
A legal opinion on the implications of sending more than one candidate from the Executive Board to the Health Assembly with reference to Article 31 of the Constitution of the World Health Organization on the process of nomination and appointment of the Director-General

Note by the Legal Counsel

1. The Working Group of Member States on the Process and Methods of the Election of the Director-General of the World Health Organization, at its first session, requested the Director-General, *inter alia*,¹ to support its work by providing a legal opinion on the implications of sending more than one nomination for the post of Director-General from the Executive Board to the World Health Assembly, with reference to Article 31 of the Constitution. This paper also reviews the approach by other intergovernmental organizations to the election of their executive heads.

LEGAL BASIS FOR NOMINATION AND APPOINTMENT

2. The legal basis for the nomination and appointment of the Director-General of the World Health Organization² is laid out in the Constitution, the Rules of Procedure of the World Health Assembly, and the Rules of Procedure of the Executive Board. The Executive Board has also adopted resolutions and decisions addressing more detailed aspects of the nomination process.

(a) Constitution

Article 31: “The Director-General shall be appointed by the Health Assembly on the nomination of the Board on such terms as the Health Assembly may determine.” ...

¹ See document A64/41.

² Documents EB119/INF.DOC./1 and EB128/27 provide a detailed overview of the full process leading to the appointment of the Director-General.

(b) Rules of Procedure of the World Health Assembly

Rule 107: “Whenever the office of Director-General is vacant ... the Board shall, at its next meeting, make a nomination which shall be submitted to the next session of the Health Assembly.” ...

Rule 108: “The Health Assembly shall consider the Board’s nomination at a private meeting and shall come to a decision by a secret ballot.”

Rule 109: “Should the Health Assembly reject the Board’s nomination, the Board shall submit a fresh proposal as soon as circumstances permit ...” ...

(c) Rules of Procedure of the Executive Board

Rule 48: ... “The nomination of the Director-General shall be decided by secret ballot in accordance with Rule 52.” ...

Rule 52 contains a detailed description of the process followed by the Board in deciding on its nomination. The process laid out in that Rule culminates in a vote by secret ballot to select one person. Paragraph 9 of the Rule states: “The name of the person so nominated shall be announced at a public meeting of the Board and submitted to the Health Assembly.”

TERMINOLOGY

3. The Rules of Procedure of the Executive Board make it clear that the Board may only propose a single candidate to the Health Assembly for appointment. The plain meaning of the Rule, as currently written, would not provide a basis for the Board to propose more than one candidate. It follows that references in the Rules of Procedure of the Health Assembly, quoted in paragraph 2(b) above, to “a nomination” from the Board, refers to the nomination of a single candidate. This is the only interpretation of the Rules of Procedure of both governing bodies that permits a coherent reading of the two sets of Rules.

4. The Constitution, however, is not explicit on this point. Article 31 refers to “... the nomination of the Board ...”. The question arises whether the concept of nomination in Article 31 refers necessarily to a single candidate or whether it could refer to more than one candidate. The official records of the 1946 International Health Conference and those of the Health Assembly do not assist in the interpretation of “... on the nomination of ...” in Article 31, from this perspective; nor do dictionary definitions provide a definitive answer about the implications of the term “nomination”. Moreover, the term used in Article 31 has slight variations in the other authentic languages of the Constitution, so the possible implications of the English term should not be overemphasized.

MODELS OF APPOINTMENT OF EXECUTIVE HEADS

5. The Working Group may wish to broaden its focus beyond the terminology of the Constitution and Rules of Procedure by comparing the model adopted by WHO with those adopted by other intergovernmental organizations.

6. In WHO, Member States opted for a two-stage process for selecting the Director-General, with the executive body of the Organization responsible for the first stage, and its plenary supreme body

responsible for the second stage. From a policy perspective, this approach reflects a deliberate distribution of responsibilities and authority among different organs, with the executive body having the lead role. Under the two-stage model, the executive body screens candidates and identifies the person whom it considers the best candidate. The supreme plenary body decides whether to appoint the person nominated by the executive body, rather than performing a second selection as such.

7. This model contrasts with a one-stage model, where all Member States vote directly to select the executive head from candidates proposed by Member States. While there may be a consultative, political process to arrive at a shortlist of eligible candidates or even a single consensus candidate, under this model the selection of the executive head is formally carried out through a direct election by the competent body, rather than through a “nomination and appointment” approach.

APPROACHES ADOPTED BY OTHER INTERGOVERNMENTAL ORGANIZATIONS

8. The Secretariat requested information from a number of intergovernmental organizations to determine whether they follow a one-stage or two-stage model. Of those that responded, the following international organizations have adopted a two-stage model: United Nations; International Labour Organization (ILO);¹ UNESCO; International Atomic Energy Agency (IAEA); International Maritime Organization (IMO); World Intellectual Property Organization (WIPO); European Investment Bank; Organization for Security and Co-Operation in Europe (OSCE).

Specialized agencies and other intergovernmental organizations

9. In only one of the specialized agencies (namely, WIPO) that opted for the two-stage model does the Constitution or similar founding document expressly provide that a single name be put forward for appointment.²

10. The other organizations with a two-stage process, that replied to the Secretariat’s request, have a legal framework similar to the one in place in WHO. That is, the Constitution, or similar founding document, does not expressly address the number of candidates that may be put forward for appointment.³ Rather – without exception – either the rules of procedure governing the nomination and appointment process specify, expressly or implicitly, that only one candidate may be proposed for appointment, or this is the constant, accepted practice.

¹ See the footnote reference in paragraph 9 concerning an amendment to the Constitution of the International Labour Organization.

² Article 8(3)(v) of the Convention Establishing the World Intellectual Property Organization provides that its Coordination Committee (which is equivalent to the Executive Board of WHO) shall (emphasis in italics added): “... nominate *a candidate* for appointment to [the position of Director-General]... ; if the General Assembly does not appoint its nominee, the Coordination Committee shall nominate another candidate; ...”. The amended Constitution of the ILO also provides for a two-stage model with a single candidate only being nominated. However, the constitutional amendment to Article 8 that would provide for a two-stage model has not yet entered into force.

³ For example, Charter of the United Nations, Article 97; UNIDO, Constitution, Article 11; ILO, Constitution, Article 8; UNESCO, Constitution, Article VI.2; IAEA, Statute, Article VII A; IMO, Convention, Article 22; WIPO, Convention, Article 8(3)(v); European Investment Bank, Statute, Article 11; OSCE, Staff Regulation 3.02.

The United Nations

11. Of the organizations that adopted a two-stage model, the language of the Charter of the United Nations is closest to that of the WHO Constitution. Article 97 of the Charter states that: "... The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council ...". At the San Francisco Conference, which led to the adoption of the Charter of the United Nations, the proposal of some delegations that the Security Council provide a list of three candidates to the General Assembly for approval was considered but not accepted.

12. At the same time, the General Assembly resolution of 24 January 1946 concerning the Terms of Appointment of the Secretary-General,¹ includes the following paragraph (emphasis in italics added):

"4. The following observations contained in paragraphs 18-21 of section 2, chapter VIII of the Preparatory Commission's Report be noted and approved:

...

(d) *It would be desirable* for the Security Council to proffer one candidate only for the consideration of the General Assembly, and for debate on the nomination in the General Assembly to be avoided." ...

13. Arguably, the reference to the "desirability" of having only one candidate recommended by the Security Council suggests that the General Assembly did not interpret Article 97 of the Charter as legally requiring it. However, while the Rules of Procedure of the General Assembly (Rule 141) do not refer to the number of candidates that may be recommended by the Security Council, the latter has always recommended a single candidate to the General Assembly for appointment.

APPOINTMENT OF REGIONAL DIRECTORS

14. The Working Group may also wish to take into account the procedures and practice for the appointment of Regional Directors of WHO. Pursuant to Article 52 of the Constitution, "The head of the regional office shall be the Regional Director appointed by the Board in agreement with the regional committee." In contrast, Article 31 refers to the appointment of the Director-General by the Health Assembly "on the nomination of the Board", and not "in agreement" with the Board. Thus, the issue of how many candidates could be put forward by a Regional Committee, which has been the subject of past debate, may nevertheless be relevant.

15. In 1956, in a report to the Board,² it was suggested that Regional Committees should submit all candidatures for the post of Regional-Director to the Executive Board. However, after consulting with the Regional Committees, the Board decided that it was "not necessary to make any changes in the practice followed so far" – namely, the practice of submitting one name only. In 1962, the Regional

¹ United Nations General Assembly resolution A/RES/11/1.

² Document EB19/34 (see Method of Appointing Regional Directors, p. 3).

Committee for Europe suggested that more than one candidate should be presented to the Board.¹ In a 1964 report to the Board, the Director-General stated:

“3. Consideration of candidates of the Board

...

3.2 Since it appears from the text of Article 52 ... that its framers intended the major responsibility for decision to rest with the Executive Board, it would appear reasonable that the Board request regional committees normally to submit the names of more than one candidate ... so as to permit the Board to exercise its responsibilities of making the appointment.”²

In resolution EB33.R42, the Board requested regional committees to “consider the suggestions contained therein”.³ Only the Regional Committee for the Western Pacific modified its process and it did so only temporarily, with the Committee returning to the previous system in 1979.

16. The matter was discussed again in regional committees, the Board and the Health Assembly in 1987 and 1988. While changes such as the creation of search committees to assist some regional committees were introduced, the practice of presenting a single name to the Board remained unchanged. However, Rule 47 of the Rules of Procedure of the Regional Committee for Europe provides that, if the Committee is unable to choose between the last two remaining candidates after three successive ballots, the names of the two candidates will be forwarded for selection to the Executive Board.

CONCLUSION

17. Article 31 of the Constitution does not address expressly the number of candidates for the position of Director-General that may be sent from the Executive Board to the Health Assembly. Member States have interpreted Article 31 through the Rules of Procedure of the Health Assembly and those of the Executive Board by providing for a single candidate only being put forward for appointment.

18. The Rules of Procedure may be amended provided that the amendments conform to the Constitution. The critical question, then, is whether Article 31 would permit an interpretation that more than one name may be put forward to the Health Assembly, or whether such an interpretation would require an amendment of Article 31.

19. On the basis of the foregoing review, Article 31 does not preclude the possibility of the Board submitting more than one candidate for the post of Director-General to the Health Assembly. Such an approach would require the amendment of the Rules of Procedure of the Board and those of the Health Assembly.

¹ Document EB33/32, Annex 2.

² Document EB33/32, subparagraph 3.2.

³ For further discussion, see *Off. Rec. Wld Hlth Org.* **132**, Annex 19.

20. At the same time, the approach followed unanimously and consistently by WHO and other intergovernmental organizations that have chosen a two-stage model of appointment of the executive head, including the United Nations, reflects a considered policy choice of entrusting the task of selecting the best available candidate to an executive body, and to leave to the plenary body the function of a political confirmation – or rejection – of that selection. Altering that model, for example, by limiting the role of the executive body to shortlist candidates and transferring the authority to select the successful candidate to the plenary body, may have consequences and implications that should be carefully taken into account.

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