

UNITED NATIONS OPEN-ENDED INFORMAL CONSULTATIVE PROCESS ON OCEANS AND THE LAW OF THE SEA

MANDATE, OBJECTIVES AND ROLE

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This presentation aims to set out the background to the creation of the UN Open-Ended Informal Consultative Process on Oceans and the Law of the Sea, and the way in which its role, objectives and mandate came to be developed.

Context

2. The agreement in 1982 at Montego Bay in Jamaica of the UN Convention on the Law of the Sea (UNCLOS) marked the start of a new era in international action on the oceans. UNCLOS provided for the first time a unified, coherent framework for the world's oceans and, therefore, required States and others involved in managing human activities that impact on the oceans to start to think in a more integrated way about their actions. Among many other things, it set out the duties of States to protect and preserve the marine environment and to conserve and manage living marine resources, including obligations to cooperate in these tasks.

3. UNCLOS is noteworthy that, unlike many international conventions concerned with policies that are bound to develop, it does not provide for regular meetings of the States Parties to consider issues generally. It provides for the UN Secretary-General to convene *necessary* meetings of the States Parties. These have concentrated on specific administrative tasks noted in the Convention, but there are differing views on the intended scope of these meetings. This is largely because many of those negotiating the Convention intended the UN General Assembly to fulfil the role of the general forum for UNCLOS issues. This expectation was largely fulfilled by the way in which the General Assembly took up the task of pursuing the entry into force of the Convention (1994), and in 1996 converted the annual agenda item on UNCLOS into a more general item on the oceans and the law of the sea.

4. Before UNCLOS had come into force, but when its provisions (apart from Part XI) had widely come to be regarded as stating customary international law, the members of the preparatory committee for the UN Conference on Environment and Development (UNCED – the “Earth Summit”, held in Rio de Janeiro, Brazil in 1992) turned their minds to the what needed to be done to promote and support such cooperation.

5. The outcome was one of the chapters of AGENDA 21, the Programme of Action for Sustainable Development, which was adopted (along with the Rio Principles and the Convention on Biological Diversity) by UNCED. Chapter 17 dealt with the “Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-enclosed Seas and Coastal Areas and the Protection Rational Use and Development of Their Living Resources”. It recommended seven programme areas:

- a. Integrated management and sustainable development of coastal areas, including exclusive economic zones;
- b. Marine environmental protection;

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- c. Sustainable use and conservation of marine living resources of the high seas;
- d. Sustainable use and conservation of marine living resources under national jurisdiction;
- e. Addressing critical uncertainties for the management of the marine environment and climate change;
- f. Strengthening international, including regional, cooperation and coordination;
- g. Sustainable development of small islands.

6. The programme area on integrated management thus reflected the growing recognition of the need for the integration of the different aspects of management in keeping with the UNCLOS preamble "conscious that the problems of ocean space are closely interrelated and need to be considered as a whole". The text recorded that "Despite national, subregional, regional and global efforts, current approaches to the management of marine and coastal resources have not always proved capable of achieving sustainable development, and coastal resources and the coastal environment are being rapidly degraded and eroded in many parts of the world". It further recorded the commitment of coastal States "to integrated management and sustainable development of coastal areas and the marine environment under their national jurisdiction", and recommended various actions to deliver on this commitment.

7. What is said on integration (Programme Area (a)) emphasises that "The role of international cooperation and coordination on a bilateral basis and, where applicable, within a subregional, interregional, regional or global framework, is to support and supplement national efforts of coastal States to promote integrated management and sustainable development of coastal and marine areas." Chapter 17 went on to state that "States commit themselves, in accordance with their policies, priorities and resources, to promote institutional arrangements necessary to support the implementation of the programme areas in this chapter (paragraph 17.116)." It went on to address management-related activities at the global level and makes specific recommendations that "The General Assembly should provide for regular coordination, within the United Nations system, at the intergovernmental level of general marine and coastal issues, including environment and development matters,..." It goes on to enumerate steps that the UN Secretary-General and the executive heads of United Nations agencies and organizations should take to improve coordination on these issues

Process towards the Informal Consultative Process

8. In response to these specific recommendations, the UN's Administrative Committee on Coordination (ACC), which brings together the Secretary-General and the heads of the specialised agencies, programmes and similar bodies, set up a Sub-Committee on Oceans and Coastal Areas (SOCA), with the remit of coordinating the follow-up of AGENDA 21, and the reports to the UN bodies on its implementation. This body, however, provided no means for establishing a dialogue between the agencies and the UN Member States. The question remained about how to follow up the recommendation on the role of the General Assembly.

9. One of the other recommendations of Chapter 17 was on the need for better protection of the marine environment from land-based sources of pollution. AGENDA 21 invited the UNEP Governing Council "to convene, as soon as practicable, an intergovernmental meeting on protection of the marine environment from land-based activities".

10. A series of intergovernmental meetings culminated in a conference in Washington DC, United States of America, in October 1995. This conference adopted the Global Programme of Action on the Protection of the Marine Environment from Land-Based Activities. As the intergovernmental meetings worked through the many source categories which impact on the marine environment, it became clear both that many international agencies would need to cooperate in implementing the Global Plan of Action, and that there was no clear forum where such cooperation could be discussed, short of the General Assembly. This lesson was re-emphasised as efforts were made to get the various international bodies to agree to play their parts in the implementation of the Global Programme of Action – the same issues had to be debated over and over again in the different bodies, and it was extremely difficult to maintain any consistent approach.

11. At the same time, the Commission on Sustainable Development (CSD) was beginning its work. The CSD was set up as a high-level body, technically a functional Commission of the UN Economic and Social Council (ECOSOC). Its main goals are to "enhance international cooperation and rationalise the intergovernmental decision-making capacity for the integration of environment and development issues", and to examine progress in the implementation of AGENDA 21.

12. Under the programme of work which CSD adopted at the outset, the first review of Chapter 17 (Oceans and All Seas) of AGENDA 21 was held at the fourth meeting of CSD in 1996.

13. In preparation for this review, the Governments of Brazil and the United Kingdom organised in December 1995 a first London Workshop on Environmental Science, Comprehensiveness and Consistency in Global Decisions on Oceans. This was attended by a wide range of countries, and chaired by Ministers from Brazil and the UK. One of the conclusions of this workshop was that "there was general agreement on the need to improve the effectiveness of the means for providing the scientific advice needed both for the formulation of priorities for global action and for ensuring a consistent base for action between the various agencies involved."

14. The 1996 session of the CSD (CSD4) considered the need for international coordination and cooperation on the oceans. It concluded that there was "a need for a periodic overall review by [CSD] of all aspects of the marine environment and its related issues as described in Chapter 17 of AGENDA 21". It also asked the UN Secretary General to review the working of the Sub-Committee on Oceans and Coastal Areas (ACC/SOCA) "to improve its status and effectiveness".

15. The programme of CSD ensured that there was a further review of Chapter 17 and oceans at the seventh meeting of CSD in 1999. In preparation for this, the Governments of Brazil and the United Kingdom organised a second London Oceans Workshop. Representatives of 39 States from all parts of the world took part, together with a range of international organisations and non-governmental organisations. This workshop concluded that, "because of the number of different international organisations involved, improved arrangements are needed for co-ordination in order to produce an integrated overview and generate consistent approaches in the various forums to the conservation and sustainable use of the seas." It suggested that "the UN General Assembly should be invited to consider how the annual debate on oceans affairs and the law of the sea can be broadened and better prepared for this purpose." It noted that "Among the possibilities is more effective use of the annual report by the Secretary-General, a Standing Committee on the Oceans (parallel to that on Outer Space) or some less formal preparatory mechanism. Preparation for the debate needs to be based on a review of the problems identified at national, regional and global levels and consideration of priorities and means for addressing them".

16. This then was the background against which the Ad Hoc Intersessional Working Group established to prepare this aspect of CSD 7 debated the question of improving international cooperation and coordination on the oceans. Agreement was reached on the need for improvements, on the fundamental role of the Secretary-General's annual report, on the need to improve AAC/SOCA, and on the need to achieve a better basis for the annual debates on the oceans. No agreement was reached on the modalities for all this: ideas put forward by a number of States or groups of States were simply recorded:

- a. Australia (on behalf of the Group of South Pacific Countries) stressed the need for a forum;
- b. Canada proposed a high-level oceans symposium;
- c. India cautioned against the proliferation of institutions and suggested expanding the General Assembly debates;
- d. Malta proposed a Committee of the Whole of the General Assembly on the oceans;
- e. Mexico, on behalf of the Rio Group, suggested a number of elements as the basis for a consensus on an appropriate process;
- f. the United States of America proposed an open-ended working group;

17. The discussions of the Ad Hoc Intersessional Working Group provided a basis on which CSD7 was eventually able to reach consensus on recommendations to ECOSOC and the UN General Assembly that, there

should be an open-ended informal consultative process on the oceans – a recommendation that was essentially adopted and given force by UN General Assembly Resolution 54/33.

Objectives

18. The basis of CSD7's recommendation was its conclusion that "oceans and seas present a special case as regards the need for international coordination and cooperation" and that, building on existing arrangements, a more integrated approach is required to all legal, economic, social and environmental aspects of the oceans and seas, both at intergovernmental and interagency levels.

19. The recommendation from CSD was, naturally, firmly based in issues of sustainable development. Nevertheless, there was a recognition that the need for an integrated approach to the oceans went beyond the three pillars of environment, economy and society to include issues of law, security, international organisation and political priorities. It also built upon the consensus in AGENDA 21 that the UN General Assembly should play the central role in coordination.

20. The General Assembly Resolution formulates the objective for the Informal Consultative Process (ICP) of providing such an approach in terms of "facilitat[ing] the annual review by the General Assembly, in an effective and constructive manner, of developments in ocean affairs by considering the Secretary-General's report on oceans and the law of the sea". The Secretary-General's Report is a magisterial overview of all the year's developments affecting the oceans. It looks, in accordance with the integrated approach referred to above, at all aspects of the oceans. The expectation was that the Secretary-General's report would draw together the issues on which coordination was needed, and thus form the basis of a sound debate on the way forward.

21. Three operational strands can be identified within this objective.

22. First, the main aim was to provide a forum in which the issues affecting the oceans and seas could be considered in the round, rather than from one or other sectoral viewpoint, and questions resolved both about how different agencies could play their appropriate parts in these issues and about priorities.

23. Secondly, the ICP could assist in deepening understanding of oceans issues among those involved in negotiations in New York. Historically, because oceans issues have straddled the fields of the Second (Economic) and Sixth (Legal) Committees of the General Assembly, the annual resolutions have been negotiated informally without reference to a committee. These informal negotiations are often spread out over a long period, and many people involved in them are therefore members of the Permanent Missions in New York, rather than experts coming from capitals for a specific subject. The ICP could therefore offer a way of exploring in more depth and in a more concentrated way (from the start it has been limited to one week) some of the major issues for the annual resolutions.

24. Thirdly, the ICP could provide a way in which there could be a dialogue between the UN Member States and the Sub-Committee on Oceans and Coastal Areas (ACC/SOCA) – that is, between the States and those charged with coordination among the UN Secretariat, the specialised agencies and other bodies.

Mandate

25. What are the most significant elements of the ICP mandate? There seem to be ten.

26. First, the General Assembly resolution stresses that everything is to be consistent with UNCLOS. This is inevitable, given the acknowledged and central role of that Convention in everything to do with the oceans. But, by placing it first and foremost, the resolution makes it clear that there can be no suggestion that the ICP or anything that it might do could modify or nuance the provisions of UNCLOS. This was a point of major importance for many States in the negotiations at CSD7.

27. Secondly, there is the three-fold description of the process: it is open-ended, informal and consultative:

- a. **"Open-ended"**: This shows that it is open to all UN Member States. The desire to ensure such access was an important factor in determining what sort of arrangement should be made to meet the need identified by CSD7. Some wished to see a committee of the General Assembly - one of the

possibilities suggested by the London Workshop. But committees by their nature do not usually include all States, unless they take the form of a "Committee of the Whole", which would not have been appropriate in the light of wishes to provide for input from a wide range of interests. Likewise, the alternative suggestion of expanding the role of the Meeting of States Parties to the Law of the Sea Convention (SPLOSC) would have restricted participation to the States Parties;

- b. **"Informal"**: Ten years ago, there was already a considerable concern over establishing any new institutions: there was a risk that any new institution could develop a life of its own, and cut across existing institutions. At that time, the agreed aim was to simplify international institutions, to clarify their mandates and to restrain their cost. A new institution could confound that overall aim. There was agreement on the need, however, for improved coordination on the oceans, and it was eventually accepted that this need could be met by an "informal process", a term which clearly spoke against creating an institution. The same end was served by restricting the machinery of the process to the two co-chairpersons, and arranging for the secretariat to be provided by the existing Division of Oceans and the Law of the Sea within the UN Secretariat out of its existing budgetary provision;
- c. **"Consultative"**: Likewise, it was essential to make clear that the process could have no powers of decision or management. The concept of "coordination" had caused considerable discussion at CSD7: most people had seen this as the task of helping independent bodies to align their priorities and activities to deliver what was needed overall; some, however, coming from a different tradition, had seen coordination as the function of directing bodies on how to behave. By emphasising the consultative nature of the process, the resolution made clear that it was the former approach that was intended.

28. Thirdly, the open-ended nature of the ICP was further extended by including, in addition to the States Members of the United Nations, also States which are not UN Members but members of the specialized agencies (such as, in 1999, Switzerland), all Parties to UNCLOS (which enabled, for example, the European Union (European Economic Community) to participate as well as its Member States), and entities that have received a standing invitation to participate as observers in the work of the General Assembly pursuant to its relevant resolutions (which covers the case of Palestine and some intergovernmental organisations). In addition, intergovernmental organizations with competence in ocean affairs were also give the right to participate.

29. Fourthly, the mandate goes on to clarify further the nature of the cooperation and coordination is needed by stressing the need to bear in mind the differing characteristics and needs of the different regions of the world. It also stresses that the ICP should not pursue legal or juridical coordination among the different legal instruments. This again responds to the concerns of a number of States that the process could become involved in trying to resolve differences in interpretation between various international agreements, and thus affect the role of States in implementing the instruments to which they are parties.

30. Fifthly, the General Assembly Resolution provides for the appointment of two co-chairpersons to coordinate the process. On the one hand, this built on the good experience of the CSD, where the Ad Hoc Intersessional Working Groups had been organised in this way, with one co-chair coming from developed countries and the other from developing countries. On the other hand, there was no provision for a *bureau*, since it was felt that this would be more like an institution than an informal process, and that the two co-chairpersons could (by informal consultations) ensure that the full range of States' views could be taken into account. One unintentional result of an annual appointment of the co-chairpersons by the President of the General Assembly has been that, because of the many calls on the President at the start of a General Assembly session, the appointment has often not been made until the end of the calendar year, limiting the time for the co-chairpersons to carry out the organisation of the meeting.

31. Sixthly, the format for the meeting was to ensure, in accordance with the rules of procedure and practices of the General Assembly, the opportunity to receive input from representatives of "the major groups as identified in Agenda 21". This was one of the more difficult parts of the mandate on which to get agreement. It addressed two points. Some States were concerned about setting a precedent for giving NGOs entry to meetings which, even if informal, were linked to the General Assembly, when the traditional mechanism for NGO input has been under specific arrangements for NGO consultative status with ECOSOC. There was also a concern, as with the CSD, to

accommodate the wider range of organizations that had become involved in the Rio Conference under the “major groups”. Eventually, agreement was reached on the basis that NGO input would come through “discussion panels” and would cover all the UNCED major groups.

32. Seventhly, the co-chairpersons were given the task of devising, in consultation with delegations, a format for the ICP. The pattern that emerged at first was to allocate the first day to the discussion of the Secretary-General’s report, to use the second and third days for discussion panels on the subjects chosen for detailed examination. These discussion panels included presentations from experts, and as required by the General Assembly resolution permitted the NGOs to contribute to the debates. Part of the fourth day was used for a report by the ACC/SOCA and an opportunity for States to have a dialogue with the members of SOCA present, and the rest for the completion of the work of the discussion panels. On the final day, the co-chairpersons presented their draft report, and it was then discussed. This pattern has undergone modifications, but the main features have been maintained.

33. Eighthly, the mandate gave the process permission to propose elements for the consideration of the General Assembly in relation to Assembly resolutions under the agenda item entitled “Oceans and the law of the sea”. This was the core of the process. By focussing on what it might be appropriate for the General Assembly to consider and endorse, the process was enabled both to give a new edge to the interventions of the General Assembly on coordination questions, and to enhance the Assembly’s negotiations and debates on these issues. The outputs of the process were therefore twofold – material on issues for consideration by the Assembly and reports of the discussions during the meetings of the process, which provided a summary of information relevant to those issues and a note of the points relevant to them which were of concern to the participants.

34. Ninthly, the mandate contained a “sunset clause” – after three years the effectiveness and utility of the process was to be reviewed. Given the concerns in 1999 about institutions that might outlive their usefulness, this provision was inevitable.

35. Tenthly, the mandate highlighted the importance of the participation of developing countries, and urged contributions to a trust fund to help them do so. This was seen as particularly important in relation to obtaining presentations from experts who know the situation in developing countries. Without adequate participation from developing countries, it was clear that many of the aims of the process would not be achieved, since the coordination of the work of the international agencies is particularly important in helping developing countries to build the capacity that they need to ensure that their use of the oceans and seas is sustainable.

36. The most significant further developments in the mandate since the start of the ICP have been:

- a. the reduction in the scope of the meetings from the original two topics to a single theme;
- b. the agreement that the ICP could revisit past topics to see what had happened since its examinations of them;
- c. the replacement of the ACC/SOCA by UN Oceans, as part of the streamlining of the ACC and its supporting bodies.

Conclusion

37. The ICP thus grew out of the emphasis in the 1990s on the need for sustainable development. However, it was deliberately placed directly under the General Assembly, rather than linked directly to the CSD or the Economic and Social Council (ECOSOC), because the issues that can arise over the oceans and seas are not solely linked to the sustainable use of the seas. Issues such as piracy and security have wider implications. If an integrated approach to the management of human activities affecting the seas is the goal, then the high-level global integration mechanism must be able to consider all aspects, and not be focused solely on sustainable development – important though that must always be.