

Agenda Item 5: General exchange of views
Statement by the International Council of Environmental Law

Intergovernmental conference on an International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

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Information on a Possible Drafting Committee

Introduction

This information paper provides considerations regarding a “drafting committee,” which may be discussed at the fourth session of the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ IGC4). The fourth session, taking place from 7 through 18 March 2022, is the last scheduled meeting pursuant to the mandates in General Assembly resolution 72/249.¹ There was a two-year delay for BBNJ IGC4 to take place due to the ongoing COVID-19 pandemic.

The goal of BBNJ IGC4 is for the Member States to conclude the negotiations on all the matters of the future treaty. A drafting committee could allow the Member States to focus on the substantive aspects of the treaty, without the need to allocate their extremely limited time on “legal scrubbing.” Such flexibility could be helpful to move the negotiations toward its conclusion during IGC4, given that conference is for two weeks and the need for the Member States to reach convergence of views remain on numerous articles.

Until now, the President of the IGC has issued draft texts of the future treaty based on Member States’ proposals. IGC4 will provide Member States an opportunity to incorporate a drafting committee to the IGC.

EXECUTIVE SUMMARY

What is a drafting committee?

The functions of a drafting committee in the context of a multilateral treaty-making process can vary, depending on the nature of the treaty in question and the composition of the treaty-making forum.² A drafting committee may work on:

- (a) Purely textual concerns, such as the improvement and refinement of texts, the internal consistency of texts and the concordance of all linguistic versions;
- (b) The structure of texts, (i.e., arrangement of articles, annexes, etc.);
- (c) Substantive questions (e.g., ambiguities, gaps, contradictions) only in so far as to decide whether it should disregard them or, if time permits, return the texts to the competent substantive forum;

¹ UN General Assembly resolution 72/249 (24 December 2017). UN Doc A/RES/72/249 (2018).

² ‘Report of the Working Group on the Review of the Multilateral Treaty-making Process’ to the Sixth Committee of the General Assembly. UN Doc A/C.6/38/L.28 (1983), para 10.

(d) Formulating drafts of texts not previously considered by another body, such as formal provisions (e.g., final clauses, final act) and legal provisions of a substantive nature, (e.g., privileges and immunities); if the main organ merely decides principles, then drafting of the entire text might be left to the committee.³

In general, a drafting committee ensures precision and consistency of the text throughout a treaty. A drafting committee will also consider the authenticity of the text in all the UN official languages.

What are some of the elements of a drafting committee that can be considered in the BBNJ IGC context?

Composition of the drafting committee

There is no one way to compose a drafting committee. For BBNJ, considerations could include:

- how will the nomination process work? Will it be the same as choosing the members of the bureau?
 - will the committee members include jurists and other experts who are knowledgeable about the negotiations, such as scientists, traditional knowledge holders, and policy advisors? While keeping the committee to a manageable size may be desirable, a diverse group will provide a holistic analysis.
 - will geographical representation and gender parity be ensured?
 - will the committee be open to the attendance of observers? Will their number be limited and, if so, based on what criteria? would observers be able to provide input?
 - how will the committee ensure transparency? Will minutes be prepared, and if so, will such minutes be considered as part of travaux préparatoires?
 - how will the committee elect its officers (chairperson, vice-chairperson(s), rapporteur(s), etc.)?
- how will the committee report to the conference? Will the Committee have a rapporteur or other reporting modalities?
- will there be a separate six language groups that will support the drafting committee, as it was the case for the Third United Nations Conference on the Law of the Sea? If such language groups were to be established, then would non-members of a drafting committee be able to participate in the work of such language groups as it was the case during the Third United Nations Conference on the Law of the Sea?

Modalities

The conference may also decide on the modalities associated with the drafting committee. The key considerations include:

- scope of a drafting committee's work;⁴
- type of draft text that a drafting committee will receive;⁵

³ Ibid.

⁴ For example, for the Third United Nations Conference on the Law of the Sea, the drafting committee's mandate was restrictive, much more so than other UN codification conferences: "It shall, without re-opening substantive discussion on any matter, formulate drafts and give advice on drafting as requested by the Conference or by a Main Committee, co-ordinate and refine the drafting of all texts referred to it, without altering their substance, and report to the Conference or to the Main Committee as appropriate. It shall have no power of or responsibility for initiating texts." See amendments to Rule 52 of the draft Rules of Procedure of the Conference. UN document A/CONF.62/L.1 in *Official Records of the Third United Nations Conference on the Law of the Sea* (United Nations publication, Sales No. E.75.V.5), vol. III, p. 77.

⁵ For example, the committee may consider the draft text on an article-by-article basis or it may receive the entire draft text of the treaty that has been agreed upon by the Member States. In the case of the Third United Nations Conference on the Law of the Sea, it was the former, which allowed the drafting committee to have sufficient time to ensure that there was adequate.

- work process of the drafting committee;
- procedures for the adoption of the drafting committee's recommendations;
- sufficient timeframes for the drafting committee to complete its work.

Conclusion

A drafting committee can be a powerful option to ensure that the treaty text is precise and consistent. The committee can also confirm the authenticity of the text in all the UN official languages. The Member States may wish to establish a drafting committee on the final day of IGC4 so that Member States can focus on the substantive aspects of the treaty, rather than to dedicate the scarce negotiation time to “legal scrubbing.” There is plenty of precedence on multilateral treaty conferences utilizing drafting committees and the composition and the modalities can be adapted to achieve the goals of the conference. Considering the delays experienced due to the COVID-19 pandemic and the need to conclude the negotiations as soon as possible in light of the accelerating degradation of marine biological diversity, maximizing the delegations’ time is essential.

A more detailed brief on drafting committees is attached.

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CONSIDERATIONS FOR ESTABLISHING A DRAFTING COMMITTEE AT IGC 4

I. Introduction

The fourth session of the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ IGC) is the last scheduled meeting as per General Assembly resolution 72/249.¹ But as the President of the BBNJ IGC stated during her briefing to delegations on 3 March 2022, there would be no 'legal scrubbing' during the fourth session of the BBNJ IGC, this could be done subsequently. This raises the question who could undertake the task of 'legal scrubbing'?

In formulating a multilateral treaty, care should be taken to ensure the precision and consistency of the text and the concordance of the various official language versions being equally authentic.² To achieve such objectives, the practice of establishing drafting committees in negotiating bodies should be encouraged.³ Annexed to the rules of procedure which the General Assembly adopted through its resolution 362 (IV) in 1949 are the recommendations and suggestions of the Special Committee on Methods and Procedures which the Assembly had approved, including those concerning the drafting of conventions as follows: "With regard to the drafting of legal texts, the Special Committee strongly recommends that small drafting committees should be resorted to whenever possible".⁴

Indeed, in practice, drafting committees have generally been established at United Nations intergovernmental conferences. Though it can be noted that no drafting committee was established by the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. Following the adoption of the UN Fish Stocks Agreement,⁵ the Conference instead requested the Secretariat to prepare the final text of the Agreement, incorporating necessary editing and drafting changes and ensuring concordance among the six language versions.⁶

II. The role of a drafting committee in the multilateral treaty-making process

There is no uniformity about the extent of the functions of drafting committees.⁷ The functions of drafting committees depend upon the nature of the treaty being formulated and upon the composition of the treaty-making forum.⁸

¹ UN General Assembly resolution 72/249 (24 December 2017). UN Doc A/RES/72/249 (2018).

² Final document on the Review of the Multilateral Treaty-Making Process. UN Doc A/C.6/39/8 (1984), para 7.

³ *Ibid.*, para 8.

⁴ UN General Assembly resolution 362 (IV) (22 October 1949).

⁵ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001).

⁶ Final Act of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. UN Doc A/CONF.164/38 (1995), para 31.

⁷ 'Review of the Multilateral Treaty-Making Process', *United Nations Legislative Series* (1985) available at <https://legal.un.org/legislativeseries/pdfs/volumes/book21.pdf>, Part two, para 39.

⁸ 'Report of the Working Group on the Review of the Multilateral Treaty-making Process' to the Sixth Committee of the General Assembly. UN Doc A/C.6/38/L.28 (1983), para 10.

Drafting committees may be charged to address themselves to:

- (a) Purely textual concerns, such as the improvement and refinement of texts, the internal consistency of texts and the concordance of all linguistic versions;
- (b) The structure of texts, i.e. arrangement of articles, annexes, etc.;
- (c) Substantive questions (e.g., ambiguities, gaps, contradictions) only in so far as to decide whether it should disregard them or, if time permits, return the texts to the competent substantive forum;
- (d) Formulating drafts of texts not previously considered by another body, such as formal provisions (e.g., final clauses, final act) and legal provisions of a substantive nature, (e.g., privileges and immunities); if the main organ merely decides principles, then drafting of the entire text might be left to the committee.⁹

Experiences of the Third United Nations Conference on the Law of the Sea and of earlier UN codification conferences

The Third United Nations Conference on the Law of the Sea provided the following mandate to the Drafting Committee: "It shall, without re-opening substantive discussion on any matter, formulate drafts and give advice on drafting as requested by the Conference or by a Main Committee, co-ordinate and refine the drafting of all texts referred to it, without altering their substance, and report to the Conference or to the Main Committee as appropriate. It shall have no power of or responsibility for initiating texts".¹⁰

The mandate of the Drafting Committee was unusually restrictive¹¹ compared to other United Nations codification conferences that had taken place. In earlier UN conferences the drafting committee concerned was responsible for preparing drafts and giving advice on drafting as requested by the Conference or by a main committee and for coordinating and reviewing the drafting of all texts referred to it and reporting to the Conference or to the Main Committee as appropriate.¹²

III. Composition of a drafting committee

With respect to the composition of a drafting committee, the main objective is to ensure adequate representation of all the languages in which a treaty is to be concluded, as well as to give due regard to the principal legal systems of the potential parties. However, there may be certain obstacles to such ideal distribution due to the constraints of geographical and political distribution, to inhibitions against

⁹ Ibid.

¹⁰ See amendments to Rule 52 of the draft Rules of Procedure of the Conference. UN document A/CONF.62/L.1 in *Official Records of the Third United Nations Conference on the Law of the Sea* (United Nations publication, Sales No. E.75.V.5), vol. III, p. 77.

¹¹ L. D. M. Nelson, 'The work of the Drafting Committee' in *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol. I (editor-in-chief Myron H. Nordquist, Martinus Nijhoff, The Netherlands, 1985), p 136.

¹² Ibid. See for example, Rule 48 of the Rules of Procedure of both the United Nations Conference on the Law of Treaties and the United Nations Conference on the Representation of States in their Relations with International Organizations, and Rule 47 of the Rules of Procedure of the United Nations Conference on Succession of States in respect of Treaties.

States serving both on the general committee and the drafting committee of a conference, and to the desirability of restricting the size of drafting committees.¹³

The members of drafting committees should be jurists, if possible, with technical expertise or experience in the relevant substantive negotiations.¹⁴

However, there is no uniformity about the formation of drafting committees.¹⁵ In United Nations conferences there has been a certain tendency towards establishing larger drafting committees.¹⁶ However, as a substantial increase may affect the work of drafting committees adversely, efforts are sometimes made to contain any excessive increase.¹⁷

Experience of the Third United Nations Conference on the Law of the Sea

The Drafting Committee of the Third United Nations Conference on the Law of the Sea consisted of 23 members, including its Chairperson.¹⁸ Its membership was in part based on the principle of equitable geographical distribution and partly on the principle embodied in a formula which had been accepted by the Conference that no State should as of right be represented on more than one main organ of the Conference.¹⁹

The Committee was assisted in its informal work by six language groups representing the official languages of the United Nations.²⁰ The language groups were open to both members and non-members of the Drafting Committee and the meetings of the coordinators of the language groups who meet under the direction of the Chairperson of the Drafting Committee were in effect open to all delegations attending the Conference.²¹

IV. Modus operandi

A drafting committee is usually established at the beginning of a conference or meeting.²² Thereafter the commencement of its work depends on the practice of the main body concerned, which may opt either for the submission of provisions and their consideration on an article-by-article basis or for the submission of the entire text after agreement has been reached on the entire package.²³ The former procedure enables the drafting committee to start its work at an early stage.²⁴ On the other hand, the latter procedure makes it difficult for the Committee to start its substantive work prior to the completion of the package and thus requires the drafting committee to compress its work to a few days

¹³ 'Report of the Working Group on the Review of the Multilateral Treaty-making Process' (n 8), para 12.

¹⁴ Ibid., para 13.

¹⁵ 'Review of the Multilateral Treaty-Making Process' (n 7), Part two, para 38.

¹⁶ Ibid.

¹⁷ Report of the Working Group on the Review of the Multilateral Treaty-making Process (n 8) para 14.

¹⁸ Final Act of the Third United Nations Conference on the Law of the Sea, para. 20, available at https://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

¹⁹ Nelson (n 11) p 135.

²⁰ Final Act of the Third United Nations Conference on the Law of the Sea (n 18).

²¹ Nelson (n 11), p 137.

²² Report of the Working Group on the Review of the Multilateral Treaty-making Process (n 8) para 11.

²³ Ibid.

²⁴ Ibid.

or hours, with the resultant restriction in the performance of its tasks to purely textual concerns, disregarding entirely questions relating to the structure of instruments and substantive issues.²⁵

It is thus important to ensure that a drafting committee has sufficient time to complete its work. This may not always be possible due to last minute negotiations and translated texts of the treaty not being available until the day after negotiations have been completed, often on the last day of a conference. This was the experience of the Final United Nations Conference on the Arms Trade Treaty.

Experience of the Final United Nations Conference on the Arms Trade Treaty

The Drafting Committee of the United Nations Conference on the Arms Trade Treaty, which represented all UN official languages and various legal traditions, had helped to standardize the text and ensure that it was of the high legal standard.²⁶ However, due to lack of time the Committee did not have the opportunity to meet and consider the translated texts of the last-minute changes that were introduced into the draft treaty prior to its submission for adoption. Subsequently inconsistencies between the English text and the other language versions of the treaty were identified after the Arms Trade Treaty had been adopted by the General Assembly. As a result, an extensive correction procedure was initiated by the depositary of the Arms Trade Treaty, the Secretary-General of the United Nations, at the request of a Member State and following consultations with several other Member States which had participated in the development of the treaty and represented different language groups, in order to mainly address the lack of concordance between the different authentic texts constituting the original of the treaty.²⁷ The proposed corrections were then circulated to all Member States and were deemed accepted in the absence of any objections after a period of 90 days. Thereafter, a procès-verbal of rectification was transmitted to all States by the depositary²⁸ and the corrections were included in the authentic text prior to the opening for signature of the treaty.²⁹

Experience of the Third United Nations Conference on the Law of the Sea

The Drafting Committee established by the Third United Nations Conference on the Law of the Sea was allocated sufficient time to provide its recommendations to the Conference. The work of the Drafting Committee commenced in 1978 at the seventh session of the Conference with the informal examination of the informal composite negotiating text of those provisions which appeared to be settled.³⁰ Meetings

²⁵ Ibid.

²⁶ Report to the General Assembly of the President of the Final United Nations Conference on the Arms Trade Treaty, Ambassador Peter Woolcott of Australia, 2 April 2013, New York, https://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference-ii/statements/2April_Woolcott.pdf.

²⁷ The proposed corrections to the Arabic, Chinese, French, Russian and Spanish texts of the Arms Trade Treaty were circulated in depositary notifications which are all available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=_en>.

²⁸ The procès-verbal of rectification is available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=_en>.

²⁹ For a detailed explanation of the practice of the Secretary-General of the United Nations as depositary with regard to the correction of errors or of a lack of concordance in the original of a multilateral treaty, see *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties. Prepared by the Treaty Section of the Office of Legal Affairs* <https://treaties.un.org/Pages/Resource.aspx?path=Publication/SoP/Page1_en.xml>.

³⁰ Nelson (n 10), p 136.

of the Committee were held during the regular sessions of the Conference and intersessionally before the draft convention was submitted for adoption.³¹

The Drafting Committee's work was divided into two parts: first, the process of harmonization of words and expressions recurring in the text and, second, the textual review, article by article, of the provisions of the draft convention.³²

The work of the Committee began at the level of the language groups. Each language group discussed drafting proposals coming from members of that language group, from other language groups and from groups suggestions for drafting changes to the text. These suggestions were then considered at meetings of the coordinators of the language groups under the direction of the Chairperson of the Drafting Committee. On the basis of their deliberations, the coordinators of the language groups in turn submitted to the Drafting Committee proposals for changes to the text. After examining these proposals, the Drafting Committee then submitted recommendations to the Conference.³³

Two types of procedures were then utilized for the adoption of the Drafting Committee's recommendations. The procedure for incorporating in the various revisions of the text the recommendations emerging from the early work of the Committee - the process of harmonization - was left largely to the discretion of the Chairpersons of the Main Committees. However, recommendations of the Drafting Committee emanating from the textual review, article by article, of the provisions of the draft convention were considered at informal meetings of the plenary and not in the Main Committees. When the informal plenary met to consider the recommendations of the Drafting Committee, the Chairperson of the relevant Committees as well as the Chairperson of the Drafting Committee would sit on the podium with the President. It was noted that this procedure was adopted to ensure that the process of examining these recommendations should not result in any lack of harmonization or coordination.³⁴

V. Conclusion

Establishing a drafting committee by the BBNJ IGC at its fourth session would enable such committee to be able to commence its work at an early stage. The committee would allow the IGC to focus on substantive issues, rather than to conduct "legal scrubbing," which can contribute to maximizing the delegations scarce time during IGC4.

³¹ The last intersessional meeting of the Drafting Committee took place from 12 July to 25 August 1982 just before the last session of the Third United Nations Conference on the Law of the Sea in September 1982. See Final Act of the Third United Nations Conference on the Law of the Sea (n 18) para 20.

³² 'Review of the Multilateral Treaty-Making Process' (n 7), Part four, para 74.

³³ *Ibid.*, para 73.

³⁴ *Ibid.*, paras 73 to 78.