

US Interpretation on IHO C-1, Annex C

Submitted by: USA

Executive Summary: Action C1.14 states that the UK requested clarification for discrepancies between the Convention and the Rules of Procedure of the Council, relating to Member State proposal submissions. This paper proposes that:

- There is no conflict between Convention article VI(g)(vii) and RoP 8(i)
- Several functions of the Council require consideration of proposals from Member States and the SG

Related Documents: RoP of the IHO Council 8(i), IHO Convention VI(g)(vii), IHO C-1 Report Actions C1/14 and Annex C

Related Projects:

Introduction and Background

1. During the first Council (C-1) meeting in October 2017, the UKHO introduced a possible conflict between the IHO Convention and the Council Rules of Procedure, noting that Article VI of the Convention does not specifically state that it is a function of the Council to review, consider, or take any other action on proposals presented by Member States or the Secretary General. Annex C of IHO Report C-1 entitled “Possible conflict between IHO Convention and Council Rules of Procedure (UK’s ad hoc analysis)” implies that the Council is not authorized to take any action on proposals from Member States or the Secretary General.¹
2. Regarding the above, Council-1 adopted Action C1/14: “The Council to seek confirmation of the Council interpretation of Article VI (g) (vii) of the IHO Convention at A-2. (deadline: C-3 for A-2).”

Analysis and Discussion

3. Under the Vienna Convention on the Law of Treaties,² a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³ The stated purpose of the

¹ C-1 Report, Annex C: “There is possible conflict between the Convention and the Council Rules of Procedure, because there is nothing in Article VI of the Convention stating that it is a function of the Council to review, to consider or to take any other action on proposals put to it by Member States or by the Secretary General.”

² Though the United States is not a party to the Vienna Convention on the Law of Treaties, it considers many of the provisions to constitute customary international law regarding treaty interpretation. See U.S. Dep’t of State, *Vienna Convention on the Law of Treaties*, <https://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Jan. 8, 2018); see also ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 7 (2007) (noting that the rules of international customary law regarding treaty interpretation are “identical” to those expressed in the Vienna Convention).

³ Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. The United States takes the position that Article 31 reflects customary international law. See, e.g., Counter-Memorial of the United States of America, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, International Court of Justice, Nov. 3, 2003, ¶6.2.

Member States in amending the Convention was to improve IHO efficiency and responsiveness, including creation of a Council that would meet annually to conduct IHO business.⁴ The importance of the Council to the framework of the amended Convention militates against interpreting the Council’s authority in an overly restrictive manner.⁵ In addition, the Council RoPs—which the Convention empowers the Council to adopt and which represent an expression of the Council’s interpretation of its own authorities—necessarily inform any interpretation of the Convention concerning the functions of the Council.⁶ As the following subsections make clear, the Convention and RoPs together suggest the Council must be able to entertain proposals from Member States and the SG.

4. *There is no conflict between Convention article VI(g)(vii) and RoP 8(i)*
- (i) The UK’s concerns focus on article VI(g)(vii), which requires the Council to review proposals from subsidiary organs.⁷ Though this provision does not include any language suggesting the Council can *only* review proposals from subsidiary organs, neither does the Convention explicitly instruct the Council to consider proposals from other sources. The UK questions whether the omission of language instructing the Council to take action on proposals from Member States or the SG in article VI(g)(vii) means the Council is prohibited from considering such proposals.⁸
 - (ii) As noted above, article VI(g)(vii) must be read in context. The instruction to review proposals from subsidiary organs is one of nine specified functions of the Council.⁹ The scope of this provision is limited to those actions available to the Council upon receipt of proposals from subsidiary organs. That is, article VI(g)(vii) merely requires the Council to review proposals submitted by subsidiary organs and refer them to one of three places: 1) the Assembly; 2) back to the subsidiary organ if necessary; or 3) to the Member States for adoption.¹⁰ This description of the Council’s duty regarding proposals from subsidiary organs in no way prohibits the Council from taking action on other proposals.
 - (iii) In fact, the Convention and RoPs contemplate the Council both preparing and voting on other “proposals,” suggesting article VI(g)(vii) cannot be the sole means by which

⁴ *Summary Brief on The Protocol of Amendments to the Convention on the IHO*, *supra* note 5; *SDWG Final Rep.*, *supra* note 7 at 158.

⁵ Because treaties must be interpreted in light of their object and purpose, Vienna Convention art. 31(1), the intent of Member States in creating the Council is informative.

⁶ *See* Vienna Convention art. 31(2) (providing that “context” for the purposes of treaty interpretation includes any related agreements or instruments made between parties to the treaty in connection with the conclusion of the treaty. Here, the RoPs entered into force the same day as the amended Convention—November 8, 2016).

⁷ *See* Council Summary Report Annex C, *supra* note 8.

⁸ *Id.*

⁹ Convention art. VI(g).

¹⁰ *Id.* art. VI(g)(vii).

proposals arrive in front of the Council for consideration.¹¹ Article VI(f) provides that IHO Member States that are not members of the Council can attend Council meetings but cannot vote, implying Council members *are* expected to vote on certain proposals. RoPs 22–26 all discuss rules related to voting on proposals.¹² Yet, none of the actions available to the Council under article VI(g)(vii) include voting. Because article VI(g)(vii) permits only review and referral of proposals from subsidiary organs, the proposals on which the Council votes must come from some entity other than a subsidiary organ.

- (iv) Further, the term “proposal” as used in article VI(g)(vii) refers to fully-formed proposals intended for adoption by either the Assembly or Member States. As the UK itself notes, the Council is acting as a filter for proposals drafted by subsidiary organs, directing them to the appropriate decision maker rather than debating or adopting such proposals itself.¹³ In contrast, RoP 8(i) states that the Council agenda shall include “any *item* proposed by a Member State or [the SG].”¹⁴ By using the term “item” rather than “proposal,” RoP 8(i) provides for the consideration of issues beyond fully-formed proposals ready for adoption. A Member State may want to raise for discussion any number of items related to the Council’s assigned functions without submitting a “proposal” as the term is used in article VI(g)(vii).
- (v) Read in context, article VI(g)(vii) contains no language suggesting it is the exclusive authority for the Council to craft or consider proposals. It only governs the actions available to the Council upon receipt of proposals from subsidiary organs, and RoP 8(i) permits Member States or the Secretary General to propose “any item” for the Council agenda, including but not limited to “proposals” ready for adoption. Therefore, there is no conflict between article VI(g)(vii) and RoP 8(i). As a result, the Council can—and, under its own rules, must—include on its agenda any item proposed by Member States or the SG that relates to a function of the Council specified in the Convention.

5. *Several functions of the Council require consideration of proposals from Member States and the SG*

- (i) RoP 8 lists all the required elements of the Council’s agenda, many of which correspond to a single function of the Council specified in article VI(g) of the Convention.¹⁵ However, at least three functions of the Council do not clearly match any required elements of the Council agenda: 1) coordinating IHO activities during

¹¹ See, e.g., art VI(g)(v) (instructing the Council to “[p]repare . . . proposals concerning the overall strategy and the work programme to be adopted by the Assembly); RoP 7 (“Member States shall submit proposals that they wish to be discussed by the Council . . . “); RoP 22–26 (rules governing voting on proposals).

¹² E.g. RoP 22 (“If two or more proposals relate to the same subject, the Council, unless it decides otherwise, shall vote on the proposals in the order in which they have been submitted.”).

¹³ Council Summary Report Annex C, *supra* note 8.

¹⁴ RoP 8(i) (emphasis added).

¹⁵ Compare, e.g., Convention art. VI(g)(i) (duty to elect Chair and Vice-chair) with RoP 8(b) (agenda shall include election of Chair and Vice-Chair).

- the inter-Assembly period;¹⁶ 2) preparing proposals concerning the overall strategy and work program for the Assembly;¹⁷ and 3) proposing to the Assembly the establishment of subsidiary organs.¹⁸ RoP 8(i)—which provides for the inclusion of items proposed by Member States and the SG on the Council’s provisional agenda—would help the Council fulfill such functions by inviting ideas for consideration and deciding which proposals may merit action.
- (ii) For example, though article VI(g)(iii) instructs the Council to coordinate IHO activities within a framework established by the Assembly, the Convention provides no further guidance on how this coordination should occur or who can propose coordination strategies. In addition, nothing in RoP 8 requires “coordination” to otherwise appear on the Council agenda. If a Member State or the SG proposed an agenda item related to coordinating ongoing IHO work, considering such a proposal would be well within the Council’s purview. Further, Convention articles VI(g)(v) and (viii) require the Council to formulate, amend, or adopt its own policy and strategy proposals.¹⁹ If Member States and the SG are unable to propose items for the Council agenda, it is unclear which of the agenda elements listed in RoP 8 would allow the Council to fulfill the functions specified in Convention articles VI(g)(iii), (v), and (viii).
- (iii) Beyond proposing substantive policies, Member States and the SG might propose items for the Council agenda that address areas of uncertainty regarding Council work, evaluate the efficacy of previous decisions, or raise any number of other issues germane to Council work that require the attention of the full Council. Unless the RoPs are read to permit the Council to take actions that are clearly prohibited by the Convention, are delegated to a different subsidiary organ, or are plainly beyond the scope of the Council’s authority—i.e. unless there is a direct conflict between a provision of the RoPs and the Convention—the Convention and RoPs are best read in harmony to allow the Council to accept agenda proposals from Member States and the SG.

Conclusions and Recommendations

6. The Convention and RoPs should be considered “in harmony” since there is no direct conflict between a provision of the RoPs and the Convention as discussed above.
7. There are no conflicts regarding the RoP 8(i) and the Convention article VI(g)(vii) regarding proposals from the Member States or the SG. The Council has the authority to consider items proposed by Member States or the Secretary General.

¹⁶ Convention art. VI(g)(iii).

¹⁷ *Id.* art. VI(g)(v).

¹⁸ *Id.* art. VI(g)(viii).

¹⁹ *See also* RoPs 22–26 (providing the rules for voting on proposals at the Council, implying the Council must take up its own proposals at times).

Justification and Impacts

8. Considering the RoPs and Convention together, recognize the Council's authority to accept proposals from both Member States and the IHO Secretary General. Doing so facilitates the Council's ability to perform the functions assigned to it by the IHO Convention. Not doing so will prevent the Council from performing the functions for which it was created.

Action Required of the Council

The Council is invited to:

- a) consider the above analysis with regard to issue raised at Council-1, Action C1-1/14, and Annex C of the C-1 Report;
- b) Agree there is no conflict regarding the RoP 8(i) and the Convention article VI(g)(vii). The Council has the authority to consider items proposed by Member States or the Secretary General;
- c) Document the decision as appropriate; and
- d) Take any other action as may be considered appropriate.