

REPORT OF THE AD HOC GROUP OF LEGAL EXPERTS ON THE PROPOSED RULES OF PROCEDURE FOR THE LRTAP CONVENTION

I. Introduction

1. At its 41st session (December 2021), the Executive Body decided to start a review of the Rules of Procedure for the Convention (Executive Body decision 2021/6, ECE/EB.AIR/148). From Paragraph 6 of that decision, it follows that the Executive Body request the ad hoc group of legal experts to undertake a legal assessment of any recommendations for revisions of the Rules of Procedure proposed by the ad hoc group of experts. Further, the Executive Body decided that the ad hoc group of experts shall present its final recommendations for consideration by the Executive Body at its forty-third session.
2. The matter regarding the review of the Rules of Procedure has been discussed and processed by a special ad hoc group, convened by the Chair of the Working Group on Strategies and Review. This group presented its findings and proposals at the 61st session of the Working Group on Strategies and Review.
3. After this discussion the matter was referred to the ad hoc group of legal experts. The group was asked to submit its assessment to the secretariat by the 3rd of November. The request contained one document named report of the rules of procedure review group (RRG) 7 September 2023 and further it contained the decision from the EB (same as above). The assessment of the ad hoc group of legal experts will be referred to the 42st session of the Executive Body as an informal document.
4. Johan Lindh (SE, responsible for the report), Helen Roberts (UK), Katharina Isepp (AT), Cathrine Bloodworth (CA) and Jeremy Weinberg (US) have participated actively in the work of making this report.

II. General remarks

5. It is noted that it is a political decision of the Parties, if and which rules they are finally going to revise and to what extent. Clustering recommendations into "items which potentially could lead to amendment", "other items with certain potential for amendment" and "other items with less potential for amendment" might be useful to arrange and present the ad hoc group of expert's work, but should not influence and/or restrict the task of the ad-hoc group of legal experts as defined by the Executive Body in Decision 2021/6. Therefore, a legal assessment has been undertaken for each of the proposals contained in the report.
6. However, we consider it important that Rules of Procedure constitutes, an as complete as possible, compilation of all procedural rules. In the future, one could consider the possibility of making a consolidated or annotated version (also of the Convention and its Protocols). As it is now it is very hard to find all relevant decisions applicable to a specific situation if one has not been working with the convention for many years.

III. General editorial remarks

7. Capital letters should be used consistently throughout the Rules of Procedure (i.e. "Secretariat", "Chair", "Bureau", "Vice-Chairs", "Party" etc.). Furthermore, lower case letters should also be used consistently for terms like "article", "rule", "representative", "officer", "subsidiary body" etc. throughout the text.
8. References to articles, rules and paragraphs should be made consistently throughout the text in the form of "article x, paragraph y" or "rule x, paragraph y". Abbreviations (e.g. rule x.y) should be avoided.
9. Harmonization in the usage of the terms "meetings" and "proceedings" and "session" is needed. If it is necessary to use more than one of those terms, then the differences between them should be clear. E.g., a "meeting" is a type of "proceeding" but perhaps a proceeding could be broader? A "session" occurs within an overall "meeting"? Usage currently seems to be inconsistent/unclear in places. (See for example Rule 1 and Rule 21)
10. Generally, the document will need a thorough editorial review and possibly a legal scrub before it is finalized. Within these processes all the examples mentioned above as well as other editorial issues could be addressed.
11. When all outstanding policy issues have been solved the ad hoc group of legal experts offers to do such a review of the final text.

IV. Need for clarification

12. The ad hoc group of legal experts have noticed that some things are not completely clear from the report of the ad hoc group of experts. The two following points ask for clarification regarding certain circumstances.
13. Have in any cases application problems occurred? If so, what have been the exact application problems? How have these possible application problems been addressed in the situation where they have occurred and how have they been addressed in the proposed changes to the Rules of Procedure?
14. In which cases are similar rules already in use in the Rules of Procedure of other Conventions? In some cases, this is indicated in the information from the ad hoc group of experts, in some cases not. It would be very helpful to have consistent information regarding this issue. If the construction already exists and if no application problems have occurred, we consider the likelihood quite high that the application would work smoothly also in our Convention.

V. Comments on specific rules

Rule 1 (scope)

15. Expanding the scope of the Rules of Procedure in this way could be problematic. Specific provisions relating to the application of the Rules of Procedure to subsidiary bodies (including particular exceptions) are included in Rule 21. Thus, it might not be accurate to state that the Rules of Procedure apply to the functioning of the Bureau, because some Rules (e.g. relating to representation and credentials) clearly do not apply to Bureau meetings. If the scope shall be amended, with the aim of increasing clarity, the changes must be consistent with the rest of the provisions.

Rule 2 (definitions)

16. If the Executive Body decides to add a rule on meetings conducted in another way than with only in-person participation, it is considered useful and necessary to add corresponding definitions to the Rules of Procedure as proposed.
17. Regarding the definition of "remote participation", it might be useful to add a specification or definition for the term "representative".
18. If "remote participation" shall not include the ability to vote (Rule 17b), we suggest that this should be specified in the definition.
19. There might be need for a further definition. Namely the term "virtual meeting" to account for situations where there would be no central location / in-person attendance. E.g., "11. "Virtual meeting" means a meeting that is conducted entirely through remote participation.' If this is added, some consequent changes would need to be made to Rule 3.

Rule 3.1 (frequency of EB meetings)

20. It is noted that the heading of rule 3 only refers to the place and date, but not to the frequency of meetings. If the reference to Article 10 paragraph 1 of the Convention is inserted into paragraph 1, the heading is recommended to be changed accordingly (e.g. "Frequency, place and date of meetings").
21. Although it may be considered helpful for completeness, this addition does not add anything substantive, as it simply repeats what is already in the Convention text. Repeating a provision from an article of the Convention text could create confusion in the event that the article is amended (although the overriding authority of the Convention under Rule 34 should be noted).

Rule 3 (hybrid meetings)

22. Although the existing Rules of Procedure do not anticipate hybrid meetings, they do not necessarily prevent hybrid meetings from taking place.

The phrase “unless the Parties decide otherwise” in Rule 3 already provides some flexibility in this regard. (See also Rule 21.1)

23. Please consider if the term “physical meeting” is clear enough. It may be clearer to refer consistently to “in-person meetings”.
24. Please consider if it is clear enough in what circumstances a physical meeting “cannot take place in accordance with Rule 3.1”. Would this require a decision of the Parties as provided for in Rule 3.1, as well as a decision of the Bureau in consultation with the secretariat as provided for in Rule 3.2?
25. Please also consider if it is necessary to call it a hybrid meeting with remote participation. It might be enough, from a linguistic (and legal) point of view to call it a “hybrid meeting”.
26. It is recommended to also consider the possibility of conducting a meeting with remote participation only (virtual meeting). Hence, the term “hybrid meeting” might be too narrow and it could be useful to distinguish clearly between the three different possibilities of conducting a meeting. In this regard, it is recommended to clearly state in paragraph 1 that in-person meetings are the default case.
27. In paragraph 3: The reference to “deemed necessary” is unclear. It would be clearer to refer to a decision by the Bureau. It is also not clear what would be “to the extent necessary”.
28. It is noted that paragraph 3 refers to “operational rules”, whereas paragraph 4 refers to “operating rules”. Although it is clear from the context that the terms refer to the same rules, attention should be paid to uniform labelling. One could also consider changing the term “operating rules” to “operating practices”, to make clear (assuming it is true and possible) that all ordinary “rules” of procedure and related rights, privileges and protections continue to apply with respect to virtual participants.
29. Regarding the second sentence in paragraph 3 (“draft operating rules”), it should be considered that the provision might be spent rather soon and that the rules of procedure should be as concise as possible. Therefore, the added value of that provision is considered to be low.
30. Rule 3 paragraph 4 provides clarity in the event of a conflict between the Rules of Procedure and any operating rules for hybrid meetings. Note that it has the effect that the operating rules could not include provisions that conflict with the Rules of Procedure even where they might have practical benefit. For example, any references to the voting procedure in the operating rules could not change the process in the Rules of Procedure but could only supplement (add to) the Rules of Procedure.
31. The expression “- to the extent possible -” in paragraph 4 is vague and opens up room for manoeuvre/interpretation. Therefore, it is recommended to delete the insertion and to consider specifying to what degree

rights, privileges and protections can be afforded to representatives using remote participation as compared to representatives with in-person participation. For example, the proposed rule 17b excludes remote participants from voting.

Rule 17a Election of officers

32. Editorial: It is recommended to keep the designation of "rule 17" (instead of "rule 17a") and to label the newly proposed "rule 17b" as "rule 17bis".
33. The language in the second sentence of paragraph 1 should be reconsidered regarding the simultaneous use of the word "due" and the expression "as much as possible".
34. It is noted that it is a political decision whether Parties wish to enshrine the Convention practice of taking gender parity and geographical balance into due account in electing the Chair and Vice-Chairs in the Rules of Procedure. It is clearly stated in the Rules of Procedure, however, that the Chair "shall not at the same time exercise the rights of a representative of a Party". The same holds true for a Vice-Chair acting as Chair in the absence of the Chair according to rule 19. Hence, the Chair is expected to act in the best interest of the Convention and not of a certain gender or geographical region. The proposal as it stands does not contradict this principle, but any language should be considered carefully in this regard.
35. One could consider changing the term "gender parity" to "gender balance", for consistency with the accompanying term "geographic balance" and so as not to create different interpretive presumptions with respect to those terms. Additionally, if there are to be an odd number of top officers, one chair and four vice-chairs, actual "parity" would be unattainable.

Rule 17a paragraph 2 (terms of office)

36. Editorial: It is noted that the expression "for an additional term equal or less than [two][three] years" is newly proposed text. This should be made visible.
37. Please note that under Rule 21 paragraph 5, the provisions relating to the number of vice-chairs would not apply to subsidiary bodies.

Rule 17b (election of officers)

38. The existing Rules of Procedure are silent regarding the process for election of officers. Our understanding is that the usual decision-making process in Rules 29 and 30 would apply. Under Rule 30, a secret ballot would not be possible.
39. It is suggested to restructure and simplify the provision. Firstly, it should be stated that by default officers shall be elected by consensus. Secondly, the procedure for the case that a consensus cannot be reached

should be specified. We propose that the provision could be structured as follows.

“ 1. Officers shall be elected by consensus.
2. In case a consensus cannot be reached, a secret ballot vote shall take place. The Secretariat shall organize the voting within the session in accordance with the following rules:
(a) [...]
(b) [...]
[...]"

40. On the content of the voting procedure, it is noted that the proposal contains expressions that would need further clarification. In particular, it is neither clear from the text itself nor from the context who the “officers of the session” referred to in paragraph 2 are. Furthermore, it should be specified that the term “representatives” refers to “representatives of the Parties”. It is also not obvious what is meant by “meeting room” since that expression could in principle also refer to a virtual setting. It is recommended to instead refer to e.g. the place of the session in accordance with rule 3, paragraph 1.

41. Regarding the content of paragraph 3 it is not clear, how it could be determined in a secret ballot vote whether Parties voted affirmative or negative or whether they abstained or not.

42. As drafted, Rule 17b would also apply to subsidiary bodies. Has the RRG considered the practicalities when applying this Rule to subsidiary bodies?

43. Rule 17b paragraph 1 requires the use of a secret ballot vote if an officer cannot be elected on the basis of consensus. (There is no flexibility for the Executive Body to decide otherwise, as in some other provisions.)

44. The definition in Rule 17b paragraph 3 differs from Rule 29 paragraph 6. The express reference to Parties needing to be “physically present in the meeting room” in Rule 17b paragraph 3 indicates that the requirement to be “present” in Rule 29 paragraph 6 does not necessarily mean physically present in the meeting room.

45. The reference in Rule 17b paragraph 5 should be to paragraph 4.

Rule 19 (temporary absence or premature resignation of the chair)

46. It is recommended that references to the Chair are made by consistently using the terminology “his or her” instead of “its” (i.e. “before the end of his or her term of office” and “unable to complete his or her term of office”).

47. Since there are four (proposed) vice-chairs there would be need to define which of these vice chairs shall be the interim chair. What if there is a dispute between two of more vice chairs on which of them shall act as interim chair? We suggest including a provision clarifying this issue.

Rule 20 paragraph 1

48. Editorial: Insert "of" before "the Implementation Committee" to make clear that it is the Chair of the IC who is part of the Bureau, not the entire IC.

Rule 20 paragraph 4 (transparency requirements of the EB Bureau meetings)

49. This could perhaps benefit from additional clarity. For example, who is responsible for posting the documents on the website? Does "as soon as practicable" mean before or after the meeting? Are there translation requirements?

Rule 21.1 (subsidiary bodies)

50. Using its ordinary meaning, "proceedings" can mean a series of events that happen in a planned and controlled way. In this context we interpret the reference to "proceedings" in Rule 21 paragraph 1 to include meetings, so we do not consider the addition to be necessary. If such an addition is made, it should also be made elsewhere for consistency (e.g. in Rule 21 paragraph 6).

Rule 21 paragraph 6 (decision-making rules for subsidiary bodies)

51. With regards to whether to include the reference to Rule 29, in Rule 21 paragraph 6, this comes down to what is considered a *decision*.
52. According to Article 10, paragraph 2 sub-paragraph b, the Executive Body is mandated to "establish, as appropriate, working groups to consider matters related to the implementation and development of the present Convention and to this end to prepare appropriate studies and other documentation and to submit recommendations to be considered by the Executive Body" (denominated as Subsidiary Bodies in the Rules of Procedure). It follows from that provision that only the Executive Body is a decision-making body and working groups are, inter alia, only supposed to prepare studies and submit recommendations for consideration (and decision-making) by the Executive Body. We note however, that Subsidiary Bodies also need to agree on various matters i.e. studies and recommendations.
53. Though, and as we understand it, the problem that one is trying to solve is the situation where there are different opinions within a subsidiary body. That is, when the subsidiary body cannot agree on even presenting both (or all) options to the Executive Body. In that situation, one option would be to say that subsidiary bodies do not have decision making powers (so Rule 29 is included in the list), but then to add something to Rule 21 that says, for example, on procedural matters the subsidiary bodies may vote or that on issues where there has been no consensus on a recommendation to the Executive Body, the subsidiary body may vote on whether to present particular options, all options or no options to the Executive Body.

54. Another way to address the issue might be for the Executive Body to set out, in its decision establishing the subsidiary body, if this body should come up with one (majority) view or if one or several divergent views/dissenting opinions also would be allowed. This could be achieved via an amendment of the respective decisions.
55. One relevant example (relating to recommendations rather than decisions) can be found in the Stockholm Convention on persistent organic pollutants. Article 19 paragraph 6 sub-paragraph c in that convention reads: *"The Committee shall make every effort to adopt its recommendations by consensus. If all efforts at consensus have been exhausted, and no consensus reached, such recommendation shall as a last resort be adopted by a two-thirds majority vote of the members present and voting."*
56. Exactly which way to chose would be a political decision.
57. In any case, this is an example where it would be helpful to know exactly which application problems one is trying to solve with a certain proposal.

Rule 30 and 30bis (voting)

58. Existing Rules of Procedure – The existing Rules are silent with regard to the method of voting, although the requirement in Rule 30 for the vote of each Party participating in a vote to be recorded in the report of the meeting has the effect that a secret ballot is not possible.
59. On the one hand, the proposed amendment to Rule 30 paragraph1 does not allow a secret ballot, so all votes are public. On the other hand, Rule 30 paragraph2 has the effect that a Party's vote is not published in the report unless requested by that Party. This approach seems a little contradictory – is it the intention?
60. A policy issue that need to be considered: whether/why the full result of a roll call vote, if one is requested by a party, should not be recorded in the report of a meeting. A decision might alternatively be taken by consensus, by a show of hands vote, or (for officer elections) by secret ballot; if none of those methods were deemed suitable or applicable in a particular instance, then there is an argument in the interest of transparency that all parties' votes shall be recorded, not only those of parties who make a particular request.
61. Rule 30bis mirrors language in Decision 1998/3 relating to the Implementation Committee. The Implementation Committee is otherwise outside the scope of the Rules of Procedure as it is not included in the definition of "subsidiary body(-ies)".
62. It should be noted that the rules of procedure may only be revised by consensus whereas decisions of the Executive Body may be revised following the decision-making rules contained in the rules of procedure. Hence, "repeating" or "duplicating" provisions that are contained in decisions in the rules of procedure may lead to increased persistency, which should be taken into due consideration regarding the newly proposed Rule 30bis.

63. The commentary states "Please note that the voting rules for officers (Rule 17 and 17bis) do not apply to the election of the members of the Implementation Committee." We agree with this statement, since the Implementation Committee is not included in the definition of "subsidiary body(-ies)".