



## **Amendments to Article 73 of the Constitution: study of legal situation concerning entry-into-force of amendments**

### **Report by the Director-General**

At its 101st session, the Executive Board decided to defer consideration of a proposal by its special group for the review of the Constitution of WHO to revise Article 73 of the Constitution in order to facilitate entry-into-force of amendments, and requested a study on the approach used in other organizations of the United Nations system. This report contains a brief analysis of such approaches and proposes options that could be applied in WHO.

1. At its 101st session, the Executive Board considered the report of the special group for the review of the Constitution of WHO.<sup>1</sup> The special group had proposed a revision to Article 73, dealing with the procedure for amending the Constitution, with a view to speeding up the often lengthy period between adoption of a proposed amendment by the Health Assembly and its entry-into-force upon deposit with the Secretary-General of the United Nations of acceptance of the amendment by two-thirds of the Members of WHO. In decision EB101(2), the Board decided to defer consideration of the proposed amendment to Article 73, and requested the Director-General to present to it at its 102nd session a study of the legal situation in other organizations of the United Nations system concerning entry-into-force of amendments, and to propose solutions consistent with international law in order to accelerate the entry-into-force of amendments to the Constitution of WHO.

### **THE SITUATION IN OTHER INTERNATIONAL ORGANIZATIONS**

2. The following paragraphs briefly analyse the relevant texts dealing with amendments to the constitutions of a range of specialized agencies and organizations of the United Nations system. The approach adopted by these constitutional documents can be categorized into two different approaches: vote by the governing body, followed, or not, by acceptance.

#### **Vote by governing body subject to subsequent acceptance for all amendments**

3. The constitutions of most organizations require that an amendment must be adopted by its governing body and subsequently accepted by separate government notification. Of the organizations studied, this approach is found in the Charter of the United Nations, and in the constitutions of WHO, ILO, International Bank for

<sup>1</sup> Document EB101/1998/REC/1, Annex 3.

Reconstruction and Development (World Bank), International Monetary Fund (IMF), ICAO, WIPO, UNIDO and IMO.

4. Varying approaches, however, exist with respect to the type of majority required to adopt a proposed amendment in the governing body concerned, and the percentage of Members needed subsequently to accept the amendment in order for it to enter into force. Most constitutions required a two-thirds majority vote in the governing body in order for the proposed amendment to be adopted (of the votes cast, in the case of WHO, ICAO and IMO, and of the entire membership, in the case of the United Nations, ILO and UNIDO), although some only require a simple majority (of the votes cast, in the World Bank, IMF and WIPO). The percentage of Members needed to accept the amendment may be (i) two-thirds of the Members for all amendments (United Nations, WHO, ICAO, IMO), (ii) two-thirds for some kinds of amendment and three-quarters for others (UNIDO<sup>1</sup>), (iii) three-quarters for all types of amendments (WIPO) or (iv) another percentage in combination with specific requirements. (The World Bank and IMF require acceptance by at least three-fifths of the Members having 85% of the total voting power;<sup>2</sup> in some cases acceptance by all Members is required;<sup>3</sup> ILO requires two-thirds of the membership, including five of the 10 Members represented on the Governing Body as “Members of chief industrial importance”.)

### **Vote by governing body may be sufficient for all or some amendments**

5. The constitutions of some organizations provide for the entry-into-force of amendments only on the basis of a vote by the governing body of the organization concerned for at least a certain category of amendments. This is the approach found in the constitutions of PAHO, FAO, UNESCO and WMO. Most organizations in this group (FAO, UNESCO and WMO) draw a distinction between amendments involving new obligations for Members (UNESCO also includes amendments which involve fundamental alterations in the aims of the Organization) and those that do not. In the case of the former, subsequent acceptance by two-thirds majority of Members is required, whereas in the latter only a two-thirds majority vote (of those present and voting in the case of FAO and UNESCO, and of the entire membership in the case of WMO) is required for the amendment to enter into force. The determination of whether an amendment creates new obligations is determined by the governing body itself.

6. In the case of FAO, there is an additional element, namely that, in the case of amendments creating new obligations, such amendments only enter into force with respect to those Members actually accepting the amendment. Since this would create different obligations with respect to different Members, this approach may not be suitable for amendments affecting the structure of an organization (which normally needs to have one structure applicable to all its Members). UNESCO and WMO do not have this additional element, rather - once the required percentage of acceptances is achieved - the amendment is applicable to the entire membership (which is the norm for all the constitutions of the organizations listed in paragraph 3 above).

7. PAHO has no requirement for subsequent acceptance for any type of amendment to enter into force. All that is required is for the amendment to be adopted by a two-thirds vote of all the Members of the Organization.

### **POSSIBLE APPROACHES SUITABLE FOR USE WITHIN WHO**

8. Some of the constitutional provisions cited above are designed to deal with specific characteristics of the organization concerned. It is thus difficult in all cases to draw hard and fast parallels applicable to the

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<sup>1</sup> A requirement for acceptance by three-quarters of the membership exists for amendments concerning the right of withdrawal, the composition and functions of the Industrial Development Board and the Programme and Budget Committee, the structure and method of adopting the budget, and the procedure for adopting constitutional amendments.

<sup>2</sup> Both the World Bank and IMF have a system of weighted voting.

<sup>3</sup> Three types of amendments are specified for each organization, concerning the right of withdrawal, and two different types of amendments involving financial issues particular to the functioning of the World Bank and IMF respectively.

Constitution of WHO. Nevertheless, a range of possibilities can be drawn from the above analysis that could be considered for use in the WHO Constitution.

### **Status quo**

9. It is clear from the above review of constitutional provisions that the majority of organizations maintain a two-tier requirement for entry-into-force of amendments which are broadly similar to those in existing text of Article 73 of the Constitution.

### **Entry-into-force of amendments on the basis of governing body action alone**

10. At the other extreme, it could be established that amendments may be made without the need for any subsequent acceptance, either in all cases as in PAHO, or for certain types of cases as in FAO, UNESCO and WMO. For certain types of case, the UNESCO model could be applied, which subjects amendments creating new obligations and changing the fundamental nature of the organization to the need for subsequent acceptance, but leaves all others to enter into force on the basis of a vote of UNESCO's governing body. If desired, the categories requiring subsequent acceptance could be changed or additional categories could be added.

### **Reduction of the level of subsequent acceptance required for entry-into-force of amendments**

11. Although none of the constitutions provide for an express level of subsequent acceptance which is less than two-thirds, there is no principle of law which would prevent such a lower level - such as acceptance by a simple majority of Members. Establishing that only a majority of acceptances are needed for an adopted amendment to enter into force should normally speed up the entry-into-force procedure, and would maintain the basic principle that acts of an organization should reflect at least the majority will of its membership.

### **Increase in the level of majority vote required for adoption and decrease in the level of subsequent acceptance**

12. If it were considered desirable both to ensure that the Constitution of WHO was amended only when that reflected the will of a *substantial* majority of its membership, and to facilitate a more rapid entry-into-force of amendments, it would be possible to establish a higher level of majority for adoption of amendments in the governing body concerned - such as three-quarters - while decreasing the number of subsequent acceptances required for their entry-into-force.

### **ACTION BY THE EXECUTIVE BOARD**

13. If the Board considered that maintaining the status quo was not acceptable, and if the proposal by the special group were not pursued, the Board may wish to consider recommending to the Health Assembly one of the other options set forth above, or some combination thereof. For the purposes of discussion, set forth below is a proposal which combines various aspects of the above options with a view to maximizing the likelihood that amendments will only enter into force when they reflect the wish of the substantial majority of the Members, but minimizing the risk of lengthy delays before they may enter into force (particularly for noncontroversial amendments).

- If a proposed amendment is adopted by the Health Assembly by a vote of three-quarters (of the Members), and does not concern a change in the objective of the Organization and/or such other category of amendments as may be agreed, it shall enter into force immediately.

- If a proposed amendment is adopted by the Health Assembly by a vote of three-quarters (of those present and voting), it shall enter into force upon acceptance by a majority of the Members.
- If a proposed amendment is adopted by the Health Assembly by a two-thirds majority vote (of those present and voting), it shall enter into force upon acceptance by two-thirds of the Members.

14. If the above proposal is generally supported, the Board may wish to request the Director-General to formulate a draft text incorporating the proposal and taking into account the views expressed by the Board. The draft text could be submitted by the Director-General to the Fifty-second World Health Assembly.

15. It is recommended that the existing six-month notification requirement for all proposals to amend the Constitution, which appears in the current text of Article 73 and which is generally reflected in the constitution of most other organizations, should be maintained.

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