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Organización
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Unidas
para la
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y la
Alimentación

COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

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DELEGATION OF AUTHORITY BY THE DIRECTOR-GENERAL

BACKGROUND

1. The Immediate Plan of Action (IPA) calls for the following action:

“Revise Basic Texts to stipulate that in line with the agreed principle of delegations of authority to the lowest appropriate levels, the Director-General may delegate final authority and responsibility in specific areas of work and action to designated officers and such delegations will be reflected in the FAO Manual and published job descriptions” (IPA, Action 3.43).

2. This matter was the subject of some discussion within the relevant Working Group of the Conference Committee. According to this action, there should be an amendment to the “Basic Texts” providing that *“the Director-General may delegate final authority and responsibility in specific areas of work and action to designated officials”* and such delegation of authority should be reflected in the FAO Manual and published job descriptions.

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3. This document addresses a few issues related to the implementation of this action. One of these issues, brought to the attention of the Legal Office, is whether an amendment to the Constitution should be made, providing for a possibility for the Director-General to delegate authority and responsibility in specific areas of work. The document also examines whether, from a legal point of view, there is a need to amend the Basic Texts to implement the action, and what could be the nature and content of a possible amendment, in the light of the position in other organizations of the United Nations system.

4. This document reviews (a) the current provisions of the Basic Texts on the authority of the Director-General, (b) the provisions of the constituent instruments of other organizations of the United Nations system on the matter, and (c) the legal practice of the Organization on matters related to the delegation of administrative authority of the Director-General. On that basis (i) the document puts forward a number of legal considerations, and (ii) proposes an amendment to the General Rules of the Organization (GRO).

CURRENT PROVISIONS OF THE BASIC TEXTS ON THE AUTHORITY OF THE DIRECTOR-GENERAL

5. Relevant provisions of the Constitution of FAO on the matter are set forth in Article VII, paragraphs 4 and 5, as follows:

“4. Subject to the general supervision of the Conference and the Council, the Director-General shall have full power and authority to direct the work of the Organization.

5. 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”.

6. No provisions on the possibility for the Director-General to delegate his authority are found in the Constitution.

7. The above provisions could be read in conjunction with Article VIII of the Constitution regarding the appointment and status of the staff of the Organization and are supplemented by Rule XXXVII of the GRO. Rule XXXVII, paragraph 1 of the GRO provides in general terms that:

“The Director-General shall have full powers and authority to direct the work of the Organization, subject to the general supervision of the Conference and of the Council and in accordance with these Rules and the Financial Regulations. The Director-General is the executive officer of the Organization, and as such shall service the Conference and Council, carry out their decisions, and act on behalf of the Organization in all its transactions”.

8. The GRO, as well as the Financial Regulations, contain extensive provisions on the authority of the Director-General in respect of a large number of matters regarding the activities and, in general, the life of the Organization. Financial Regulation 14.1 contains a specific provision on delegation of authority as follows:

“The Director-General may delegate to other officers of the Organization such authority as he considers necessary for the effective implementation of these Regulations”.

PROVISIONS OF THE CONSTITUENT INSTRUMENTS OF ORGANIZATIONS OF THE UNITED NATIONS SYSTEM ON THE AUTHORITY OF THE EXECUTIVE HEADS

9. The provisions of the Basic Texts of the Organization, in particular the Constitution, both in form and substance, are similar to the provisions of the constituent instruments of other organizations of the United Nations system, as confirmed by inter-agency consultation and research. There is a common approach to the matter throughout the system and the same underlying rationale is reflected in the Basic Texts of the organizations. References to the possibility for the head of agency to delegate his/her authority are not, as a general rule, provided for in the constituent instruments, not even in the main Basic Texts of those organizations. This is so because, except for the specific situation of the representation of the head of agency in meetings of particular bodies¹, delegation of administrative authority is assumed to be a matter entirely for the head of the organization.

10. Chapter XV of the United Nations Charter deals with the Secretariat and contains a number of provisions on the matter. Article 97 provides that *“the Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization”*. Article 98 of the Charter provides that *“the Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization”*. This Chapter deals with a number of related matters such as the international character of the secretariat and the related obligation of Members to respect the exclusively international character of the responsibilities of the Secretary-General and the staff, and not to seek to influence them in the discharge of their responsibilities, as well as the authority of the Secretary-General vis-à-vis the staff. The Charter does not address the question of delegations of authority by the Secretary-General.

11. Article 8 of the Constitution of the International Labour Organization (ILO) provides that *“there shall be a Director-General of the International Labour Office, who shall be appointed by the Governing Body, and, subject to the instructions of the Governing Body, shall be responsible for the efficient conduct of the International Labour*

¹ As provided for in Article VII, paragraph 5 of the FAO Constitution. There are similar provisions in the constituent instruments of other organizations.

Office and for such other duties as may be assigned to him (paragraph 1)". It is also provided that *"the Director-General or his deputy shall attend all meetings of the Governing Body"* (paragraph 2). No reference is made in the ILO Constitution of a delegation of authority by the Director-General.

12. Article 31 of the Constitution of the World Health Organization (WHO) states that the Director-General *"(...) subject to the authority of the Board, shall be the chief technical and administrative officer of the Organization"*. Article 32 reads as follows: *"The Director-General shall be ex officio Secretary of the Health Assembly, of the Board and all commissions and committees of the Organization and of conferences convened by it. He may delegate these functions"*.

13. Article VII.a of the Statute of the International Atomic Energy Agency (IAEA) provides that *"the staff of the Agency shall be headed by a Director General"* who *"shall be the chief administrative officer of the Agency"*. Under Article VII.b *"the Director-General shall be responsible for the appointment, organization, and functioning of the staff and shall be under the authority of and subject to the control of the Board of Governors"*. This article further provides that *"he shall perform his duties in accordance with regulations adopted by the Board"*. The Rules of Procedure of the General Conference and the Board of Governors foresee, as is the case in other organizations, a possibility for the Director-General to be represented at meetings of the General Conference and the Board of Governors (Rule 37 of the Rules of Procedure of the General Conference and Rule 8 of the Rules of Procedure of the Board of Governors).

14. Under the Convention establishing the International Maritime Organization (IMO), the Council, with the approval of the Assembly, appoints the Secretary-General. The Secretariat comprises the Secretary-General and such other personnel as the Organization may require. Under Article 47 of the Convention, *"the Secretary-General shall be the chief administrative officer of the Organization and shall appoint the above-mentioned personnel"*. There are no explicit provisions on delegation of authority by the Secretary-General.

15. At the World Intellectual Property Organization (WIPO), the Director-General is the chief executive officer of the Organization. The WIPO Convention provides that, as chief executive officer, he represents the Organization and reports to and conforms to the instructions of the General Assembly as to the internal and external affairs of the Organization. He is likewise responsible for preparing the programs and budgets of the Organization. No provision is made for delegation of his authority, on the assumption that the power to delegate is inherent in the authority bestowed upon the executive head as chief executive of the Organization.

16. According to the Agreement Establishing the International Fund for Agriculture Development (IFAD), the President *"shall be the legal representative of the Fund"* and *"under the control and direction of the Governing Council and the Executive Board, shall be responsible for conducting the business of the Fund"* (Article 6, Sections 8(h) and (d)). The President is entitled to designate staff members to represent him at meetings of the Governing Council (Article 6, Section (i)) or other occasions (e.g. loan signing ceremonies). There is no provision in the constituent instruments regarding delegation of authority of the President to other staff.

17. The Constitution of the International Civil Aviation Organization (ICAO) does not make any explicit provision for the chief executive officer to delegate authority to other staff “*but, as a matter of course, such power to do so is assumed*”².

18. The Basic Texts of the International Telecommunications Union (ITU) have a particular structure and consist of the ITU Convention and the ITU Constitution³. Article 5 of the Convention provides that the Secretary-General “*shall be responsible for the overall management of the Union’s resources; he may delegate the management of part of these resources to the Deputy Secretary-General and the Directors of the Bureaux, in consultation as necessary with the Coordinating Committee*”. Under Article 11 of the Constitution of the Union, the Secretary-General remains “*responsible to the Council (of the Union) for all the administrative and financial aspects of the Union’s activities*”.

19. While the World Trade Organization (WTO) is not strictly speaking part of the United Nations system, it may be of interest to mention that the Marrakesh Agreement establishing WTO provides that its Secretariat is headed by a Director-General and does not make provision for delegation of his authority (cf. Article VI).

20. In conclusion, from inter-agency consultation and research, it appears that whether or not administrative authority of the executive head of the organization should be delegated is entirely a matter for the head of agency, as determined by him on the basis of considerations of efficiency and good administration. As a general rule, delegation of authority is neither precluded nor foreseen in the constituent instruments, as it is considered that the possibility of delegating administrative authority, in accordance with generally recognized principles of law, is inherently vested in the head of agency, who remains ultimately accountable *vis-à-vis* the Governing Bodies for any delegated authority, as expressly stated in the ITU Constitution. More specifically, except for this particular situation, neither the possibility for the head of agency to delegate authority, nor the conditions attached to such delegations of authority, are set out in the constituent instruments of the organizations.

FAO’S PRACTICE ON DELEGATIONS OF ADMINISTRATIVE AUTHORITY OF THE DIRECTOR-GENERAL

21. Delegations of authority may be viewed from a variety of standpoints, as evidenced by legal literature, which reveals some differences in treatment of the matter depending on the disciplines in question (i.e. constitutional law, administrative law, labour law, criminal law, etc)⁴. A review of the practice of FAO regarding delegations of

² Communication from the Legal Office of ICAO.

³ The ITU Convention is the main Basic Text of ITU. The ITU Constitution implements the ITU Convention. At ITU, the relationship between the Convention and the Constitution is comparable to the that between the FAO Constitution and the GRO.

⁴ There are indeed important differences in the approach to delegations of authority depending on the concerned discipline and countries, which may be substantially different from the approach taken in constitutional or administrative law. For instance, in France in commercial and labour law a manager can delegate authority to a subordinate manager for a number of decisions. Such authority can be sub-delegated further. The subordinate manager who takes a decision on the basis of a delegation of authority may be held criminally liable for the decisions taken. It is not the manager who delegated authority who is

administrative authority of the Director-General is useful for the consideration of the issues at hand.

22. In FAO the matter has been examined in connection with delegations of administrative authority of the Director-General within the Organization. It is frequent that the Director-General delegates authority to designated senior officials of the Organization, either through the Administrative Manual, or through a specific administrative issuance. Section 119 of the Administrative Manual contains a long list of matters on which the Director-General has delegated authority to other officials of the Organization. The legal aspects involved in such delegations, or similar delegations by other heads of agencies have been tested on a number of occasions by the Administrative Tribunal of the ILO and the position on this matter is well defined. This position involves a few features.

(a) First, a delegation of authority by the Director-General to an official to decide on particular matters must be validly given to him and reflected in a duly publicized administrative act. The Director-General may revoke or modify the delegation. A number of judgments restated this principle, and at times there was extensive judicial review of whether a delegation had indeed been issued, or whether a particular act alleged to constitute a delegation of authority had been drawn up and publicized in a proper legal form, so as to constitute a valid delegation of authority⁵. The matter was discussed recently in FAO in connection with a Director-General's Bulletin⁶ through which the Director-General had delegated authority in many areas to some officials.

(b) Second, delegated authority must be exercised by those officials to whom it was delegated, and cannot be sub-delegated, unless the delegation of authority provides explicitly that such officials may sub-delegate authority. This position has also been confirmed by the Administrative Tribunal in a number of cases⁷, in line with the old principle of Roman law "*delegate potestas non potest delegare*", that is: "*no delegated powers can be further delegated*". This principle is embedded in the laws of both civil law and common law countries.

(c) Some clarifications may need to be provided in this connection, in particular as concerns what is commonly referred to as "*delegation of signature*" as compared to a delegation of authority. In the case of a delegation of signature, the authority to take a particular decision is not delegated or sub-delegated to an official. The latter is simply given the possibility of preparing the document setting out a particular decision and conveying it to the concerned parties in the name of the authority entrusted with decision making authority. However, it is the official who has authority to decide who actually takes the decision in question.

criminally responsible for the decision taken. However, the person who delegated authority retains civil liability for any damages arising from the exercise of the delegated authority. Thus, even in situations where substantial authority may be delegated by a manager, that manager may be held accountable for consequences that may arise from the exercise of the delegated authority.

⁵ Judgments N^{os} 869, 282 and 247.

⁶ Director-General's Bulletin N^o 2006/19.

⁷ Judgment N^o 1477.

This solution, applied frequently on administrative matters, does not obviate the need for the official to whom authority was delegated to take the decision and, if necessary, to provide evidence that he took such decision. There are cases where the Administrative Tribunal researched, in the light of all pertinent circumstances, whether the authority who conveyed the decision went beyond that role and actually took the decision which it had no authority to take.

23. Other legal features of delegations of authority have not been debated within FAO, or have been debated in a context other than that of the delegation of authority of the Director-General. One of them is that delegations may concern only a limited portion of the authority of the delegating official. This issue has not been raised presumably because, in general, heads of agency delegate only a portion of their authority. General transfer of authority by an administrative official would not be legally correct because in administrative law, authority to act is not seen as a right to act, but as an obligation to act, and an administrative official cannot disinvest himself from his statutory duties and responsibilities.

24. Furthermore, in administrative law and, more broadly in any inter-institutional context, the official that has delegated authority to a subordinate official remains ultimately responsible for the actions taken by that official. This principle is followed strictly within international organizations, as delegations of authority from executive heads are not effected in general and unconditional terms, and the executive heads remain accountable, responsible *vis-à-vis* the relevant Governing Bodies. For example, it would be inappropriate for a Director-General to refuse to take responsibility for a particular action within his mandate in his relations with the Governing Bodies, on the grounds that he had delegated authority on the matter to another official. This would undermine the normal relationship between the functions of the Governing Bodies and the administrative functions of head of agency.

25. These principles are relevant when considering the matter in the context in which it was examined by the Conference Committee for the Follow-up to the Independent External Evaluation of FAO and is reflected in the IPA, namely the relationship between the Governing Bodies and the Director-General, as chief executive officer of the Organization, within their respective spheres of competence and authority.

RELEVANT LEGAL CONSIDERATIONS

26. In examining how IPA action 3.43 could be implemented, it would be useful to keep in mind, in addition to the above, a few considerations.

27. From a legal point of view, it would be possible to provide in the Constitution or the GRO for the Director-General to delegate administrative authority on a number of matters. This would not be an obligation placed upon the Director-General. An explicit reference to such delegation of authority would be a mere possibility for the Director-General to act in a particular manner, based on considerations of good administration and internal organization of work. Therefore the question arises as to whether there would be a need to amend the Basic Texts in order to reflect a possibility which is, anyway, inherent in the administrative authority of the Director-General.

28. As evidenced by the above review of the constituent instruments of organizations of the United Nations system, too specific provisions on the delegation of authority of the Director-General might not be consistent with a general objective of preserving the respective scope of competence of the Governing Bodies and the administration – what is generally referred to in the IPA as “*governance*” and “*management*” –, because it would confuse the dividing line between these two spheres of action. It might be preferable that the Governing Bodies, on the one hand, and the administration, on the other hand, should be in a position to exercise fully their functions within their respective mandates. This would be consistent with a recommendation of the Independent External Evaluation of FAO that there should be better distinction between governance and management. In any case, it is suggested that, should a decision be taken to amend the Basic Texts, this should not be done through an amendment to the Constitution, but rather to the GRO.

29. If it is considered appropriate that an amendment should explicitly authorize the Director-General to delegate “*final*” authority on a number of matters to designated officials, it would have to be clearly stated that the designated officials, beneficiaries of the delegation of authority, would be accountable for the decision, and not the Director-General, as implied in the words “*final authority*”. The question arises as to whether this would be in line with the general principle embodied in the Basic Texts of FAO that the Director-General is the chief executive officer of the Organization, responsible for carrying out the decisions of the Conference and Council, and for acting on behalf of the Organization in all its transactions. This would not reflect the generally accepted position followed throughout the United Nations and it is questionable whether this would be desirable on policy grounds.

30. It is therefore proposed that an approach similar to that followed at ITU be considered, i.e. a possibility for the Secretary-General to delegate responsibility to other officials, provided that the executive head remains accountable for all actions *vis-à-vis* the Governing Bodies, which would mean that no “*final*” authority is delegated and that the Director-General remains ultimately accountable for decisions taken under that delegated authority. This would be in line with the practice of the Organization, as described in paragraphs 22 to 24, and the jurisprudence of the ILO Administrative Tribunal.

31. In light of the above, the CCLM could envisage two options for the implementation of IPA action 3.43:

- (a) **First option:** As reflected in the practice of most organizations of the United Nations system, it could be considered that, legally, there might be no need to amend the Basic Texts of the Organization in order for the Director-General to be able to delegate administrative authority on a number of matters within his mandate. This is so for a few reasons: (i) first, a proper definition of the respective areas of governance and management, i.e. the competence of the Governing Bodies and the administration, would require that each of them be able to exercise their responsibilities fully within their respective mandates; (ii) second, a possibility of delegating administrative authority in accordance with generally recognized principles of law is a matter of course, inherent in the administrative functions of the Director-General, as is the case in other organizations of the United Nations system; (iii) the Financial Regulations make provision for delegation of authority by the Director-General on financial matters

(b) **Second option:** In response to the wishes expressed by Members and Action 3.43 of the IPA an amendment could be made to Rule XXXVII of the GRO on the functions of the Director-General. The content of the proposed amendment could be along the lines of the provisions of the Constitution of ITU whereby, while being able to delegate authority, the Director-General would remain accountable to the Conference and the Council. The following paragraph could thus be added to the GRO:

“The Director-General may delegate authority conferred upon him by this Rule, under such conditions as he may establish, provided that the Director-General shall remain accountable to the Conference and Council for the direction of the work of the Organization, in accordance with Article VII, paragraph 4 of the Constitution”.

SUGGESTED ACTION BY THE COMMITTEE

32. The Committee is invited to review this document and offer such views as it deems appropriate.
33. The Committee is more specifically invited:
 - (a) To indicate whether any specific issues reviewed in this document require guidance from the Conference Committee;
 - (b) To review and advise on the above options for the implementation of IPA action 3.43.