the Vienna Convention on the Law of Treaties (hereinafter “VCLT”) makes the transmission of treaties to the UN for registration or filing and recording obligatory after their entry into force. It further provides that the designation of a depositary automatically constitutes “authorization” for the depositary to transmit a treaty for registration or filing and recording, as appropriate.⁵

¹ Internal communication of 24 February 1954 from G. Saint-Pol, Legal Officer, to M. Veillet-Levallée, “Obligation to Register the FAO Constitution with the Secretariat of the United Nations”.

² Letter of 12 January 1961 from C. Stavropoulos, Legal Counsel of the UN, to the Director-General of FAO. Internal communication of 5 April 1961 from G. Saint-Pol, Legal Counsel, to M. Veillet-Levallée, Assistant Director-General, “Filing and Recording of the FAO Constitution”.

³ See *Repertory of Practice of United Nations Organs*, Article 102, 1945-1954, volume V, paras 77-81.

⁴ Article 102 of the UN Charter reads:

1. *Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.*
2. *No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.*

⁵ VCLT, Article 80 - Registration and Publication of Treaties - reads:

1. *Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.*
2. *The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.*

10. The processes to give effect to Article 102 did not effectively start until 14 December 1946, when the UN General Assembly, by its Resolution 97(I),⁶ adopted regulations to give effect to Article 102 (hereinafter “the UNGA Regulations”).⁷

11. Article 1(1) of the UNGA Regulations provides that “*Every treaty or international agreement, whatever its form and descriptive name, entered into by one or Members of the United Nations after 24 October 1945... shall as soon as possible be registered [...]*”. Registration may be effected by “*any party, or in accordance with Article 4 of these regulations*”.

12. Pursuant to Article 4(2) of the UNGA Regulations, a Specialized Agency is permitted to submit a treaty or international agreement that is subject to Article 102 for registration in the following cases :

"(a) Where the constituent instrument of the specialized agency provides for such registration;

(b) Where the treaty or agreement has been registered with the specialized agency pursuant to the terms of its constituent instrument;

(c) Where the specialized agency has been authorized by the treaty or agreement to effect registration.”

13. In addition, in accordance with long-standing practice, the UN Treaty Section has accepted agreements for registration submitted by intergovernmental organizations which, in their capacity as depositary of the agreements,⁸ have been expressly authorized therein to effect registration, on the ground that submission by such organizations is tantamount to submission by the parties themselves. A provision to this effect can be found in Article XIV of the FAO Constitution in which it is stated that certified copies of agreements approved by the Conference or the Council “*shall be transmitted to the Secretary-General of the United Nations for registration once [the agreement] has come into force as a result of action taken under [the Article XIV]*”. However, Article XIV of the Constitution cannot be applied to filing and recording of FAO’s constituent instrument.

14. The UNGA Regulations also established a formal basis for the voluntary submission for filing and recording of treaties or international agreements where they are not subject to registration under Article 102.⁹ Article 10 of the UNGA Regulations authorizes the UN Treaty Section to file and record the following categories of treaties and international agreements:

(a) Treaties or international agreements entered into by the UN or by one or more of the specialized agencies. This covers treaties and international agreements between: (i) the UN and non-member States; (ii) the UN and specialized agencies or international organizations; (iii)

⁶ Resolution 97(i) adopted by the General Assembly, 14 December 1946, as modified by Resolutions 364 (B) (iv), 482(v) and 33/141 A, adopted by the General Assembly on 1 December 1949, 12 December 1959 and 18 December 1978 respectively.

⁷ Registration and Publication of Treaties and International Agreements: Regulations to give effect to Article 102 of the Charter of the United Nations (GA resolution 97 (I), as amended by GA resolution 364 B (IV) and 482 (V). Available at: https://treaties.un.org/xml/db/MSDB/pageRegulation_en.html

⁸ The depositary of a treaty is responsible for ensuring the proper execution of all treaty actions relating to that treaty. The depositary’s duties are international in character, and the depositary is under an obligation to act impartially in the performance of those duties. The UN Secretary-General is guided in the performance of his/her depositary functions by: (a) Provisions of the relevant treaty; (b) Resolutions of the General Assembly and other UN organs; (c) International law, including customary international law.

⁹ The obligation set out in Article 102 does not cover two distinct circumstances: (i) treaties and international agreements entered into by a Member prior to the entry into force of the UN Charter and (ii) treaties and international agreements entered into either before or after the coming into force of the UN Charter, but to which no Member of the UN is a party.

specialized agencies and non-member States; (iv) two or more specialized agencies; and (v) specialized agencies and international organizations.

(b) Treaties or international agreements transmitted by a Member of the UN which were entered into before the coming into force of the UN Charter, but which were not included in the treaty series of the League of Nations; and

(c) Treaties or international agreements transmitted by a party not a member of the UN, which were entered into before or after the coming into force of the UN Charter and which were not included in the treaty series of the League of Nations.¹⁰

15. In 1961, the UN Legal Counsel was of the opinion that the FAO Constitution did not fall within the scope of Article 10 of the UNGA Regulations.¹¹

IV. CONSIDERATIONS ARISING IN THE CONTEXT OF THE FAO CONSTITUTION

16. The FAO Constitution is not registered, nor recorded and filed, with the UN. It is not published in the UNTS. It is published, and publicly available, on the FAO website.¹²

A. Whether or not the FAO Constitution should be submitted for filing and recording

17. The Organization was born on the afternoon of 16 October 1945 when its Constitution was signed by 34 countries and entered into force. By the end of the first session of the FAO Conference, convened from 16 October to 1 November 1945, FAO had 42 Members. The UN did not come into existence until 24 October 1945, eight days later. The UN Charter came into force on the same date.

18. As an instrument pre-dating the Charter, the FAO Constitution may not fall automatically within the scope of Article 102 of the UN Charter requiring mandatory registration. Moreover, there is no express provision in the FAO Constitution requiring or authorizing the registration or recording and filing of the FAO Constitution with the UN.

19. The Governing Bodies would need to make a preliminary determination as to whether it is desirable to submit the FAO Constitution for filing and recording and eventual publication in the UNTS.

20. Filing and recording would not have any legal consequences for the Organization, nor for its “ownership” or “management” of its Constitution. In the view of the Legal Office, valid grounds to refuse the recording and filing of the FAO Constitution with the UN Secretariat do not really exist. Such an attitude could be considered as dilatory and, ultimately, not in the interest of the Organization bearing in mind its status as a specialized agency of the UN Common System. Furthermore, the language of Article 80 of the VCLT would tend to support the case for recording and filing of the FAO Constitution.

¹⁰ The basis for this Article can be found in UNGA Resolution 23(I). Under this Resolution the General Assembly initiated the system of voluntary submission by both Members and non-members of the UN, of treaties or international agreements not subject to registration, for the purposes of filing and publication. It was pointed out at the time that it was in the interest of the UN that treaties and international agreements of all nations, including non-members, be made public and that there did not appear to be any reason for not giving non-members the opportunity of transmitting their international agreements for publication, with the express understanding that such transmission would be regarded as a voluntary act based upon practical convenience. (Source: *Repertory of Practice of United Nations Organ*, Article 102, 1945-1954, volume V, paras 71-74.)

¹¹ Letter of 12 January 1961 from C. Stavropoulos, Legal Counsel of the UN, to the Director-General of FAO.

¹² <http://www.fao.org/docrep/meeting/022/K8024E.pdf>

21. It is noted, however, that if FAO were to accede to the request of the UN Treaty Section to submit the FAO Constitution for filing and recording, this would imply an enormous amount of work, as the information to be provided covers all actions since it came into force, together with information regarding the date and method of participation by the Member States.¹³ The Legal Office considers that special arrangements would need to be agreed with the UN Secretariat.

B. Which entity could submit the FAO Constitution for filing and recording

22. It is understood that, over the years, the practice of the UN Treaty Section on acceptance of instruments for registration or filing and recording, has become increasingly flexible as to the entity that may submit instruments for this purpose.

23. In its communication of 2015, the UN Treaty Section considered that no authorization from the Governing Bodies is needed for the Director-General or the FAO Secretariat to submit the FAO Constitution for filing and recording. The UN Treaty Section considers that a sufficient basis exists for the Director-General or the FAO Secretariat to submit the Constitution for filing and recording because: (a) in accordance with Article 77(1)(g) of the VCLT,¹⁴ the depositary is entrusted with the responsibility of registering a treaty deposited with it and, although the FAO Constitution does not designate a depositary, the Director-General exercises some depositary functions (for instance, receiving notices of withdrawal¹⁵ and proposals for amendments¹⁶); (b) FAO has custody of the original text of the FAO Constitution, and (c) FAO has the relevant information in relation to the instruments of acceptance deposited by its Members.

24. However, the Legal Office is mindful that the negotiating States did not designate the depositary, either in the FAO Constitution itself or in any other manner, for example, by a separate decision. Furthermore, there is no express provision in the FAO Constitution requiring or authorizing the filing and recording of the FAO Constitution. It is considered, therefore, that it cannot be implied – from the practice of the UN Treaty Section or Article 80 of the VCLT concerning the authority of depositaries to submit instruments for registration – that the Director-General, or the FAO Secretariat, is inherently authorized to undertake such actions.

25. In addition, Article 4(2) of the UNGA Regulations defines the specific circumstances in which the secretariat of a specialized agency may register a treaty, from which it could be understood that the secretariat of a specialized agency is not automatically authorized to submit a treaty for filing and recording.

26. The Legal Office considers, in light of the ambiguity of the legal position, that this matter that calls for the guidance of the Members.

27. In 1961, the UN Legal Counsel considered that two options existed:¹⁷

¹³ The following documentation to be provided to the UN Secretariat: certifying statement; true and complete copy of all authentic text(s) in paper and electronic format; copies of reservations, declarations, objections; list of contracting States or organizations; Date and method of entry into force, place and date of conclusion, names of signatories; and subsequent actions.

¹⁴ VCLT, *Article 77 – Functions of depositaries* – reads, in relevant part:

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

g) registering the treaty with the Secretariat of the United Nations.

¹⁵ Article XIX of the FAO Constitution.

¹⁶ Article XX of the FAO Constitution.

¹⁷ Letter of 12 January 1961 from C. Stavropoulos, Legal Counsel of the UN, to the Director-General of FAO.

(a) the Organization could invite a Member Nation to submit the FAO Constitution for filing and recording. In that case the Organization would have to provide the Government concerned with all the data necessary to enable it to furnish the required documentation under the UNGA Regulations. The Member Nation in question would be responsible for future actions related to the FAO Constitution, such as notification of changes in membership of the Organization.

(b) Alternatively, *“the Organization could request the FAO Conference to authorize [the Director-General] to submit the Constitution for filing and recording. Such an authorization would allow the Secretary-General to treat the submission by [the Director-General] as being tantamount to filing and recording by the States parties themselves”*.

28. The Legal Office considers that both of the options presented by the UN in 1961 have a firm legal basis. For practical reasons, it considers that the option of submission by the Director-General, rather than by a Member Nation, is the appropriate way forward should the Members determine that the FAO Constitution should be transmitted for recording and filing by the UN. It further considers that it would be appropriate to seek an express mandate from the FAO Governing Bodies authorizing the Director-General to submit the FAO Constitution for filing and recording. Such a mandate would allow the UN Secretary-General to treat the submission by the Director-General as tantamount to filing and recording by the Member Nations themselves.

V. SUGGESTED ACTION BY THE COMMITTEE

29. The CCLM is invited to review this document in light of the above considerations and the practice in such matters, and to make such observations as it deems appropriate. In particular, the CCLM is requested to provide guidance on:

- (a) whether the FAO Constitution should be transmitted to the UN Treaty Section for filing and recording and subsequent publication in the UNTS; and
- (b) if so, whether the Director-General should transmit the FAO Constitution for this purpose; and
- (c) in that event, recommend to the Council, or the Conference through the Council, as deemed appropriate by the CCLM, to authorize the Director-General to take such action.