

ALTERNATIVE VOTING SYSTEMS IN INTERNATIONAL ORGANIZATIONS



AND THE BINDING TRIAD PROPOSAL TO IMPROVE U.N. GENERAL ASSEMBLY DECISION-TAKING

by

PAUL C. SZASZ

Published in May, 2001 by
Center for UN Reform Education
211 East 38th Street, Suite 1801
New York, NY 10017

Reprinted in August, 2007 by
Center for War/Peace Studies 330
East 38th Street, Suite 19Q
New York, NY 10016

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The design on the cover is a replica of a 1991 oil painting, "The Wings of Peace," by Richard Hudson, the originator of the Binding Triad Proposal and the first Executive Director of the Center for War/Peace Studies.

The triangle represents the three concurrent majority factors, which under the Binding Triad would make decisions legally binding, namely:

- (1) one-nation-one-vote (the same as now)
- (2) population
- (3) contributions to the regular UN budget.

A wingspan flying out of the Triad symbolizes the world of peace with justice that could be achieved under the Binding Triad decision-making system.

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**Originally published in May, 2001
(ISBN Number 1-881520-09-9)**

by

**Center for UN Reform Education
211 East 43rd Street, Suite 1801
New York, NY 10017
1-212-682-6958
www.centerforunreform.org**

**Reprinted in August 2007 by
Center for War/Peace Studies
330 East 38th Street, Suite 19Q
New York, NY 10016
1-212-490-6494
www.cwps.org**

About the Author

Paul C. Szasz (1929 – 2002) served for over forty years as a legal officer of the United Nations and its related organizations. He started his career in 1958 with the International Atomic Energy Agency (IAEA) in Vienna, as a legal and later as a safeguards officer. In 1966 he became an attorney in the International Bank for Reconstruction and Development (World Bank) in Washington, D.C., and Secretary of its International Centre for Settlement of Investment Disputes (ICSID). From 1971 he served in the Office of Legal Affairs of the United Nations in New York City, eventually becoming the Director of the General Legal Division and the Deputy to the UN Legal Counsel. At both the United Nations and the IAEA his responsibilities included the rules of procedure of the various organs and conferences of these organizations.



Soon after his retirement in 1989 from regular service with the United Nations, Mr. Szasz became Director (Legal) in the Office of the Special Representative of the Secretary-General for Namibia, in Windhoek. Later he became a consultant to the United Nations concerning various administrative matters and the UN Environment Programme (UNEP). From 1992 to 1995 he was the Legal Adviser of the International Conference on the Former Yugoslavia in Geneva. During 1996 and 1997 he served as a legal consultant to the International Civil Service Commission in New York and then as Acting Director of the Office of the UN Legal Counsel and Deputy to the Legal Counsel. After 1999 he was a consultant to the World Health Organization (WHO) on its “Tobacco Free Initiative”. From 1986 Paul Szasz taught as a Visiting Professor or Guest Lecturer at the Law Schools of Pace University, the University of California at Berkeley, Cornell University and the University of Georgia. He was also an Adjunct Professor at the New York University School of Law from 1991.

In addition Mr. Szasz was the author of over 140 studies on international law, particularly on the control of nuclear energy, outer space, the structure and administration of international organizations, the settlement of international disputes, the international legislative process, international environmental law and the UN’s role in Namibia and in the former Yugoslavia. He also participated in numerous international legal conferences, symposia, seminars and workshops and in particular since 1988, in the field of International Environmental Law.

Paul Szasz was born in 1929 in Vienna and lived in the United States after 1941 where he became a citizen. With a Bachelor of Science (BS) in Engineering Physics (Cornell 1952) and a Bachelor of Laws (LL.B), he earned a Specialization in International Affairs from Cornell in 1956. He clerked for Judge Elbert Tuttle at the U.S. Court of Appeals for the Fifth Circuit (1956-57) and studied as a Fulbright Scholar at the Europa Institute of the University of the Saarland in Saarbrücken (1957-58). Mr. Szasz was fluent in four languages: English, German, Hungarian and French.

The Role of the Center for UN Reform Education

The Center for UN Reform Education was founded in 1978 following a conference on UN reform at Villanova University. Subsequent conferences were held, inter alia, at the University of Chicago and New York University. The Center is funded by dues from member organizations, by grants from private foundations, and by tax deductible contributions and legacies from individual donors.

The Center does not endorse particular UN reform proposals. Its purpose in publishing this and all of its other monographs is to encourage and stimulate a thorough discussion of various ways to reform, improve and strengthen the UN system. The opinions expressed in this and all other monographs are those of the authors alone and do not necessarily reflect the views of the Center or of any of its affiliated organizations.

In recognition of the extensive experience of Paul C. Szasz in the United Nations and in so many parts of the UN system, we strongly urge every recipient of this monograph to read carefully the author's analysis and to debate and discuss the concepts put forth herein with their colleagues.

Walter Hoffmann, Executive Director
Center for UN Reform Education, May 2001

About the Center for War/Peace Studies

The Center for War/Peace Studies, a non-profit, tax-exempt U.S. organization incorporated in 1977, is a "think tank" located in the United Nations backyard. The central objective of the CW/PS is to establish an international political and legal system that will make possible the abolition of war.

Working on the premise that the present international decision-making system is obsolete, the CW/PS has developed the Binding Triad System for global decision-making. Under the Binding Triad concept, the U.N. General Assembly would be transformed from a powerless "Town Meeting of the World" into a genuine global legislature. Its decisions would require majorities on three "legs," based on the present one-nation-one-vote arrangement, population, and contributions to the regular U.N. budget, which are a rough measure of GNP.

From the website www.cwps.org August 2007

**Alternative Voting Systems in International Organizations and the Binding Triad
Proposal to Improve UN General Assembly Decision-Taking**

EXECUTIVE SUMMARY

The majority voting system set out in the UN Charter for the General Assembly and other political organs constituted an important advance over the unanimity principle that was used by the League of Nations. However, with decolonization and the rapid growth of the United Nations, the “One Member One Vote” (OMOV) rule soon allowed these bodies to be dominated by the large number of developing states; even though their economic and military power is negligible and their population often small, through sheer numbers they can readily outvote those states whose financial and technical contributions are essential to make the United Nations function. As a consequence, the UN General Assembly, the world’s principal political organ, has not been entrusted with serious responsibilities and can only somewhat indirectly foster the development of international law.

It has therefore been suggested that weighted voting, which is used in different forms in all international financial and certain other specialized organizations, should be introduced in suitable form into the General Assembly. After examining various possible weighting factors, only population and financial contributions to the UN commend themselves, though the raw data may have to be adapted for such use. This study analyses in particular the Binding Triad (BT) proposal that would give the Assembly the power to adopt international legislation, provided it does so by a voting system that requires majorities to be attained by votes calculated on the OMOV basis as well as by votes weighted according to population and UN contributions. A number of variations of this proposal are examined and it is concluded that while the BT proposal may not be adoptable in its precise original form, its study should stimulate much needed reform in the powers, decision-taking and even the composition of the General Assembly.

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GLOSSARY OF ACRONYMS

BT	Binding Triad proposal of the Center for War/Peace Studies
C/E	Council of Europe
COPUOS	Committee on the Peaceful Uses of Outer Space
CPC	Committee for Programme and Co-ordination
CTBT	Comprehensive Test Ban Treaty
CW/PS	Center for War/Peace Studies
DAC	Development Assistance Committee of OECD
EC	European Community
EU	European Union (the political manifestation of the EC)
FRY	Federal Republic of Yugoslavia
G-77	Group of 77 (the grouping of the developing states)
GA	General Assembly [of the United Nations]
GEF	Global Environmental Facility
IADB	Inter-American Development Bank
IBRD	International Bank for Reconstruction and Development (or World Bank)
ICJ	International Court of Justice (or World Court)
IFAD	International Fund for Agricultural Development
IFI	International Financial Institutions: the IMF, IBRD, IFAD, and the Regional Development Banks (e.g., IADB)
IGO	Intergovernmental Organization
ILO	International Labour Organization
IMF	International Monetary Fund
MIGA	Multilateral Investment Guarantee Agency (of the World Bank Group)
NAM	Non-Aligned Movement
NGO	Non-Governmental Organization
NNGO	National NGO
NPT	[Nuclear] Non-Proliferation Treaty
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OMOV	One-Member-One-Vote rule (as in GA under UN Charter Art. 18.1)
OPEC	Organization of Petroleum Exporting Countries

OSCE	Organization for Security and Co-operation in Europe
R/P	Rules of Procedure
SFRY	Socialist Federal Republic of Yugoslavia
UN	United Nations
UNCLOS	UN Conference on the Law of the Sea
UNCTAD	UN Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNWRA	UN Works and Relief Administration for Palestine Refugees in the Near East
US	United States [of America]
USSR	Union of Soviet Socialist Republics (or Soviet Union)
WFP	World Food Programme
WHO	World Health Organization

Alternative Voting Systems in International Organizations and the Binding Triad Proposal to Improve UN General Assembly Decision-Taking

Introduction

The General Assembly is the principal political organ not only of the United Nations but of the world community as a whole. Its annual agenda encompasses most of the significant problems that humanity faces, and even those that are not formally under consideration are now regularly reported to it by the sponsors of all significant international meetings or negotiations. Yet, there are two evident and related weaknesses of that central organ: (1) Except in respect of the management of the United Nations itself, the Assembly has no powers to take or to order actions, either by states and even by the one powerful UN organ — the Security Council; all the Assembly can do is to make recommendations, which are all too often disregarded; (2) The Assembly is required to take its decisions (whether by simple or by two-thirds majorities) on the basis of each member, large or small, powerful or weak, immensely rich or poverty-stricken, having exactly the same voting power; as a partial palliative to the absurd consequences of this unrealistic voting structure, under which the weightier states can (and often are) decisively outvoted by many smaller members, most significant decisions are now taken by consensus, which in effect constitutes a reversion to the unanimity system of the largely impotent League of Nations. It is clear that as long as the Assembly must function under this handicap, it will not be entrusted with significant powers and responsibilities.

The present study is designed primarily to examine what, if any, alternative voting systems could be considered for the UN General Assembly, taking into account that even at present many international organs function under different rules. In particular, the Binding Triad system is analyzed, which would confer some genuine legislative powers on the Assembly, provided that these powers are exercised under special weighted voting rules that would to some extent reflect the genuine differences among the nearly 200 members of the organization.

I. Development of Voting in International Governmental Organizations (IGOs) and International Conferences

When sovereigns or their representatives met in early conferences — practically always peace conferences — no genuine voting took place since no collective decisions could be taken whereby the conference could bind any unwilling or absent state. Rather, those that wished to take a decision, for example, to execute a treaty, did so, and those that did not wish to participate could not be required to do so — though evidently they might be induced to go along, by persuasion, promises or threats.

This too was true in early international organizations, such as river commissions and the original telecommunication and postal organizations. Though strictly procedural decisions could be taken by majority votes, any substantive ones required concurrence by all.¹ This arrangement is reflected in the Covenant of the League, which in Art. 5.1 stated that except as otherwise provided, “decisions at any meeting of the Assembly or of the Council shall require the agreement of all Members of the League represented at the meeting”, while Art. 5.2 stated that “All matters of procedure at meetings of the Assembly or of the Council ... may be decided by a majority of the Members of the League represented at the meeting”. Basically, this was the general rule until the end of the Second World War.

A. The UN General Assembly (UNGA)

At the end of the Second World War a new arrangement was introduced with the establishment of the United Nations, which was also reflected in most of the specialized agencies, in corresponding regional organizations, as well as in most international conferences. UN Charter Art. 18 provides, in respect of the General Assembly, in general terms that:

- (1) Each member of the Assembly has one vote — the one-member-one-vote (OMOV) rule;
- (2) Decisions on “important questions” require a two-thirds majority of the members present and voting;
- (3) Decisions on other questions require a simple majority of the members present and voting.

¹ See Robbie Sabel, *Procedure at International Conferences* (Cambridge U Press, 1997), section 1.0, p.7.

Numerous important details about the implementation of these general rules are discussed in section III below. Although these Charter-based rules are formally still in full force and effect, it should be pointed out (in anticipation of a more detailed discussion in section III D below), that an important practical shift has taken place in respect of many decisions: because of the “tyranny of the otherwise impotent majority” in the absence of any weighting rules, more and more international political decisions are now taken by “consensus”, i.e. by quasi-unanimity.

B. Other Current International Organs and Organizations

Although the UN General Assembly’s decision-making rules are, as indicated above, the model for most other organs and conferences in and outside the world organization, it is important to recognize that there are actually a great number of other voting rules in existence (the principal ones of which are summarized immediately below) — so that any argument based on the suggestion that those of the Assembly are necessarily sacred and immutable must fail.

1. Within the United Nations

a. The UN Security Council

The Council, as now constituted, has 15 members. All decisions require the affirmative votes of at least 9 members (i.e., 60%), and any that are not clearly procedural can be blocked by the negative vote of any of the 5 permanent members (the veto).²

b. The Economic and Social Council and the Trusteeship Council

These two Councils, of limited size, also follow the OMOV rule, but all decisions, substantive and procedural, are taken by a simple majority of those present and voting.³

c. The International Court of Justice

The ICJ consists of 15 individuals, though in a given case there may be somewhat more or fewer; its decisions are taken by a simple majority of those participating in the case (no abstentions are allowed), but if the vote is tied then the President of the Court has an additional “casting” vote.⁴

² UN Charter, Art. 27.

³Id., Arts. 67 and 89.

⁴ ICJ Statute, Art. 55.

2. International Financial Institutions (IFIs)

a. International Bank for Reconstruction and Development (IBRD) and International Monetary Fund (IMF)

In both the Bank and the Fund, each member's Governor is allocated a certain minimum number of votes, but the bulk of all the votes are allocated to Governors according to their state's respective capital subscriptions. Some twenty Executive Directors are appointed or elected,⁵ each by one or more Governors, and cast the votes allocated to these Governors; in other words, voting power is heavily weighted according to capital contributions.⁶ All operational decisions are taken by simple majorities, but certain important decisions require specified higher majorities, up to 100%.⁷ Some decisions require both a specified majority of the membership and a specified majority of votes, i.e. in effect, dual majorities.⁸ In both institutions, the executive head (Managing Director of the IMF, President of the IBRD) preside over the respective Executive Directors, and although not ordinarily entitled to vote, have a casting vote in case of an equal division.⁹

⁵ In the IMF, 5 Executive Directors are appointed, each by one of the largest contributors, and 15 are elected by the rest; in the IBRD, 5 Executive Directors are appointed and 19 are elected (of these, 4 are elected by a single member each).

⁶ In the IMF, all but about 2.13% of the votes are attributed to capital contributions; in the IBRD that figure is about 2.83%.

⁷ In the IMF, certain amendments to the Articles of Agreement that affect the rights of members directly require unanimity (IMF Articles of Agreement (A/A), Art. XXVIII(b)); some two dozen require 85% majorities (e.g., changes in quotas of members (id., Art. III.2(c)) and about as many require a 70% majority (e.g., authorization to agree on exchange rates for certain transactions (id., Art. XIX.7(b)), and all the rest a simple majority (id., Art. XII.5(c)). In the IBRD, also certain amendments to the Articles of Agreement require unanimity (IBRD A/A, Art. 8(b)); some require an 80% majority (e.g., increasing the number of Executive Directors (id., Art. 5.4(b)), a few require 75% (e.g., increases in the capital stock (id., Art. 2.2(b)), distribution of the assets of the Bank upon dissolution requires 66 2/3% (id., Art. 6.5(f)), and all the rest a simple majority (id., Art. 5.3(b)).

⁸ For example, expelling a member from the IMF requires a majority of the Governors having 85% of the total voting power (IMF A/A, Art. XXVI.2(c)); permanently suspending the operations of the IBRD requires the votes of a majority of the Governors having a majority of the total voting power (I A/A, Art. VI.5(b)).

⁹ IMF A/A, Art. XII.4(a); IBRD A/A, Art. 5.5(a).

b. Multilateral Investment Guarantee Agency (MIGA)

The members are divided into two categories, in effect developed and developing.¹⁰ Each member is allocated a certain minimum number of votes, but the bulk of all votes are allocated according to each member's holding of stock in the Agency;¹¹ however, special arrangements were made that during the first three years of MIGA's operation each category of members would have at least 40% of all the votes, and that thereafter voting parity will be preserved between the two categories.¹² Except as otherwise specified, all decisions require a simple majority of the votes cast,¹³ but about a dozen types of decisions¹⁴ require a "special majority" of two-thirds of the total voting power representing no less than 55% of the subscribed shares.¹⁵ The President of the World Bank has a casting vote in the Board.¹⁶

c. International Fund for Agricultural Development (IFAD)

IFAD has three categories of members: (I) developed (DAC) states; (II) OPEC states; and (III) other developing states.¹⁷ As originally designed, each of those three categories was allocated an equal number of votes; within categories I & II, the votes allocated to the category were reallocated to members in accordance with their capital contributions; within category III, the votes were equally divided among all its members.¹⁸ Subsequently, when in later replenishments the contributions of the category II states consistently fell below those of category I, the relative number of votes allocated to these two categories was adjusted.¹⁹

¹⁰ Convention Establishing MIGA, Schedule A.

¹¹ *Id.*, Art. 39(a).

¹² *Id.*, Art. 39(b) and (c); see also the official Commentary on the MIGA Convention, Part VI.

¹³ *Id.*, Art. 42(a).

¹⁴ E.g., increases in the capital stock (*id.*, Art. 5(c)).

¹⁵ *Id.*, Art. 3(d).

¹⁶ *Id.*, Art. 32(b).

¹⁷ See Schedule I, Part I, to the Agreement establishing IFAD.

The terms indicated in the text are not used in the Schedule or otherwise in the Agreement, but can be derived by examining the states listed in the several categories. By amendment of the Agreement these categories have been renamed A-C, and the latter is subdivided into three sub categories for Africa; Asia, Europe and the South Pacific; and Latin America and the Caribbean.

¹⁸ Schedule II, Parts I-III to the Agreement.

¹⁹ See Article 6.3 of the amended Agreement of 26 January 1995.

3. Commodity Organizations

Numerous “Commodity Organizations” operate with substantially the following voting system: The membership is divided between Producers and Consumers, each of which groups controls one half of the total votes; within each group the votes are allocated partly on an equal basis but largely according to the amount of the commodity that is exported or imported.²⁰ The adoption of proposals should normally be by consensus, but if that cannot be obtained, it requires a simple or qualified majority of all votes,²¹ with at least a specified minimum from each of the two groups.²²

4. International Labour Organisation (ILO)

In the ILO General Conference each member state is represented by a delegation of four: two governmental representatives, one chosen by the association of employers in the state and one by the principal labor union(s)²³; the Governing Body has a corresponding composition.²⁴ Each member of a delegation votes individually. Most decisions require a simple majority²⁵; some (e.g., the adoption of Conventions and Recommendations) two-thirds.²⁶

5. Organisation for Economic Co-operation and Development (OECD)

OECD takes practically all its decisions by unanimity²⁷; a member may, however, indicate that it is not interested in a

²⁰ For example, in respect of the 1989 International Agreement on Jute and Jute Products, see Article 10.

²¹ Jute Agreement (note 20), Art. 12.1.

²² For example, under Art. 2.8 of the 1989 Jute Agreement (note 20), a “special vote” is defined as: “a vote requiring at least two thirds of the votes cast by exporting members present and voting and at least two thirds of the votes cast by importing members present and voting, counted separately, on condition that these votes are cast by a majority of exporting members and by at least four importing members present and voting.” Such a vote is required for questions such as a decision of the Council to meet some place other than its headquarters, the appointment of the Executive Director, decisions on financing projects, etc.

²³ ILO Constitution, Art. 3.1.

²⁴ Id., Art. 7.1.

²⁵ Id., Art. 17.2.

²⁶ Id., Art. 19.2.

²⁷ Agreement establishing OECD, Art. 6.1.

particular decision, in which case it does not vote and is not bound by the decision.²⁸

6. European Organizations

a. Council of Europe (C/E)

In the Committee of [Foreign] Ministers, each has one vote²⁹; many important decisions require unanimity (i.e., no negative votes and at least a majority of all members)³⁰; many other decisions require a two-thirds majority of those voting and at least a majority of all the members.³¹ In the Consultative Assembly, members have varying numbers of representatives, from 3 to 18, who are elected by the respective national parliaments from among their members.³² Most important decisions require a two-thirds majority, but the Assembly may, by such a majority, specify different majorities for certain decisions.³³

b. European Community

(i) The Commission consists of two members each from the five largest states and one each from the others³⁴; in principle they are appointed by the collective decisions of the governments, but in practice the appointees of the respective governments are approved. Its decisions are taken by simple majority.³⁵

(ii) The Council consists of one minister from each member state (which minister depends on the subject under consideration by the Council). Though the basic rule is that the Council acts by a simple majority of its members³⁶, in fact special majorities are required for most decisions and for this purpose a number of votes are allocated from 10 to the four largest countries to 2 for the

²⁸ Id., Art. 6.2.

²⁹ Statute of the Council of Europe, Art. 14.

³⁰ Id., Art. 20(a); such decisions include recommendations made by the Committee of Ministers to all member governments, with a request that these report on compliance.

³¹ Id., Art. 20(d); such decisions include the adoption of the budget, of rules of procedure, and of administrative or financial regulations.

³² Id., Arts. 25 and 26.

³³ Id., Art. 29.

³⁴ 1965 Treaty Establishing a Single Council and a Single Commission of the European Communities, Art. 10.

³⁵ Id., Art. 17.

³⁶ Treaty Establishing the European Economic Community, Art. 148(1).

smallest (76 in all).³⁷ Depending on the subject, decisions require a simple majority, a qualified (i.e. 54 votes, or about 71%) majority, a qualified majority including the positive votes of at least half the members, or unanimity.³⁸

(iii) The European Parliament consists of directly elected representatives from each member state. The largest state (Germany) is allocated 99 seats, the smallest (Luxembourg) 6. In practice the elections take place along party lines and the elected parliamentarians are seated according to their respective parties rather than by nationality.³⁹ The majority requirements are exceedingly complex, ranging from simple to absolute to 2/3rds and 3/5th requirements, and sometimes dual requirements are set in terms of fractions of the entire membership and fractions of the number of votes cast.⁴⁰

c. Organization for Security and Co-operation in Europe (OSCE)

OSCE, which is derived from the Helsinki Accord, takes all its decisions, as did the negotiations leading to that Accord, by consensus.

II. Factors Relevant to the Decision-Taking Process

Before considering possible improvements that might be made in the decision-taking processes of the General Assembly, it may be useful to examine systematically the critical features of the above-described voting systems.

A. Allocation of Voting Powers Among Members

The most important characteristic of any set of voting rules in any organization, including international ones, is how voting power is allocated among the members. In most essentially political organizations, such as the United Nations on the world-wide level and organizations such as the Organization of American States (OAS) and the Organization of African Unity (OAU) on the regional one, the allocation is “one-member-one-vote” (OMOV); this is said to reflect the “sovereign equality of states”, a principle

³⁷ Id., Art. 148.2

³⁸ T.C. Hartley, *The Foundations of European Community Law* (Third Edition, 1994), pp. 19—23.

³⁹ Martin Westlake, *A Modern Guide to the European Parliament* (1994), Section 2.6, p. 88.

⁴⁰ Id., Table 5, pp. 261—63.

often explicitly set out in the constitutional instruments of such organizations (e.g., UN Charter Art. 2.1).

As pointed out above, there are, however, many IGOs that have a different distribution of votes. Among essentially political organizations, one can refer to the European ones, such as the Council of Europe and the European Union, in which voting power is carefully allocated to reflect (but not proportionally) the relative importance of the several members. These allocations result, of course, from extensive political bargaining whenever such an organization is first established, when important restructurings take place, and necessarily whenever new members are admitted. Often the starting point is equal voting power for the principal members, with the lesser ones receiving appropriately scaled down numbers. These arrangements reflect the fact that these European organizations have achieved a greater degree of maturity, or integration, than other regional or world-wide organizations, in part due to the greater homogeneity of their memberships.

The principal IFIs, the IBRD and the IMF, on the other hand are structured more along the lines of ordinary shareholder-owned corporations, in which each member receives votes in accordance with its investment; however, in both a slight adjustment is made, in that a small fraction of the voting power (in IMF, 2.13%; in IBRD, 2.83%) is not allocated to the capital shares, but is divided equally among all members — thus very slightly mitigating the harshness of pure investment-based voting strength, which would leave the poorer members essentially powerless. On the other hand, in certain IFIs, such as IFAD and in regional development banks (e.g., the Inter-American Development Bank -- IADB), the voting power is first of all divided (equally or in a specified proportion), between two or three groups of members (those presumed to have generally parallel economic interests, such as “developed” or “developing”), and within these groups the allocation may reflect respective investments.

Commodity organizations are rather simple types of IGOs, where the interests of the members in the organization can be said to be unidimensional, i.e. according to the quantity of the given commodity a given member exports or imports. It is therefore logical that, as pointed out above (pages 5 - 6), the voting power is divided first of all equally between groups of members that have these respective interests, and within each of these groups according to the degree of such interest.

B. Who Exercises a Member's Votes

In most political IGOs, such as the UN and most of its specialized agencies, and in most regional organizations such as OAS and OAU, member states are represented by diplomats accredited to the organization. These diplomats are, in effect, bureaucrats assigned temporarily or permanently to the foreign office (e.g., the US State Department).

In IFIs, generally, the Governors are Ministers of Finance or Directors of the Central Bank. The Executive Directors are individuals, five of whom are designated by the governments of the largest investors and the others (15 in the IMF, 19 in the IBRD) are elected by groups of the other members, who direct their votes and other actions; however, all Directors are paid by the organizations in which they serve.

In the International Labour Organisation (ILO), the two governmental representatives of each state are diplomats appointed by their governments, just as in the purely political IGOs; however, the employer and the employee representatives are chosen by national non-governmental organizations (NNGOs), i.e. by the principal groupings of employers and of labor unions in each member.

In the Committee of Ministers of the Council of Europe and in the Council of Ministers of the European Community the representatives are cabinet ministers: Foreign Ministers in the C/E and in some meetings of the EC Council, and other resource ministers depending on the nature of the particular EC Council meeting.

In the Parliamentary Assembly of the C/E, the representatives are members of their respective parliaments, chosen by those bodies. In the EC's European Parliament the representatives are directly elected by the voters in the respective member states, according to nationally determined electoral rules; as a matter of fact, these quinquennial elections have become some of the principal political events in Europe.

C. Majority Requirements for Various Decisions

The general majority rule in the organs of most political IGOs is that substantive decisions require a two-thirds majority of those casting votes, while procedural decisions — including decisions concerning what the applicable majority should be — are taken by simple majorities of those voting.⁴¹ Although it is possible to cast three types of votes: Yes, No or Abstention (and

⁴¹ For example in the UNGA, as required by Charter Art. 18.2-3.

sometimes it is also possible to be recorded as not voting or absent), only those representatives casting Yes or No votes are considered to have voted⁴²; Abstentions are, in effect, not considered as votes cast, and are thus for most purposes (except for lists of votes cast) assimilated to those who don't vote or are absent. For some particularly important votes (e.g., adoption of amendments to the UN Charter by the UN General Assembly) “absolute” majorities are required⁴³, i.e. majorities determined by counting the entire membership and not merely those who had cast Yes or No votes. In order to proceed to voting, a quorum of a majority of the members of the body must ordinarily be present, but it is not required that the number of Yes, No and Abstentions actually cast meet the quorum requirement. It follows from the above that in a 100—member body most substantive decisions could theoretically be adopted by just 2 Yes votes, 1 No vote and 97 Abstentions or non-voters — though of course such situations are more theoretical than real.

In most IFIs, as well as in a number of the above-mentioned European organs, certain decisions may require majorities other than just simple or two-thirds, i.e., as specified: 60%, 66 2/3%, 75%, 85%, 100% (unanimity).⁴⁴

Some organs (e.g., the EC Council of Ministers) require unanimity for certain fundamental decisions, and in some (e.g., OECD) practically all decisions require unanimity or consensus (OSCE). In the latter type of organizations the question of the voting power of each member does not arise, because each member's vote is required for a positive decision.

The UN Security Council presents a peculiar mixture of majority and unanimity requirements. On the one hand, every decision, procedural or substantive, requires at least 9 votes (60%); on the other, any substantive decision can be “vetoed” by the negative vote of any of the five permanent members of the Council.⁴⁵ It should also be noted that unlike in most other organs, where a decision as to the procedural or substantive nature of a question is itself a procedural matter, in the Security Council any

⁴² Rules of Procedure of the General Assembly (A/520/Rev.15), Rule 86.

⁴³ UN Charter, Art. 108.

⁴⁴ See pages 3-4, especially footnote 7.

⁴⁵ It should be noted that this “rule” actually represents a deviation from the clear language of UN Charter Article 27.3, which calls for all substantive decisions to be supported by the affirmative votes of all the permanent members — but by long-standing practice, an abstention by a permanent member is not considered as a veto.

decision to consider a question procedural is itself vetoable⁴⁶; this leads to the so-called “double veto”, when a permanent member first insists (by use of its veto) that a given question be considered as substantive, and then vetoes that decision.

D. Miscellaneous Voting-Related Rules

In many IGOs that are primarily financed by annually assessed contributions paid by members, those that fall over two years behind in paying their contributions (because of the peculiarities of when assessed contributions are considered overdue, this usually requires an actual deficit of three years’ worth of contributions) automatically lose their votes in at least the principal representative body.⁴⁷ Such vote can be restored automatically by making a sufficient payment, or by a vote of the body concerned if it is convinced that the failure to pay is beyond the control of the member.

Votes in most IGOs must ordinarily be cast in a meeting of the body concerned, and generally no proxy or other type of absentee voting is permitted. In most organizations, particularly in the IFIs, there are rules allowing certain decisions to be taken by correspondence.⁴⁸

In most mature international systems very few votes are actually taken. This does not mean that the above-described decision-making rules are meaningless, but rather that once such a system has been negotiated or renegotiated (and that is often a process that takes decades), it is generally easy to calculate what the outcome of a vote on any given proposed decision would be. Since, in the international political context there is usually little advantage in pushing unsuccessfully for a decision⁴⁹ if the portents

⁴⁶ This is not provided for in the UN Charter, but in the “San Francisco Declaration” issued by the conveners of the 1945 Conference on the United Nations.

⁴⁷ Under UN Charter Art. 19, the vote is lost merely in the GA; Art. XIX.A of the IAEA Statute specifies that members so delinquent “shall have no vote in the Agency”.

⁴⁸ In practically all organizations there are provisions for calling emergency meetings at a time sooner than the next scheduled meeting; for this purpose the membership is polled by correspondence (see UN Charter Article 20, final clause, and GA Rule of Procedure 9). In the IFIs urgent decisions are with some frequency required between the usual annual meetings of the Board of Governors, and therefore there are elaborate rules governing “Voting without Meeting” (e.g., IBRD A/A Art. 5.2(e), and By-Laws Section 12).

⁴⁹ There are occasional exceptions when a representative is not actually concerned with the views of the international community but is playing to some domestic audience — to show either that a real effort has been made to

are negative the proponents will either withdraw their proposal or continue negotiations until they can achieve the necessary majority; once that has been accomplished, there is no need to demonstrate that fact, and the chair of the body will usually just announce that it is understood that the proposal is acceptable. Thus in bodies like the Board of Governors of the IAEA (which basically follows the voting rules of the UN General Assembly) or the Executive Directors of the World Bank (pages 3 - 4), there were several decades in which not a single vote was called for. Naturally, this requires skillful management, generally involving long— established cooperation between the political leadership of the body and its secretariat. Incidentally, this process is often described as “consensus building”, but should be distinguished from those situations (described at pages 21 - 24) in which the rules require that “consensus” be achieved or at least striven for.

III. Description and Critique of the Current UNGA Voting Procedures

A. Allocation of Voting Powers

Even though every UN member is entitled to five representatives in the General Assembly⁵⁰, it only has one vote in the Assembly.⁵¹ Thus the General Assembly firmly adheres to the OMOV principle, which aside from being explicitly required by the Charter can also be said to be derived from the basic “principle of the sovereign equality of all [UN] Members”.⁵²

The right to vote is automatically suspended for a Member that is too far in arrears in the payment of its assessed financial contributions to the Organization, though the Assembly may restore the vote “if it is satisfied that the failure to pay is due to conditions beyond the control of the Member”.⁵³ The Assembly

accomplish a particular nationally popular goal, or to demonstrate the perceived hostility of the international community (vide Kirkpatrick’s almost blatant attempts during the mid-1980s to show Congress what a hostile environment the General Assembly was by continually insisting on bringing clearly losing proposals to a vote).

⁵⁰ UN Charter, Art. 9.2.

⁵¹ *Id.*, Art. 18.1.

⁵² *Id.*, Art. 2.1.

⁵³ *Id.*, Art 19.

has established a procedure for dealing with requests for restoration of votes, involving its Committee on Contributions.⁵⁴

Although suspension of the rights and privileges of membership under Charter Art. 5 has never yet taken place, these rights and privileges would presumably include that of voting in the Assembly. However, in effect the same result has been achieved in a very few instances (e.g., South Africa from the mid-70s until the introduction of a multi-racial government; the Federal Republic of Yugoslavia from 1992 to 2000), when the Assembly has refused to seat any delegation from a state even though there was no conflict between potential rival delegations. In a few instances when there has been such a conflict, which the Assembly was politically unable to resolve (e.g., the (Belgian) Congo immediately after its admission in 1960; Cambodia in the mid-'90s), neither of the rival delegations was seated and the Member was in effect deprived of a vote.

Critique: What is wrong or at least troublesome about these rules? It is evident that the greatest problem is that all members have the same vote, regardless of their size or “weight”. Take just one factor (though for democratic purposes probably the most important one), population: China in 1998 had a population of 1,255,698,000, while Nauru’s and Tuvalu’s was 11,000 each⁵⁵, a factorial discrepancy of some 114,154; thus in the General Assembly (and in many similarly structured organs in the UN System of IGOs) one Nauru or Tuvalu’s citizen’s vote was worth as much as that of over one hundred thousand Chinese. Expressed differently, the 14 smallest members of the United Nations whose cumulative population is just less than a million, could outvote China 14:1; more disturbingly, 126 countries whose total population amounts to less than 478 millions (38% of the population of China, 49% of that of India, and about 7% of that of the world as a whole) have votes totaling two-thirds of the membership of the Assembly and can adopt any resolution within the latter’s competence.

There is a similar discrepancy if one considers other factors, such as economic power. Although not as easily measurable as population, a fair approximation can be made by considering the UN’s assessment scale, which is somewhat indirectly derived from “ability to pay”. On that scale, the US is currently assessed 22.000% (just reduced from 25.000%), while 43

⁵⁴ GA Rule of Procedure 160.

⁵⁵ Most population figures are taken from the *United Nations Diary: 2001* and are based on official UN statistics; those of the states admitted during the year 2000 are taken from *The Statesman’s Yearbook 2001*.

of the poorest states are only assessed at the “floor rate” of 0.001% each⁵⁶ — leading to a factorial discrepancy of 22,000, almost as great as that in population. The 126 states that pay the lowest rates of contribution (maximum 0.059%) contribute a total of just over 1% to the United Nations, yet control sufficient votes to adopt any resolution.

The sole justification for this state of affairs is that the OMOV rule reflects the sovereign equality” of all UN members. But, in a sense that argument is circular, for the only manifestation of that equality is precisely that equality in voting power. The absurdity becomes clearer when considering what happens when a member of the United Nations splits: each of the resulting fragments ends up with a vote, even if these new states are in effect collectively weaker than the original one was. For example, when the Socialist Federal Republic of Yugoslavia (SFRY), a significant Balkan power, co-founder of the Non-Aligned Movement (NAM) and a leader of the Group of 77 (G-77), came apart in a series of fratricidal wars, it lost economic, political and military power, but ended up with five votes in the General Assembly (which might increase to still more if Kosovo and/or Montenegro split off from the FRY, or if Bosnia-Herzegovina should fragment further).

Finally, it should be noted that it is the OMOV rule that has been at least the largest factor in the drive towards consensus. Whatever the merits of that approach — and these and other aspects of consensus are discussed at pages 23 - 24 — to a considerable extent it represents a reversion to the pre-World War II unanimity principle whose abandonment marked the emergence of modern multinational intercourse.

B. Votes are Cast by Government Representatives

With the very infrequent exception that occurs when a Head of State or Government or a Foreign Minister personally sits in the General Assembly and casts his country’s votes, these are cast by designated representatives accredited to the Assembly or by alternates or experts included in the delegation. In the overwhelming number of cases all of these are diplomats, though in a few instances parliamentary representatives are included in delegations (e.g., the US almost always includes some US Senators and Representatives), or perhaps academic experts or NGO representatives.

⁵⁶ All assessment figures are those adopted for the year 2001 by A/RES/55/5 B, Annex II, of 23 December 2000.

But whoever is actually casting a member's vote in the General Assembly, that person is an instructed representative of his/her country, i.e. s/he casts votes according to instructions formulated somewhere in the government and ultimately issued by the Head of State or of Government. These instructions may be very precise and detailed, as are those issued by well organized countries with large foreign services and with excellent communications to their capitals so that any sudden developments in New York can be reported and new directions obtained; thus these representatives may have very little discretion in casting votes on even minor procedural issues, and none at all on major substantive ones. By contrast, in many smaller and less well-organized countries the representatives sent to the Assembly may possess most of the state's expertise on the United Nations and the problems it is considering, and they may thus receive only very general instructions: vote with the African group (or the OAU), or with the NAM or the G77 — and the tactical positions of these groups are determined in side meetings among the appropriate representatives that take place at the margins of the General Assembly throughout its sessions.

Critique: Although this classic means of representing states in international fora (adopted after the era passed when personal sovereigns might attend and represent themselves in international gatherings) seems natural and leads to a certain degree of coherence in the international positions taken by governments in various multinational bodies as well as in regional and bilateral negotiations, it is perhaps the principal factor in leading to the accusation of a “democratic deficit” in most international fora. The complaint in effect is that the persons who represent states in international fora are too distant from and not sufficiently accountable to the ordinary citizens of the country. Of course, in principle, in a democratic state, citizens vote for the executive and the legislature, and it is these who, through the usual bureaucratic mechanisms, formulate the policies that the state's representatives are instructed to carry out in international fora, such as the General Assembly. However, even in democratic states the ordinary citizen may feel too remote from the outcome of this process, and helpless to influence it; when a US citizen is unhappy about the position taken by his country internationally, does he write his Senators, the President, the Secretary of State or the Ambassador to the UN? Would any such appeals be effective?

That this state of affairs is not absolutely necessary is demonstrated by the two European parliamentary bodies: the C/E Parliamentary Assembly, which is composed of national parliamentarians elected by their own parliaments, and by the EC's European Parliament whose members have since 1979 been

elected directly by the voters in the EC members states. In both of these bodies, the representatives are seated not according to national delegations but in political party groupings (e.g., Christian Democrat; Socialist).⁵⁷

On the other hand, democratization through direct NGO representation in parliamentary bodies would not seem to be possible or desirable (except within very specialized situations such as that of ILO), for the reasons indicated at pages 40 and 41, below.

C. Majority requirements

1. Important and Specially Designated Questions

Decisions of the General Assembly on “important” questions require a 2/3rds majority of those “present and voting”. Since the Rules of Procedure define “present and voting”⁵⁸ as those casting an affirmative or a negative vote, while those abstaining are considered as not voting,⁵⁹ all that is required to meet this requirement is that there be at least twice as many Y votes than N votes; if there are no N votes, even a single Y vote technically meets the requirement. Though the presence of a majority of members is required for any decision to be taken,⁶⁰ it is not required that a majority participate in the voting for the decision to be valid.

It should be noted that the criterion leading to the requirement of a 2/3rds majority in the GA is that the decision relate to an “important” question.⁶¹ This is unusual, for in almost all similar bodies the criterion is that the question be “substantive”, rather than “procedural”. The Charter specifies that “important” questions include questions relating to peace and security, to the operation of the trusteeship system, and to the budget, as well as a number of very specific ones, such as the admission, suspension and expulsion of members.⁶² What is not clear — and has never yet been definitively settled — is whether questions that might be considered as inherently “important” even though they do not fall into any of the listed categories, require a 2/3rds majority.

⁵⁷ For the EC, see T.C. Hartley (note 38), pp. 30—31.

⁵⁸ UN Charter, Art. 18.2.

⁵⁹ GA R/P Rule 86.

⁶⁰ *Id.*, Rule 67 (second sentence).

⁶¹ U.N. Charter, Art. 18.2.

⁶² *Ibid.*

In addition, the Assembly can decide, by a simple majority, that decisions on “additional categories of questions” (i.e., other than “important” ones, or other than those listed in Art. 18.2) are also to require a 2/3rds majority.⁶³ Some such categories have been included in the Rules of Procedure,⁶⁴ and from time to time ad hoc decisions have been taken that a certain decision requires a 2/3rds majority — but no “categories” have ever been thus designated.

Critique: The unusual criterion of what is “important” is inherently much more difficult to define than what is “substantive”, as the former is a more subjective term. Consequently, there have been, from time to time, debates and even procedural votes as to whether a particular decision requires a 2/3rds vote — though in practice the issue arises only infrequently because most proposals either clearly have a 2/3rds support, or do not even command a majority.

2. Other questions

Decisions on all questions that are not deemed “important”, including the determination of additional categories of questions that are to require a 2/3rds majority, require only a simple majority of those present and voting. This means simply that there be more Yes votes than No votes — no matter how few there may be of either.

In practice this means that all “procedural” questions require only a simple majority. As these procedural questions include decisions as to whether a question is or is not “important” (such a decision may be taken directly, or on a challenge to a ruling of the President that a particular question is or is not important), it is theoretically possible for a bare majority to determine that a particular decision requires only a simple majority, no matter how “important” it may seem — unless the question is one that Art. 18.2 clearly identifies as important (e.g., the admission of new members).

Comment: Though in theory the type of manipulation discussed in the previous paragraph could take place, in practice the members of the General Assembly have proven to be

⁶³ Id., Art. 18.3.

⁶⁴ GA Rules of Procedure 15 (consideration of items added late to the agenda), 19 (adding agenda items during special sessions or emergency or special sessions), 81 (reconsideration of proposals).

sufficiently law conscious or fair-minded that there has rarely, if ever, been a clear misuse of this power.⁶⁵

3. Special Majority Requirements

Aside from the general provisions in Charter Art. 18.2 - 3 concerning majority requirements, there are a few special provisions scattered throughout the Charter that specify special majorities that are based not on those “present and voting” but rather on the total membership of the Organization.

Convening unplanned special sessions of the GA⁶⁶ and electing Judges of the International Court of Justice⁶⁷ requires an absolute simple majority of the Assembly. Amending the UN Charter⁶⁸ or convoking a Charter Review Conference⁶⁹ requires an absolute 2/3rds majority.

Although the Charter would not seem to allow the General Assembly to establish majority requirements other than those specified in the Charter,⁷⁰ the Security Council has in effect caused it to do so by providing in the Statutes of the ad hoc War Crimes Tribunals for Yugoslavia⁷¹ and Rwanda that their judges be elected by the same majority as required for ICJ judges.

4. Majority Requirements in Main Committees of the Assembly and in other Subsidiary Organs

The Rules of Procedure of the General Assembly specify that “Decisions of committees shall be taken by a majority of the members present and voting.”⁷² This rule applies to both the plenary Main Committees and to others, as well as to other

⁶⁵ This statement is of course a subjective one, as after many contested procedural decisions the losing party will claim a misuse while the prevailing one will assert the clear propriety of the decision.

⁶⁶ UN Charter, Art. 10.

⁶⁷ ICJ Statute, Art. 10.1. For this purpose the membership of the GA is expanded to include representatives of those non- member states that have become parties to the ICJ Statute (at this time, only Switzerland).

⁶⁸ UN Charter, Art. 108.

⁶⁹ Id., Art. 109.1.

⁷⁰ See Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955, p. 67

⁷¹ S/RES/827 (1993), Annex, Art 13.2(d).

⁷² GA R/P Rule 125.

subsidiary organs established by the Assembly⁷³ unless explicitly otherwise decided.

In adopting this rule the Assembly in effect decided that Charter Art. 18.2-3 are not applicable to its committees (including its plenary ones) and subsidiary organs. Though by itself this decision is not particularly significant — since all substantive decisions of the Main Committees are reviewed by the Assembly itself, using its own voting rules — it potentially raised the question of whether Charter Art. 18.1 (the OMOV rule) is necessarily applicable to Committees. In this connection it should be noted that even though Procedural Rule 124 specifies that “Each member of the committee shall have one vote”, it is not suggested that this rule is itself Charter—based. This question will be examined later, in connection with whether or not a Charter amendment would be required to introduce weighted voting (pages 56-57).

D. Consensus

1. Some definitions

Although none of the following terms are formally defined in the Rules of Procedure of the General Assembly, these terms are generally used in the senses indicated below:

- a. Acclamation: General, presumably unanimous approval, indicated by noise; usually used as a substitute for the election of a popular candidate running unopposed (if there is more than one candidate, there must be a formal, secret ballot)
- b. Unanimity: Approval by a vote in which no negative votes are cast — some argue there should also be no abstentions, but that is not the usual requirement. In some instances the chair may announce that he assumes that there is unanimous approval for a proposal, and if no one objects, unanimity may be recorded.
- c. Approval without a vote: The chair merely announces that he assumes that the proposal is approved — that is the normal way in which most proposals are accepted, unless there is a specific request for a vote; no unanimity is implied.
- d. Consensus: Though not defined or even mentioned in the GA Rules of Procedure, consensus has from time to time been defined in formal rules, to the effect that there is

⁷³ Id., Rule 161.

general agreement for the approval of a proposal and that no one is opposed to the adoption. The chair may announce that he understands that there is a consensus, and then call on those wishing to speak; even though some may indicate that they would prefer some changes, if none indicate that they oppose adoption, then consensus is attained.

e. General Agreement: A term used before “consensus” came into general use, and still having roughly the same meaning as that term.

2. The development and need for Consensus:

Even in the early days of the United Nations, when the Western states and their usual allies could easily assemble a 2/3rds majority, an attempt was often made to attain unanimity or at least general agreement, particularly for important proposals. This was done even though it might necessitate making some compromises and extending negotiations beyond what was necessary merely to attain adoption of a proposal; it was generally thought important to attain or preserve general international comity. On the other hand, when general agreement seemed out of reach, there was little hesitation about proceeding to a vote and then getting on to other business.

The political complexion of the General Assembly changed drastically in the early 1960s, with the admission of many newly decolonized states, mostly from Africa. With these admissions, and with the loosening of the Latin American states from the political control of the United States, the underdeveloped (later, more diplomatically called the “developing”) states, attained first a simple majority and then quickly a two-thirds majority in the General Assembly. Politically this majority became effective when these states organized themselves into two largely overlapping groupings: the political “Non-Aligned States” and the economic “Group of 77”.

From then on, starting with the mid-to-late 1960s, these states could force through any decision that they wished (and naturally could defeat any that they opposed). Many of these decisions led to resolutions on political matters such as decolonization and disarmament, or economic ones relating to development and the assistance to be granted therefore by the richer states (e.g., the Charter of Economic Rights and Duties of States⁷⁴) or even to legal matters relating to treaties on the succession of states (largely by decolonization⁷⁵) however, insofar

⁷⁴ A/RES/3281 (XXIX).

⁷⁵ 1978 Vienna Convention on the succession of States in respect of treaties.

as these resolutions amounted to no more than non-binding recommendations to member states (generally made under Charter Art. 10), they could be and were often ignored by many of these, leading to increasing frustration as ever-sharper resolutions were ever more frequently disregarded.

However, the developing states could also adopt decisions that could not as easily be frustrated: those relating to the structure and budget of the Organizations. A simple or a 2/3rds majority could create permanent or ad hoc organs, convene conferences, require reports, etc. They could also appropriate moneys for these purposes, including them in the budget of the Organization and assess them on all members, according to a scale of contributions approved by a 2/3rds majority of the Assembly.⁷⁶ Though these decisions could not be directly disregarded or fully frustrated by the Western states (the Eastern European or “Socialist” states more often than not, but not invariably, went along with the developing states), these did make it clear from time to time that there were some limits to what they would put up with in order to keep the Organization functioning.

By the mid-1970s it became clear that something had to give. The compromise worked out was that whenever the developing states were serious about wishing to develop a resolution that the others would not simply disregard, or about creating organs with which members in general would cooperate, they would have to try to secure general agreement for its terms. That process came to be called striving for general agreement or for consensus. Though never formally included in the Rules of the Assembly, it started making its appearance in the Rules of Procedure of conferences (e.g., UNCLOS III) and the practices of some subsidiary organs (e.g., the Committee on the Peaceful Uses of Outer Space — COPUOS).

3. Two types of Consensus Requirements

It is not generally recognized that consensus requirements can be agreed to or imposed in two subtly different ways that lead to important differences.

a. Consensus as the Sole Procedure

There are instances in which consensus (or the attainment of general agreement) is the sole decision-making device for a

⁷⁶ Strictly speaking, Charter Art. 18.2 does not specify that the scale of contributions requires a 2/3rds majority, but this has always been the practice.

particular body — such as COPUOS or the Conference on Disarmament. Those bodies can then only make any progress by negotiating a consensus, i.e. a decision that no member objects to adopting. As long as that cannot be done, the body must keep trying, for otherwise it is stuck on at least that particular issue. A deadlock may last for several sessions, for years, indeed for decades. It can reflect a fundamental disagreement between two groups of participants, but sometimes solely the principled or the idiosyncratic objection of a single member (e.g., that of India in the Conference on Disarmament on the Comprehensive Test Ban Treaty).

Though naturally various pressures can be exercised inside or outside the body to bring obdurate members into line, if and for as long as these are ineffective, the body may simply be unable to act. Evidently, therefore, such a procedure is not suitable for a body, like the General Assembly, which in any event must get certain items of business accomplished — e.g., the budget adopted, appointments made or approved, states elected to principal and subsidiary organs.⁷⁷

b. Consensus as the Preferred Procedure, but Backed up by the Possibility of Voting

As already mentioned, since the mid-1970s the General Assembly has been under increasing pressure to take important decisions by consensus; nevertheless, this is not required by any rule, so that any time the majority loses patience with an apparently unproductive negotiation it can be broken off and a vote taken — with all the formal and informal consequences thereof. Though not formalized in the Assembly itself, in establishing certain organs and especially conferences, the Assembly has specified that every effort must be made to achieve general agreement or consensus before there can be a resort to voting; for example, in the Rules of Procedure of the Third Conference on the Law of the Sea (UNCLOS III), an elaborate procedure was established that had to be followed before any vote could be

⁷⁷ It might be recalled that at the 19th session of the General Assembly in 1964 - 65, a crisis arose because the Soviet Union had fallen sufficiently far behind in the payment of its assessed contributions that it would automatically lose its vote in the Assembly; though the US was pushing for just that denouement, the USSR threatened to leave the Organizations if it were actually to be deprived of its vote, and the majority of members did not want this to happen - nor did they want to confront the US. Consequently, it was decided to reduce the session to only its most essential items of business, and to take all decisions without a vote. This was the one experience that the Assembly itself had with a self-imposed compulsory consensus rule — and it was by no means a satisfactory situation, or one that anyone would wish to repeat.

taken⁷⁸ — and indeed for many years all voting was avoided while the Conference slowly made progress, until at the very end the US forced a vote on the final treaty text.

Here the situation is quite different from that described at page 23. No single state or small group of states can blackmail the entire body by threatening to hold up all progress until satisfied on a particular point, for resort can always be had to voting to break any obstruction. In practice what this means is that unreasonable positions will not be pressed too far, so that negotiations don't get bogged down except on really vital issues. On the other hand, it is possible that at a certain point a political decision is taken by the leadership of the body, if backed by a sufficient majority, to override even fundamental objections of a small minority — as was done at the conclusion of the Rome Conference on the Statute of the International Criminal Court — and to proceed by general agreement if possible, but by a vote if necessary. In some instances, the very decision to proceed to a vote produces the long elusive consensus, for those who held up a voluntary agreement might not wish to be voted down in a showdown.

4. Evaluation of Consensus

a. Advantages

Although the need to achieve consensus in certain bodies or situations is sometimes decried as an unfortunate requirement, the consensus process arguably offers some important benefits.

The first is that the extensive negotiations often required to achieve consensus usually improve the text being negotiated.

In an attempt to achieve general agreement new ideas surface that would not have occurred had one merely made an attempt to achieve a text satisfactory to a minimal 2/3rds. Many times the improvement is an objective one — i.e. the negotiated text is clearly better than the initial unilateral one; in other cases the improvement is basically subjective, in making the text acceptable to states that could not have agreed to the initial version, without however spoiling it for those that would have preferred that text.

The most important advantage is that the text finally achieved is indeed acceptable to all members. Consequently, when adopted, it is apt to be complied with - which would not have been the case had the text been imposed on a number of unwilling

⁷⁸ UNCLOS III Rule of Procedure 37, A/CONF.62/30/Rev.1, reproduced in 13 I.L.M 1199, at 1205 (1974).

members. The very fact that proposals they have made have been incorporated in the consensus text may turn original opponents into supporters. Often states manage to convince others that the original version would for constitutional or political reasons be unacceptable unless certain matters were adjusted, and if that can and is done these obstacles disappear.

b. Disadvantages

There are two apparent disadvantages to a serious search for consensus, particularly if the initial positions of the members of a body are far apart.

The first is time. Serious negotiations may take a very long time, longer than many impatient members may consider necessary. Indeed, if the attainment of consensus is actually required and voting cannot be resorted to at all, the body may be blocked completely or for long periods — as has been true of both COPUOS and the Conference on Disarmament. But even if the possibility of voting has been maintained as a sort of ultimate weapon, before that weapon can be deployed or at least effectively threatened much time may be wasted — at least in the subjective view of those wishing to move on.

The second disadvantage is the so-called “least common denominator” factor. In order to achieve general agreement it may be necessary to water down a text, until from the point of view of at least its more extreme supporters it loses much of its original value. Evidently, it is always a subjective question whether the advantage of having achieved general agreement and the expectation of general compliance is outweighed by the apparent weakening of a bold proposal.

E. Types of General Assembly Decisions

While as a formal matter, all General Assembly decisions (which are either expressed as Resolutions whose text has been carefully examined and adopted, or as Decisions that merely reflect an agreed, usually procedural conclusion) are alike, their legal effect may be quite different.

1. Recommendations

The great bulk of General Assembly decisions merely constitute, in whole or in large part, recommendations to UN members, sometimes even to non-member states, to other IGOs, and to other principal political organs of the Organization. Except for the “specialized agencies” of the UN System, which are bound by the Charter or by their Relationship Agreements with the United Nations to at least take serious account of such recommendations, there generally is no legal compulsion to do so. It can, of course,

be argued that the members of the UN, having endowed the General Assembly with the power to make recommendations to them,⁷⁹ have thereby obliged themselves to take at least good faith account of recommendations that have been made.

A certain number of General Assembly resolutions are cast in a particularly solemn form, such as the 1948 Universal Declaration of Human Rights.⁸⁰ These resolutions are usually carefully negotiated and generally adopted by unanimity or by consensus, and by their titles or texts indicate their importance, and there is consequently a general expectation that they will be observed and complied with. To the extent that this actually occurs — often because these texts are then incorporated into other resolutions, into treaties and into domestic legislation — they or at least essential parts of them, may gradually attain the status of customary international law and thus become binding on all states and other actors in the international community.

From time to time the General Assembly adopts the text of a treaty and then recommends to the membership that they take the necessary steps to become parties to it; sometimes, such treaty is actually adopted within another body, such as by an Assembly—convened diplomatic conference (e.g., the Rome Conference on the Statute of the International Criminal Court), and is then commended to the membership by the Assembly. As these multilateral treaties are the principal means by which international law advances, and has indeed advanced very rapidly in the past decades, these recommendations are of particular importance to the development of international law. These treaties of course constitute binding international law, but only in respect of the states that have become parties to them. (See pages 41 and 42)

2. Organizational Decisions

Many resolutions of the General Assembly relate, in whole or in part, to the structure or operations of the organization. Thus the Assembly can admit, suspend or expel members, elect some or all of the members of the other principal organs, appoint the Secretary-General, appoint or approve the appointment of various senior officials (e.g., the High Commissioner of Refugees, the High Commissioner for Human Rights, etc.), establish subsidiary organs, convene conferences, adopt the budget, etc. All these decisions are binding within the organization, as are instructions addressed to the Secretary-General (under Charter Article 98). Decisions relating to the terms of service of the staff of the United

⁷⁹ UN Charter, Art 10.

⁸⁰ A/RES/217 A (III).

Nations may be binding not only in respect of these, but because of the mechanism of the “common system of staff administration” also govern the staffs of many of the specialized and related agencies.

It should be noted that a certain number of these decisions, such as those relating to the organization’s membership,⁸¹ the election of ICJ Judges⁸² and the appointment of the Secretary-General,⁸³ are ones that can only be taken with the collaboration of or on the recommendation of the Security Council.⁸⁴

3. Assessment of Contributions

Once the General Assembly adopts the Regular Budget of the United Nations, or the budget for certain peace-keeping missions, it divides the resulting cost among all the members of the organization according to scales of assessments that are also negotiated within and adopted by the Assembly.⁸⁵ These assessments then become legal obligations on each member. Though it is also provided that members that fall too far in arrears in the payment of their assessments lose their votes in the Assembly,⁸⁶ this penalty in no way diminishes the international legal obligation of members to pay their full assessments.

4. Amendments of the Charter

The General Assembly, voting by a 2/3rds majority of the entire membership, is empowered to adopt amendments of the UN Charter.⁸⁷ These amendments enter into force for all members, when they have been ratified by 2/3rds of them, including also all the permanent members of the Security Council.⁸⁸ Thus even non-consenting members (except, of course the permanent members of the Council) can be bound by a Charter amendment with which they disagree.

⁸¹ UN Charter, Arts. 4, 5 and 6.

⁸² ICJ Statute, Arts. 8—12.

⁸³ UN Charter, Art. 97.

⁸⁴ The ICJ held in an Advisory Opinion on the Admission of New Members, that the “recommendation” of the Security Council required by Charter Article 4, is one that must be heeded, i.e. that the Assembly cannot act against or without such a recommendation, though it need not necessarily take an action recommended to it (*Competence of the General Assembly for the Admission of a State to the United Nations*, I.C.J. Reports 1950, p. 4).

⁸⁵ UN Charter, Art 17 2.

⁸⁶ Id., Art. 19.

⁸⁷ Id., Art 108

⁸⁸ Ibid.

Whether or not a non-consenting member could escape from being so bound by withdrawing from the United Nations, is not clear, as the Charter is entirely silent on the possibility of any withdrawals, and the organization's practice is inconclusive.

Up to now the several amendments to the Charter have only accomplished increases in the size of the Security Council or of the Economic and Social Council. Whether or not the Charter amendment procedure could be used to impose new substantive obligations on members — e.g., could the Non-Proliferation Treaty be adopted as a Charter amendment?— has not been explored and is not clear (see pages 57 - 58)

IV. Weighted Voting

A. The Theoretical Considerations

The argument for weighting votes in the General Assembly is simple: a body in which there is such a discrepancy between the equal voting power of all members as is called for by OMOV, and the relative significance of states as measured by other factors, such as population, economic power (perhaps measured by rate of assessed contributions) or military power (difficult to quantify, but still very real), cannot and will not be taken seriously. This is most easily observed when comparing the amount of money that the United Nations is allowed to handle (even if including both budgets based on assessed, as well as those based on voluntary contributions) with those allocated to the IFIs, in particular the World Bank and the IMF.⁸⁹ This difference suggests both the greater material impact that the latter have and the relative trust that the financially strong countries have in these differently governed organizations. Though the developing countries continue to decry this state of affairs, and to demand either that governmental assistance be channeled through the more “democratic” UN or that the voting system of the IFIs be changed, it is clear that in the world as it is no such changes will take place.

There are those who insist that the ONOV principle is indeed the democratic one, sometimes misleadingly analogizing to the one-person-one-vote rule in democratic countries and societies. However, this analogy is clearly misleading, as the US Supreme Court pointed out in striking down systems whereby in many US States all counties, both underpopulated rural ones and populous urban ones, had the same voting power in the State legislature; the

⁸⁹ This is illustrated by the fact that the Global Environmental Facility (GEF), through which several environmental agreements and activities are financed, was placed largely under the care of the World Bank rather than under UNEP or some other body taking decisions by OMOV, as the developing countries wished.

Court held that it is not stones and trees whose voting power must be equated, but that of people.⁹⁰ There is no reason to consider that what is conceptually true nationally should not also be valid internationally.

Indeed, the principal — indeed the sole — argument for OMOV is the concept of the sovereign equality of states, on which the UN and other similar IGOs are allegedly based.⁹¹ But adherence to this principle is not complete: The five permanent members of the Security Council not only enjoy that position, as well as permanent membership on the Trusteeship Council (and by an informal gentlemen’s agreement also on ECOSOC and the World Court), but also enjoy the right of veto in the Security Council and over the entry into force of Charter amendments.⁹² Thus do the realities of power (even though somewhat frozen in time) intrude on the alleged sanctity of “sovereign equality”.

B. Criteria for Selecting Weighting Factors

Even if it were generally accepted that some form of weighted voting is necessary before the General Assembly can be entrusted with serious responsibilities — and of course those that benefit from the present system are generally unwilling to make that concession, even conceptually — it is still useful to decide what a proper weighting factor would be.

Although considerations such as those discussed in the previous section suggest that population is the obvious and indeed the sole proper weighting factor, that too would not correspond to current realities. Taken literally, it would mean that China and India, together, would control almost 40% of the votes — certainly enough to constitute a “blocking minority” for any important question (see pages 37 - 38), and with only a few allies sufficient for at least a simple majority. Not only would such an arrangement not correspond to reality, it would clearly be unacceptable to all except perhaps these two states.

On the other hand, the voting formula of the IFIs, based almost purely on capital contribution or investment, may be satisfactory or at least acceptable for those rather narrowly focused IGOs, it would not be proper for a broad-gauged one like the United Nations.

It is thus necessary to consider what factor should properly be taken into account in allocating voting power in an organ like

⁹⁰ *Reynolds v. Sims*, 377 U.S. 533, at 580—81 (1964).

⁹¹ E.g., UN Charter, Art. 2.1.

⁹² *Id.*, Art. 108, final clause.

the General Assembly. Indeed, since it appears unlikely that any single factor will do, the question is what factors should be taken into account — and also how several factors could be combined to lead to an acceptable voting formula.

Before concentrating on particular factors, it may, however, be useful to consider some criteria that any factor selected for this purpose should fulfill.

1. Ease of Calculation

Unless one wishes to allocate voting power purely subjectively, i.e. by a political negotiating process, it would be best to choose some factor(s) that can be measured with some ease and without undue controversy.

2. Relevance to the Particular IGO

Although some factors would be relatively easy to establish with considerable precision, such as the land area of each UN member, such data would not be of any relevance in respect of the work or operations of the organization. Presumably nobody, except perhaps the Russian Federation or Canada, would argue that voting power should be related to that factor.

3. Benevolence of the Factor

Even if military strength — or some aspect, such as number of nuclear bombs — could be readily measured, it would not be desirable to make voting power depend on a factor that at least some states could readily increase to the detriment of international security. Contrariwise it might make sense to stimulate a factor such as contributions to the United Nations or for some other benevolent purpose — as long as precautions are taken to prevent outright vote buying.

C. Examination of Potential Factors to Determine Voting Power

Taking into account criteria such as those just discussed, what weighting factors would it make sense to consider, individually or together, and perhaps in some combination with OMOV, as bases for establishing voting power in the General Assembly?

1. Population

Population would seem, from several points of view, to be an indispensable and logical factor in determining voting strength. It is of direct relevance in the structuring of most democratic societies, and it is relatively easy to establish with some precision.

Its principal drawback, as discussed above, is that in at least the present state of the world community, gross population figures would not be acceptable to most countries for this purpose. A minor drawback, by comparison, would be the undesirability of stimulating competitive population growth -- though it would seem rather unlikely that many states would adjust their population policies for the long-range purpose of gaining voting power in the General Assembly.

In principle one might consider instead of total population figures, some modification thereof, such as counting only literate persons, or by factoring education into the count by weighting each person by number of years of completed schooling. Though theoretically this might make sense, and could perhaps even be calculated — though such data would evidently be far more difficult to secure on a reliable basis than raw population figures — distribution of voting power on such a basis would almost surely be considered discriminatory and therefore unacceptable, no matter how logical it might seem.

A different, essentially mathematical type of modification of raw population data might also be considered to make them more acceptable and usable for voting calculations; this is discussed at pages 33 - 35.

2. Military Power

Though in the real world military power is clearly of significance in determining the respective significance of countries, its use for the purpose of determining voting power would clearly be unacceptable. Aside from the practical difficulty in agreeing on measures of military strength and of actually making a count (though the possibility of states revealing all their hidden weapons might be considered as a desirable byproduct), the undesirability of stimulating an arms race for any purpose, by thus directly rewarding such a factor, is contrary to all human instincts and to the declared peace making and sustaining role of the United Nations.

3. Economic Power

Again, although economic power is clearly important in determining the relative significance of states in the international community, the direct use of that factor would appear only somewhat less desirable and practical than using military power as a measure of voting strength. However, a derivative of economic power, namely contributions to the international community, may be a very proper factor for this purpose, and is discussed next.

4. Contributions to the United Nations

One factor that it is very easy to measure precisely and that one would wish by all means to stimulate is that of contributions to the organization. Because of the way assessed contributions are calculated, on a conceptual “ability to pay” basis, such a measure would also be relatively closely coupled to economic power and in a sense serve as a surrogate for it.

Before discussing any drawbacks of this possible measure, it may be useful to consider some variants. One is whether account should only be taken of assessed contributions to the Regular Budget, or also of the recently much larger assessments to the peace-keeping budgets, which are calculated on a somewhat different scale. Should account be taken of voluntary contributions — which again are larger than those assessed for the Regular Budget? Finally, should account be taken only of what is assessed (or voluntarily pledged), or should account be taken only of actual payments — which may vary from the assessment because of willful withholdings or because of genuine inability to pay?

The principal conceptual objection to basing voting power on financial contributions is the, perhaps essentially emotional, reluctance to reward riches with explicitly greater political influence. If account is also to be taken of voluntary contributions, then there may even be accusations of vote-buying—even though, on the other hand, anything that stimulates contributions to the organization and its work should be welcomed. To lessen such an objection, and also to prevent frequent large adjustments in voting power, one might consider using voluntary contributions averaged over a longish period, and perhaps multiplied by a fractional factor that would somewhat diminish their significance compared to the assessed payments.

Finally, as was suggested in respect of population data, some essentially mathematical type of modification of plain contribution figures might also be considered to make them more acceptable and usable for voting calculations; this is discussed at pages 33-35.

5. Territory

The territory of countries is nowadays relatively easy to measure and tends to be invariant. Nevertheless, the use of this factor for allocating votes would clearly not be sensible or acceptable.

6. Democracy

Some thought has been given over the years to the possibility of encouraging democracy in member states, or rather

to discouraging anti-democratic tendencies, by allowing only such governments to act in the General Assembly as can be said to democratically represent the population or the citizens of the state. For years this was an evident non-starter, because so many UN members were not ruled democratically; with the spread of democracy in the past two decades, one has come closer to a majority of democratically ruled states. However, any plans to punish or discipline undemocratic ones, have always been based on the assumption that their representatives would simply be temporarily excluded from the Assembly — which was, in effect done to South Africa under its apartheid regime.

Attractive as it might theoretically seem to diminish by some factor the voting power in the Assembly of undemocratically ruled states, it is not difficult to see why this would be entirely impractical. Aside from the unlikelihood of ever agreeing to the principle, how would the quality of democracy in a country ever be reduced to a usable factor. (For example, would the inordinate influence of lobbying money in the US suggest that it should exercise only 90% of the votes otherwise due to it?)

D. Massaging the Data

1. Compressing the Scales

Having determined, on the basis of the above analysis, that population and contributions to the UN (however calculated) are probably the optimum and possibly the only practical factors to determine voting power in the General Assembly, the question is how this data can be converted into figures usable in voting formulae.

The principal immediate problem is that the straightforward use of either population or contribution figures yields what is probably an unacceptable spread between the highest and the lowest figures, or in other words it gives an unreasonably high voting power to one or two top states in each category. On the basis of population China would receive 21.5% of the votes, or 114,154 times as many votes as the least populous states, Nauru and Tuvalu; India would receive 16.6% of the votes, or 88,267 times as many as Nauru or Tuvalu. The ratios are almost as bad on the basis of assessed contributions; using the newly adopted scale, the US would receive 22.0% of the votes or 22,000 times as many as each of 37 least contributing states; Japan would receive 19.629% of the votes, or 19,629 times as many as each of the smallest contributors. Although mathematically precise, it seems apparent that such large discrepancies would not be acceptable, on any basis, to the great majority of members.

A rather simple solution would be just to cap some of these top figures, say at 15% of all the votes based respectively on population or on contributions. This is clearly an arbitrary figure, and some other cap could be chosen, and it is of course not necessary that the cap for the two factors be the same. If lower caps are chosen, more and more of the top countries in each category would be limited — but the ratios between the voting strength of the top countries and the bottom ones would still remain in the order of at least 10,000:1.

There are, however, other ways of compressing the scales, and to do so more equitably than merely setting an arbitrary cap that applies to just a few states. For example, one could use the square roots of the basic data. In case of population, this would reduce the factor for China from about 1,256 millions to 35.4 thousand, compared to Nauru's reduction from 11,000 to 105 — or a more comprehensible ratio of only 341:1. The overall fraction of the votes that China would command would be only about 5.4%, compared to India's 4.6%, the US's 2.5% and Nauru's 0.02%. On the contributions scale, the US factor would be reduced from 22,000 to 148, compared to 1 for the smallest contributors. Naturally, other roots, such as cube roots, could also be used, leading to even further compression — though always maintaining the same order of voting strength, from largest to smallest. Compression could also be achieved by the use of logarithmic and other functions.

It should be noted that in a somewhat comparable body, the EC European Parliament, a similar type of compression of scales is used. Germany's population (80 million) is almost exactly 200 times that of Luxembourg (.4 million); however, in the European Parliament Germany has 99 seats and Luxembourg 6, a ratio of just 16.5:1. The square root of 200 is about 14.1.

2. Combining Scales

Assuming that one wishes to select more than one of the possible factors to determine voting power in the General Assembly, how can these factors be combined? One could, of course pick several factors, such as population and contributions, allocate a specified percentage of the total number of votes on the basis of each of these, and then simply construct a combined scale by addition. For example, assuming that one decides to use just two factors: population and contributions, and to allocate an equal number of votes to each, then if China is entitled, using an uncompressed scale, to 21.5% of the population votes and 1.5% of the contributions votes, it could receive overall the average of these, or some 11.5% of the votes; similarly the US would receive 5.2% of the population votes and 22% of the contribution votes, or

an average of 13.6%. The advantage of this calculation is simplicity; the objection is the conceptual one of appearing to add apples and oranges (which of course in real life is often done when calculating the number of pieces of fruit). In this connection it should be noted that in the IBRD and the IMF one in effect combines two voting factors to obtain a single number for voting power: about 2.5% of the voting power is allocated on the basis of 250 votes per member; the rest are distributed according to respective capital investments; the two figures are added to yield a single number for each member.⁹³

Alternatively, one could keep the scales entirely apart by calculating the number of votes cast separately by each factor and establishing separate majority requirements for each. In effect, one would act as if there were separate “chambers” for each voting factor, in each of which votes are taken and calculated separately — and to take a decision a specified majority (not necessarily the same) would have to be attained in each chamber.

Both methods are feasible, with the first one arguably simpler, because each member has only a single figure for its voting power and only a single set of majority requirements is required for each type of decision.

E. Implementation of Weighting

Assuming that political agreement can be reached on some form of weighting of votes in the General Assembly - how can this be implemented in practice? In particular, how could several forms of weighting be effectuated?

1. Single Weighting

Assuming that agreement can be reached on introducing only a single type of weighting, let us say by population, how could this be accomplished in practice? There are several methods:

The first, and most obvious, is to adjust the membership of the body, i.e. the General Assembly, so that states that have the lowest number of votes according to the agreed weighting system have one or a few representatives each, while states that are entitled to more than one vote would have correspondingly more. This, in effect, is the method used for both the C/E Parliamentary Assembly and in the EC’s European Parliament; it is also the method used for the US House of Representatives. In adapting it to the General Assembly there would, however, be some complications. In the first place, it would require rounding off

⁹³ See pages 4 and 9.

voting power to the nearest integer, which would in itself lose differentiation between many states whose populations are close but not equal. The principal difficulty, however, would be that such a formula would almost inevitably lead to a body of very large size. For example, if Nauru is to have 1 representative, then China, even using a compressed scale (by square roots) would be entitled to 341 - and the entire Assembly would have to have about 6,600. Although this difficulty might be overcome by requiring several of the smallest states to combine with others for a single representative (such as in the World Bank, where all but the largest members must combine with others to elect Executive Directors), there is another objection. Unless arrangements were made for electing the members directly (as in the European Parliament) or at least indirectly (as in the C/E Parliamentary Assembly), there would be no point in having multiple representatives from one country all appointed by the same government, with presumably the same voting instructions.

The obvious answer is to have each member still represented by a single person, who would be entitled to cast multiple (or fractional) votes according to the state's allocated voting power. Though that might appear invidious, it is the procedure followed in the IFIs, and the use of voting machines and computers means that such a procedure need not delay the taking of votes no matter to how many decimal places voting power is calculated.

Pending the adoption of the probably necessary Charter amendment (but see pages 56 - 57) to introduce weighted voting, it is possible (indeed it is already being done) to achieve a very rough approximation of weighted voting by establishing subsidiary bodies in which the members with heavy voting power are always represented, while lesser members only occasionally find a seat, and to require by procedural rules that various types of decisions must first be approved by these bodies before they can be considered by the Plenary GA.⁹⁴

⁹⁴ In effect, this was done in a compromise reached in 1986 in connection with the adoption of the budget by the General Assembly. Instead of trying to weigh votes as the "Kassebaum Amendment" (to the US law appropriating funds to the UN) would have required, and which the State Department deemed to be both politically and legally impossible to introduce, the Assembly decided that the budget would at some stage, before reaching the "Plenary" Assembly itself, have to be approved by the 34-member Committee for Programme and Coordination (CPC), on which the US and other large contributors are always represented, and that that body would continue to act by consensus (UNGA resolution 41/213 of 19 December 1986, part II.) Thus, without formally changing the voting rules of the Assembly, which might have been constitutionally questionable, in effect a veto power was given to each of the

2. Multiple Weightings

If voting power is to be based on multiple weightings, its implementation is likely to be somewhat more complicated.

The immediately apparent solution is to introduce separate chambers for each type of weighting — much as the Great Compromise in Philadelphia led to the establishment of a Congress of two Houses.⁹⁵ In each of these chambers then the weighting of votes would be accomplished as discussed in the immediately preceding section.

However, again, as long as all representatives are appointed by national governments (rather than elected on some basis by one or more constituencies), there really is no point in multiple chambers just to accommodate the need for voting by multiple weightings. It would be just as easy to have a single national representative cast votes based on different weightings, because presumably the sense of each of these votes would be the same, conforming to the same instructions.

The question then becomes, as explored on pages 34 - 35, how to combine votes based on different weighting systems. While conceptually it is possible to combine such votes in a single scale (by deciding how much weight each of those weightings should have — e.g., should the population weighted vote count as much as the contribution weighted vote), and specify the majority requirements for that scale, there are also some advantages in simply maintaining each voting scale separately. This is particularly so if one of the scales is meant to preserve the OMOV rule.

V. Determining Majority Requirements

It is not always realized that the majority requirements established for any political body have a dual function — one explicit, one implicit. The explicit function is to specify the degree of positive support that a proposal should have in order to be adopted. The more significant the proposal is, for example the establishment of rules that are to bind all the members of the body, the greater the degree of support should be.

The other side of the coin is that a majority requirement in effect determines how great a minority must be in order to be able to block a proposal that is unacceptable to that minority. In many

largest contributors — as well as to each of the other members of the CPC elected from the general membership.

⁹⁵ Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (1966), Ch. XV, p. 185.

bodies (such as the UN General Assembly as it is now constituted) that minority must be just over one-third to be certain of being able to prevent adoption of an “important” proposal. The same is true in the US Congress when the question is on overriding a Presidential veto, or in the US Senate on ratification of an international treaty; however, when it comes to maintaining a filibuster under current Senate rules, 41 of the 100 Senators are required to block a closure motion.

In the IFIs this function of the majority requirement becomes very explicit. By seeing that majorities of 60%, 66 2/3%, 80%, 85% or 100% are required for certain decisions,⁹⁶ it is possible to calculate who is being protected. If the requirement is very high, some states may individually be able to block approval; as the majority requirement is decreased, fewer and fewer states will individually have a blocking minority — perhaps ultimately only the US and only for the most important decisions;⁹⁷ with still further decreases there will have to be more and more complicated coalitions of members that will have the power to block a decision.

If due to a weighting system certain members of the General Assembly will be granted large numbers of votes, then the question in setting the majorities requirements becomes: which and how many states will it take to be able to block action. Presumably, one would try to avoid setting any majority requirements so high that one or only a very few states will be able to do so. That, in turn will evidently depend on the weighting system. Consequently, the establishment of weighting formulae for votes and the setting of majority requirements in respect of those votes are closely interlinked political decisions whose successful negotiation is likely to become a make-or-break issue for any reforms along the lines here contemplated.

In this connection account must also be taken of the fact that conditions are likely to change over time, especially over long periods of time. Politicians are likely to make constitutional decisions based on current conditions that to them seem immutable. For example, the General Assembly was originally established in 1945 on the implicit assumption that the then existing political lineup would remain largely unchanged: that Western Europe would command about 20 of the 51 votes in the

⁹⁶ Page 4, footnote 7 and 8.

⁹⁷ Although over time the US relative contribution to the Bretton Woods institutions has gradually decreased, it is still over 15% in the IMF and the World Bank, enabling it, and it alone, to block decisions requiring an 85% majority (see page 4, notes 7 and 8).

Assembly and would thus always have a blocking minority on important questions; so would the United States, which it was assumed would be able to control the approximately 20 Latin American votes; between them, these two blocks had sufficient votes to adopt any proposal in the majority of instances when they agreed; if they disagreed, nothing could be done, except by negotiations. Within less than twenty years, this cozy formula was demolished by the rapid admission of some eighty newly decolonized states and the not unrelated detachment of the Latin Americans from the US. Similarly, in the Security Council, China, a secure Western ally, by 1949 became one of the Soviet Union, and then non-aligned; only desperate maneuverings delayed the direct impact of this on the United Nations until 1971. In other words, cautious diplomats will want to build wide margins of safety into any blocking minority calculations.

VI. Selection of Representatives

A. Official Representatives

Subsection B on page 10 discussed the various types of persons who can represent a state in an international organ. The question is whether there is any point in considering an alteration in the present system, whereby in the UNGA representatives are all appointed government representatives, for the most part professional diplomats, who negotiate and vote under the instruction of the respective Head of State or Government or Foreign Minister.

The principal reason for considering some change is in the perceived “democratic deficit” in many international organizations, including the United Nations. As pointed out above, that term means different things to different people, but in particular that the representatives in these organizations are too distant from the citizens of the member states, even of thoroughly democratic ones.

In the European context this problem was perceived and dealt with much earlier, evolving in two different ways. The Parliamentary Assembly (originally the Consultative Assembly) of the Council of Europe has, from its establishment in 1949, been composed of members of national parliaments elected by and from the membership of these bodies. The European Parliament evolved slowly from the ECSC “Common Assembly” in 1951, which followed the C/E model, into the present body whose members have been directly elected since 1979.

The question is whether either of these models is suitable for the UN General Assembly. In the first place it should be noted that the European parliamentary bodies, and particularly the European Parliament, are integral parts of what from its inception

was and has by now clearly become, a supranational organization; that is, the structure of which the Parliament forms a part, is one that exercises important governmental powers and that there are other organs that correspond to those of a national executive and judiciary. The United Nations, on the other hand, is clearly a different type of body, and any evolution to supranationalism is at best glacially slow.

Nevertheless, there are demands for democratization, and should the powers of the General Assembly be increased by giving it some type of legislative powers (as suggested below), then these demands are sure to become louder. It is, therefore, perhaps time to start considering at least the first step — which as in Europe might be the selection of representatives by and from national parliaments.

However, before such a step can be undertaken, it will be necessary to reconsider the structure of the United Nations itself, which is at most barely “governmental”. In particular, if the representatives in the Assembly are no longer to be direct government agents, it will be necessary to create another organ in which that is the situation, and then divide the current tasks of the Assembly between the two new bodies. In particular, it would seem proper to maintain those functions whereby the Assembly contributes to the formulation of international law, in the body in which government representatives function; that body would also be the one that deals with most aspects of UN structure, appointments and budget. The more parliamentary body could deal with many political resolutions, and also exercise oversight with respect to the functioning of the organization, its various organs and officials. Over time, more responsibility will gradually be shifted to the parliamentary body - which was also the sequence in the corresponding European institutions.

B. NGO Representatives

NGOs have been particularly active in pressing for a democratization of IGOs; in part they merely mean thereby an increased influence of NGOs and their representatives. However, even though NGOs (both international and national) have important roles to play in connection with governance, those cannot include that of a direct participant. NGOs can properly act as gadflies, as unofficial monitors, and as sources of information and even ideas to official delegates. However, they are neither representative enough themselves (they can represent millions of members or just a few) nor of guaranteed benevolence (NGOs can

be representatives of disreputable industries, of various types of Mafias, or have some sordid agendas), and, even at best, tend to focus on single issues to the exclusion of the broad appreciation of multifaceted problems that genuine legislators must be prepared to deal with.

Exceptional examples, such as ILO, tend to be ones that prove the rule. In a sufficiently narrowly focused organization it may be possible to find a role for specialized NGO appointees to represent particularly circumscribed interests (e.g., those of labor and management). This would not be applicable to a body with an extremely broad-based assignment, such as the UN General Assembly.

VII. The General Assembly and International Legislation

Under the Charter, the General Assembly has the explicit task of “encouraging the progressive development of international law and its codification.”⁹⁸ Though only imperfectly equipped to do so, the Assembly has always taken this assignment most seriously.

Because its powers vis-à-vis member states are essentially limited to the making of recommendations⁹⁹ (see pages 25 - 26), the Assembly has, in effect two means of fulfilling this portion of its mandate: the launching of international treaties and the stimulation of the creation of customary law.

The more straight-forward method of “legislating” is the treaty-making process. The role of the Assembly in effect is to facilitate the negotiation of multilateral treaties, either within its own deliberative bodies (principally its Main Committees), or within other standing or ad hoc organs (such as the International Law Commission, the Commission on Human Rights, and the UN Environment Programme), and/or by the convening of diplomatic conferences. These devices have already yielded many hundreds of treaties, from the Genocide Convention to the Biodiversity Treaty to the [Nuclear] Non-Proliferation Treaty, which have vastly changed and expanded the international legal landscape.

There are, of course, some limitations to this procedure. The first is in the process of negotiations itself, which in human experience (including in the formulation of national legislation) is an imperfect device: it may take very long (particularly if there is a striving for consensus), it may yield a rather low level of agreement, and it may fail altogether when a subject is too

⁹⁸ UN Charter, Art 13. 1.(a).

⁹⁹ Id., Arts. 10 and 11.

controversial. Furthermore, once a treaty has been adopted or even when it enters into force, it does not automatically bind all international actors, the way national legislation normally binds all domestic actors. A treaty binds a state only once that state has explicitly taken action to become a party to it (normally by ratifying it), and even in doing so states may usually make reservations or exercise options that modify the application of the treaty in respect to them. Thus a treaty, instead of being a seamless legal web, is often more like Swiss cheese: many states are not covered, or only become covered years later, and the obligations of all states are frequently not identical.

With all their imperfections, multilateral treaties are still usually the preferred way of legislating internationally. The principal alternative, the creation of customary law, is a very indirect process. Customary law, once it comes into being, has the advantage of generally binding all states. However, the creation of such law, which consists of the actual practice of states undertaken in the belief that such practice is legally required, necessitates stimulating states into acting in a certain way. The Assembly can attempt to do so by adopting recommendations to that effect — which, in order to be effective, must be carefully negotiated. Usually the form of such a recommendation is a resolution of the Assembly adopted with due solemnity and if possible by consensus; later resolutions follow up on the recommendation and the Secretary-General may be asked to request members to report on their compliance. Such a resolution is said to create “soft law”, i.e. a rule with which compliance is expected, but not legally required; once the soft law hardens, through a practice of actual compliance, customary law has been created. Clearly, this is not a precise process.

Both customary law and multilateral treaties are binding in international law whatever their effect may be under the domestic law of the various states. However, generally speaking international law is not “enforceable” in the same sense that domestic law is enforceable. This is because the machinery for international enforcement is generally very weak (with the possible exception of enforcement actions ordered by the Security Council under Chapter VII of the Charter). However, as more and more international courts come into being, they naturally apply international law, and to that extent enforce it.

Generally speaking, no international organization or organ can directly impose new norms of international law on states, even its members. One exception may be the Security Council, which in carrying out its function to protect international peace and security may sometimes exercise a normative and not merely executive

function; however, the Council has so far certainly not exercised such a power extensively.¹⁰⁰ Occasionally an international organ may be given powers under a treaty to take certain normative decisions (e.g. to establish certain standards of conduct), but that is always in implementation of a treaty to which states have voluntarily become parties.¹⁰¹ The General Assembly has no such general powers — except to the extent that the Charter amendment process might be (it never has yet been) used to that end (see page 27 and pages 57 - 58).

One question to be examined in this paper, in connection with the proposed Binding Triad (section VIII below), is whether it would not be possible to grant the General Assembly, through a Charter amendment, the power to impose international legislation through a prescribed process. This would convert the Assembly, which is at best a quasi-legislature, into a true one.

VIII. The Binding Triad (BT)

The Center for War/Peace Studies (CW/PS) has developed the Binding Triad (BT) proposal to address two of the principal perceived problems, discussed above, with the UN General Assembly: The OMOV system, which allows decisions to be taken by great majorities that in no way reflect realistic power relationships in the world community (see pages 27 - 28), and its general impotence to impose international law on its members (see pages 25-26).

A. The Proposed Binding Triad

The Binding Triad has for some years been officially formulated by the Center for War/Peace Studies as a proposed addition of a new paragraph 3 to Article 13 of the UN Charter, as follows:

“ Article 13

“ ...

¹⁰⁰ In connection with the imposition of sanctions on particular states, the Security Council has established rules as to what types of transactions relating to that state are permissible or forbidden (e.g., S/RES/757 (1992), paras. 4 - 12). The Council has never yet, however, established any general rules that states must observe to maintain peace and security.

¹⁰¹ For example, the IAEA Board of Governors is authorized by Article I.2 of the 1963 Vienna Convention on Civil Liability for Nuclear Damage to establish maximum limits for the exclusion of small quantities of nuclear material from the application of the Convention — a power that it exercised by a resolution of 11 September 1964 and revised by a resolution of 14 September 1978 (IAEA Legal Series No. 4).

“3. The General Assembly may enact legislation that creates rights and obligations under international law for all Members of the United Nations and for natural and legal persons under their jurisdiction, by a decision that attains, notwithstanding Article 18, each of the following percentages of votes cast by the members of the General Assembly present and voting:

- (a) a two-thirds majority, with one vote assigned to each member;
- (b) [a simple majority], with votes assigned to each member in proportion to its population, with no member assigned votes in excess of [15%] of the world population; and
- (c) [a simple majority], with votes assigned to each member in proportion to its assessed contribution to the regular budget of the Organization, with no member assigned votes in excess of [15%] of that budget.”

The four passages in brackets are tentative and subject to negotiation in the process of adopting the proposed amendment.

It is of course clear that certain other clarifications would have to be added, such as a specification of the year for which population figures should be calculated (should it be the same year for perpetuity, or one changing each year, presumably one or two years after the current one), and the year for the assessed contributions (presumably the current one).

B. Analysis and Critique of the BT Proposal

1. General

One of the most important characteristics of the BT proposal is what it does not do! It does not change anything in the way that the General Assembly currently operates. All decisions and actions the Assembly can take now it could still do under the BT, by precisely the existing voting system.

In particular, the BT would, as formulated, not change the way that the UN budget is adopted and scales of assessment established. This would still happen by unweighted 2/3rds majorities calculated on the OMOV basis. Thus nothing would be done to alleviate or correct one of the principal objections that the US Congress has: that states that collectively pay just 1% of the UN budget can, in principle, require the other states to pay a

theoretically unlimited amount.¹⁰² In other words, the objectives of the Kassebaum amendment would not be addressed.

Presumably this would also mean that most really significant decisions, for example, the adoption of new treaty texts, would continue to be taken, as far as possible, by consensus — at least when it is hoped to achieve a meaningful decision that member states are likely to comply with voluntarily.

2. The Proposed New Power of the General Assembly

What the BT proposes is that the General Assembly be equipped with a quite new power, one not characteristic of any other international organ or organization (see pages 40—43), except for those of the supranational European Community. That power would be to legislate internationally, that is to create international law that is binding on all UN member states, and on all persons (individuals, societies, corporations) subject to them. Considering that at present Switzerland is the only significant state that is not a UN member, such GA-created legislation would apply practically universally.

It should be noted that such international law would be of a different type from the three types that have generally been recognized for the past century: treaty or “conventional” law; international customary law; and general principles of law.¹⁰³ Of course it could be argued that in effect it would be a type of derivative “treaty law”, because its origins could be traced to the UN Charter, a treaty, which as proposed to be amended would grant the Assembly the power to legislate. However, while some treaties have granted IGOs quite limited powers to “legislate” in very carefully circumscribed areas and usually with the possibility of a state opting out,¹⁰⁴ the proposed power of the Assembly would appear to be unlimited - nor would it be possible for any UN member state to opt out as is generally allowed when an IGO is given even limited power to legislate.

a. Possible Limitations on the Proposed Legislative Power of the GA

The question has therefore been raised whether the BT should be modified to introduce at least some limits on the power

¹⁰² Presumably, however, there would be no change in the current compromise arrangement, whereby the UN budget must at an early stage be approved by the 34-member CPC, on which the US is always represented, and which acts by consensus (see page 36, note 94 above).

¹⁰³ See ICJ Statute, Art 38 l(a) - (c).

¹⁰⁴ See, e.g., the power of the World Health Assembly to adopt regulations for states (WHO Constitution, Arts. 20 - 21).

of the GA to legislate. One limitation could be said to be implicit, and that is that the laws adopted by the Assembly would have to have an international dimension, as other matters could not be made subject to international law. However, as the limits of international law have proven to be flexible, and in the recent past expanding rapidly, this constraint may not offer sufficient reassurance to those concerned about possible overreaching by the GA.

There are various ways in which limitations could be specified on the proposed legislative power of the GA: they could be expressed in general or in specific terms, and either positively or negatively. These alternatives will be explored in the following subsections.

(i) General Limitations

The simplest way to limit the proposed power of the GA would appear to be some short characterization, such as restricting legislation to “global” or “world-wide” issues. One objection is that any such general term is unlikely to be precise enough to serve the desired purpose. Would legislation concerning Antarctica, or whaling, or driftnet fishing in the South Pacific be considered “global”? How about legislation that impinges principally on the developed countries — for example a tax in favor of the developing world?

Similarly, if a broad term is used negatively, i.e. to specify subjects as to which the GA might not legislate, it is unlikely that sufficient precision can be attained. For example, the general limitation on the activities of the United Nations stated in Charter Article 2.7, that the organization may not “intervene in matters which are essentially within the domestic jurisdiction of any state” — an injunction that would presumably also apply to the exercise of this proposed new power — naturally begs the question of what those matters are; thus while in the early years of the UN, human rights were generally considered to be of essentially domestic import, this is no longer so half a century later.

Another type of general limitation might be to specify that legislative decisions of the GA must be general in nature and not refer to particular situations and disputes — leaving these to be dealt with by the Security Council or some disputes resolution mechanism, such as the World Court. The Assembly could, of course, continue to adopt non-binding recommendations as to any matter, under the existing voting rules.

(ii) Specific Limitations

A more promising but clearly more difficult route is to attempt to specify in very precise terms the subjects as to which the GA might legislate or not. This, for example, is the pattern of Article I of the US Constitution; Section 8 of that Article sets out seventeen areas as to which Congress may legislate (a few additional ones appear in other sections of the Constitution, or were added by amendments), and Section 9 specifies seven preclusions (others were added later, for example by the First Amendment).

In respect of the matter at hand, one might suggest that the GA be given specific power to legislate in respect of the high seas, Antarctica, outer space, weapons of mass destruction, the international trade in weapons, international trade and commerce, transboundary environmental matters, human rights (though that might be considered too broad a subject), and humanitarian rules of warfare; more controversial would be subjects such as refugees and stateless persons, narcotic drugs, international terrorism and related crimes. Specific preclusions might include immigration and nationalization, education, health (except in its transboundary aspects), domestic taxation, etc.

(iii) Judicial Review

No matter how any limitations on the proposed legislative power of the GA are expressed, whether generally or particularly, whether positively or negatively, the question arises: who is to interpret them, i.e. who is to determine whether a particular legislative enactment is consistent with whatever limitations that are enacted?

Three possibilities come to mind, of which two can more or less readily be rejected. The GA itself is not a proper forum for such a determination, because in enacting the legislation it implicitly must have decided that it had the power to do so, i.e., that it was not precluded from doing so by any of the express limitations. To leave the determination to individual UN member states is to invite anarchy, because those states that oppose the legislation will presumably find some ground on which they may consider it illegal and would thus free themselves from its obligations. The only possibility, therefore, is to test the legitimacy of legislation through some sort of judicial organ.

The first question then becomes: what court should be entrusted with this task. Although one could of course establish a special tribunal for this purpose, it lies close at hand to rely for this purpose on the principal judicial organ of the United Nations: the International Court of Justice (ICJ), often referred to as the World

Court. Although the determination of whether a particular action of the GA is in accord with the UN Charter is not specifically within the current jurisdiction of the Court — the 1945 San Francisco Conference specifically rejected a proposal that the ICJ be the “constitutional court” for the UN — it might be possible either to adapt the existing advisory jurisdiction of the Court for this purpose, or to amend its Statute (which is part of the UN Charter) suitably.

There are several possibilities for the judicial testing of GA legislation, which could be used alternatively or cumulatively

(a) Advance advisory opinion, which the GA might request (and perhaps at the demand of one or more states might be obliged to request) before a legislative resolution is actually adopted. This would correspond to the procedure available in a number of states (e.g., France), whereby a judicial organ can be asked to examine proposed legislation, before adoption, for any constitutional flaws;

(b) An “advisory opinion”, made binding as part of the proposed Charter amendment enacting the BT, which could be requested by any UN member state, either directly — which would require a Charter amendment - or through the GA;

(c) A judgment reached as a result of contentious litigation by one member state against another in which one (presumably the principal) issue would be the legality of particular GA legislation. Although under Article 59 of the ICJ Statute such a determination would only be binding on the states that participated in the particular case, in practice the Court’s striving to maintain consistency in its jurisprudence would almost preclude a different determination in another litigation involving other states or in an advisory opinion.

(d) If litigation involving the legality of a certain piece of GA legislation should arise in some other international or even national tribunal, arrangements could be made for securing an advisory opinion of the ICJ that would then be binding on the tribunal in which the question originally arose. This would be similar to jurisdiction exercised by the European Court of Justice.

b. Legislation Directly Affecting Persons

As formulated, the BT would give the power to create “rights and obligations under international law” for all members of the UN “and for natural and legal persons under their jurisdiction”.

Classic international law only involved the rights and obligations of states, and those of individuals are only granted or imposed mediately through the state(s) to which they are subject. Although this is still largely the situation, some notable exceptions have been developed in recent decades. In particular, human rights treaties have more and more granted rights to individuals even against their own states and established mechanisms (e.g., committees, commissions, and courts of human rights) through which such rights can be vindicated; on the other hand, international criminal law has been extended to individuals through the several ad hoc international criminal tribunals that have already been established, and in particular through the nascent International Criminal Court. It seems likely that in the future the direct involvement of “persons” with international law will increase.

Removing the reference to “natural and legal persons” from the proposed BT formulation would probably make little difference in the legislative power to be granted to the GA, since persons can, at least in principle, always be reached through their states — but the phrase as proposed serves to reinforce the forward looking nature of the proposal.

c. Political Limitation

The real limitation on the possible legislative activities of the GA would of course be political. As discussed further below, the BT raises a quite difficult set of voting barriers against the adoption of any proposed legislation. Because of the natural reluctance of most states to limit their own freedom and sovereignty, it is likely that only the most urgent, essential and popular proposals would ever be adopted as legislation. In this connection it should be noted that in the GA (differently from the US Congress) states are directly represented.

d. Possible Legislation under the BT Proposal

It is naturally difficult to predict what, if any, international legislation the General Assembly would adopt, given the power to do so. Examining past resolutions by the Assembly gives only an imperfect guide. In the first place, most such resolutions are, because of the current limitations on the powers of the Assembly, not formulated in normative terms. That is, they do not express rules that can clearly be applied. By their very nature, such resolutions generally state only principles, it being understood that if these were to become binding they would have to be expressed far more precisely and carefully.¹⁰⁵ Secondly, it can generally not

¹⁰⁵ For example, the Universal Declaration of Human Rights was adopted in three years and consists of 30 relatively brief articles. To express these

be assumed that states willing to adopt a non-binding resolution, even if quite precisely formulated, would necessarily adopt the identical text if it would thereby become binding, on themselves and others.

Many resolutions on arms control, environmental or economic matters, even though regularly adopted by great majorities or without a vote, would, if converted into BT legislation, presumably fail on the second or third legs of the triad. Thus proposals that would impinge on the freedom of action of the major powers would have difficulty in passing either the population or the contributions barriers (depending, of course, on exactly how high these would be set); similarly, proposals for large scale resource transfers from the First to the Third World¹⁰⁶ would probably be resisted and defeated by the former, using the contributions leg — even if the transfers are within limits that many such states have voluntarily assumed for some years. On the other hand, any resolution perceived as unduly burdening the developing states (e.g., by imposing high labor or environmental standards) could easily be blocked by these through the OMOV leg.

There are, however, some examples of legislation that could presumably be adopted under the BT system. For instance, the Non Proliferation Treaty (NPT) is at this time rejected by only four states: Cuba, India, Israel and Pakistan — and even though two of these are quite populous it is unlikely that they could block adoption on the population leg; the other states already parties to and bound by NPT, would presumably vote for it in sufficient numbers to adopt it as legislation. Probably the same can be said for the Comprehensive Test Ban Treaty, which in international negotiations was seriously and implacably opposed only by India; presumably it would be outvoted. On the other hand, the Oslo/Ottawa Landmines Treaty, though generally deemed a success, is still opposed by China, Russia and the United States, which with a few allies could probably block its adoption as BT legislation.

There are other examples of treaties that could be converted into international legislation and thereby be made binding on the

principles in treaty form required 18 more years of negotiation, and resulted in 84 lengthy articles set out in the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (in one publication, 6.5 pages v. 32).

¹⁰⁶ For example, the oft-repeated recommendation that all developed states should contribute 0.7% of their GDP as Official Development Assistance.

few laggards and holdouts. In the human rights field there is the Convention on the Rights of the Child, to which only Somalia and the United States are not parties. There are several environmental treaties, such as the Vienna Convention and the Montreal Protocol on Protection of the Ozone Layer; however, that popular treaty regime shows some of the difficulty of international legislation: The Montreal Protocol has already been amended several times, and not all parties to the Convention and to the Protocol have become parties to all the amendments; while it can be assumed that the former could be adopted as BT legislation, it is not clear that each of the important amendments could be, at least at the present stage.

It should not be thought that the BT proposal will lead to an easy way to adopt international legislation and consequently to an immediate flood of new international law. More than likely only very few significant items would survive the stringent requirements of the triple voting legs. Exactly how stringent these requirements will be in practice depends a great deal on how the four blanks in the proposed formula are filled and on other factors discussed on pages 52-54. Aside from these considerations, it is likely that at least initially there will be a reluctance to use the proposed new international machinery — negotiation of proposed legislation that can survive the political requirements.

e. Domestic Constitutional Obstacles — Especially in the US

As the international legal system is at present constituted new obligations are placed on states almost exclusively by the treaty route. This means that each state, to be bound, must formally consent to the treaty (a step normally accomplished by ratification), and in many states, in particular the United States, this requires action by the legislature or by some branch of it. The question is, how this process can be reconciled with the proposed BT.

In theory, of course, if the United States were to consent to the BT amendment — and unless it did so the amendment could not enter into force (because under Charter Art. 108 the ratification of all permanent members of the Security Council is required for the entry into force of a Charter amendment) — then it would have consented to the legality of all legislation that would be adopted under it. The question of course is, whether the US Senate would agree to a procedure that would permit future international legislation to be adopted without its explicit consent. Not likely! If the proposed procedure were one under which a US vote would always be necessary for the adoption of BT legislation, one might conceive of an arrangement whereby the US Delegates would, by domestic law, be prevented from voting for any international

legislation of which the Senate had not first approved; but, of course, under the BT proposal legislation could be adopted over US objection.¹⁰⁷

3. Special BT Voting Requirements

a. Votes Cast by Government Representatives

As formulated, the BT would not change anything in the structure of the General Assembly, such as the arrangement that the representatives of each member are instructed officials of the government. Indeed, the Assembly would proceed as it does at present, except that when it was acting on BT legislation, the votes of each representative would be counted in three different ways, according to the legs of the BT.

Especially because one of the legs of the BT is based on population, it is likely that it will be proposed that the votes on that leg of the triad be cast by directly or indirectly elected parliamentarians, as in one or the other of the two European parliamentary bodies. As pointed out above (pages 35 - 37) this would not be easy to accomplish, especially if the population figures are merely capped and not compressed; in the former case, unless many small states are forced to elect common representatives, the size of the resulting body would have to become inordinately large.

More fundamental, of course, is whether the UN is prepared to move at this time in the direction indicated, in a somewhat different context, by the European organizations — i.e., towards greater democratization.

¹⁰⁷ The procedure whereby the US became a party to the IAEA statute is instructive in this respect. The IAEA Statute can be amended if any 2/3rds of its members ratify the amendment — and such amendments, like those of the UN Charter, become binding on all members (IAEA Statute, Art. XVIII.C(ii)) . However, unlike the UN Charter, the IAEA Statute allows members that do not wish to be bound by an amendment of which they do not approve, to withdraw from the Agency (id., Art. XVIII.D). When the US Senate came to consider ratifying the IAEA Statute, it added an “understanding” that should an amendment enter into force of which it had not approved, then the US would automatically withdraw from the Agency. What the international and domestic legal effects of that understanding are, i.e. what if the President refused to withdraw, is not clear — but the sentiments of the Senate in taking this action in 1957 are obvious.

b. The Three Legs of the Triad

(i) The OMOV Leg

The preservation within the proposed BT of the OMOV leg, i.e. of normal voting under Charter Article 18.1-3, is meant to protect the interests of the overwhelming majority of smaller, weaker UN members. Because of that requirement, no BT legislation can be adopted that does not secure the overwhelming approval of these states. Illogical as the OMOV rule may be, it is clear that it cannot, at least at this stage, be discarded.

(ii) The Population Leg

As proposed, the population leg would be based directly on the respective populations of the UN membership, presumably subject to a cap. It will of course be essential to specify the year in which this count is to be made — necessarily one some years back — and, because of the importance of the matter, how such count is to be carried out. (A US-type decennial census would presumably be too difficult and expensive to implement on a world-wide scale.)

The first question is whether direct population counts, with or without a cap, are really suitable for establishing voting power in the General Assembly. Presumably, many would feel that it overcorrects for the fault of the OMOV system, by allowing enormous discrepancies in the respective voting powers — i.e., in the order of over 100,000:1, between the largest and smallest members. Even a 15% cap would only reduce that discrepancy to about 79,000:1. For that reason it might be best to explore some form of mathematical compression of the scale, such as suggested on pages 33-34. As there pointed out, that in effect is what is done in the European Parliament.

The second open question is what “majority” requirement should be specified in the first bracket of that provision. As pointed out on pages 37-38, the real purpose of whatever number is placed in that blank is not to establish the majority that must be attained for adoption, but rather to determine the size of the minority required to prevent passage — and that, in turn, really amounts to a decision on what countries, in addition to perhaps India and China, should be allowed to block action on that leg. Naturally, that figure would also depend on whether a capped or a compressed or a capped and compressed scale is used.

(iii) The Contributions Leg

In the first place, the same principal concerns apply to the contributions leg as were expressed above in respect of the population leg: whether to use a capped direct scale or a

compressed one (which need not necessarily be according to the same mathematical formula as used for the population scale), and the amount of an eventual cap and the majority/minority requirement to be specified.

As pointed out on page 32, there are, however, other matters that might be considered in connection with contributions. The first is whether account should be taken of only contributions assessed for the regular budget, or also of those for peace-keeping operations (which in recent years greatly exceed the normal budgetary figures — and whose inclusion, under the current formula, would benefit the permanent members of the Security Council and disadvantage the least developed states).

Secondly, the same question could be asked in respect of voluntary contributions — and, if so, of contributions to which funds or purposes: UNDP, UNHCR, UNRWA, UNICEF (both governmental and private gifts?), WFP, etc. On the one hand, cumulatively these contributions also greatly exceed the assessment for most developed countries; on the other, as they are not limited by an agreed formula, they could be used to “buy” votes — a danger that could be mitigated by using a long-term rolling average. Finally, there is the question of whether any account should be taken of the non- or delayed payment of contributions, particularly if withholdings are deliberate. All these, of course, present difficult political questions.

4. The Political Salability of the BT

Adoption of the BT proposal would constitute a potentially major reform of, or in any event change in, the powers and functions of the General Assembly. The question is: How can such a major change be sold to those states that will have to adopt it by amending the UN Charter?

a. The Attitude of the Developing States

It is plain why there is likely to be an initial reluctance on the part of the developing states to accept any proposal that would seem to deprive them of their one great political advantage in the world community: their equal vote, state by state, with that of the greatest world powers, and collectively their ability to outvote them on any issue.

The most important selling point must be that under the BT proposal they would in fact lose nothing. All the existing powers of the General Assembly would be preserved as they now are. The G77 or the NAM will still be able to adopt any internal arrangements for the United Nations that they wish, by creating

and abolishing organs and offices, and to set the budget (subject to the existing political compromise involving the CPC¹⁰⁸ — which, however, is not set in concrete); they will also continue to be able to adopt resolutions constituting recommendations to states and to other IGOs, whether on ad hoc political questions, or on the adoption of new treaties or the creation of soft and customary law.

All the BT would do is to give the Assembly an important additional power that it does not now have - to adopt binding international legislation. Because of the first leg of the BT, that power could in no way be exercised without the concurrence in each instance of a great majority of the developing states, and never against the opposition of a significant number of them.

That having been said, it should be recognized that any departure from the OMOV principle is psychologically difficult for the small states. For decades they have been battling those instances in which the international community has relied on other voting systems, in particular on those of the IFIs. These states have for years been trying to shift responsibility for significant resource transfers from the IFIs to OMOV—governed UN organs (e.g., UNDP, UNCTAD), only to be rebuffed by the states that control these resources.

b. The Attitude of the More Powerful States

It would seem that those states that have for years chafed under the arbitrariness of the OMOV system should unreservedly welcome any move towards intelligently weighted voting. Whether they will actually do so within the BT context is another question.

In the first place, these states will also note that the BT proposal will not change anything about the current functioning of the General Assembly — and particularly the theoretical ability of the mass of poorer states to adopt a budget of any size and shape these states desire. It may very well be that one price the developed states may wish to impose for the adoption of the BT is its partial application to the financial processes of the UN — for example, that the budget be adopted by a process involving the first and third legs of the BT.

The big issue, however, for the developed states is whether they would welcome or fear the possibility of GA-adopted international legislation. And that, in turn, will depend to a considerable extent on the constraints that are included in the second and third legs of the triad. If it is too easy to adopt legislation, i.e. if large blocking minorities are required to stop the process, then there is likely to be a reluctance to expose themselves

¹⁰⁸ See footnote 94, page 36.

to the dangers of unwanted legislation. On the other hand, there are evidently instances in which some of the developed states would welcome the possibility of imposing international law (e.g., NPT, CTBT, and some environmental controls) that they, as well as a majority of developing states are willing to accept, but that now can be held up by a few obdurate holdouts (e.g., India).

5. Adoption of the BT proposal

What formal steps would have to be taken to introduce the BT, or any variation thereof? As there are two branches of the BT proposal, an examination in respect of each is necessary.

a. Weighted Voting

At first glance it would seem self-evident that any departure from the OMOV rule enshrined in Charter Article 18.1 would require a Charter amendment. Indeed, it might even be argued that no ordinary amendment would do — such as the mere proposed addition of a new paragraph 3 to Article 13 — since any departure from OMOV would imply a violation of Article 2.1 that bases the organization on the “sovereign equality of all its Members.”

However, as has already been pointed out (pages 13-15 (critique) above), this sovereign equality is not all that it would seem to be, in view of the special privileges provided in numerous articles to the five states designated as permanent members of the Security Council.

It is actually possible to construct an argument to the effect that the General Assembly could well introduce weighted voting by a mere procedural decision — though not for itself (i.e. the so-called Assembly Plenary), but rather for its Main Committees or any other subsidiary bodies. In this connection it should be noted that, in spite of the clear language of Charter Article 18.2 that decisions on important questions require 2/3rds majorities, this basic rule has not been applied to the Main Committees. So, if one paragraph of Article 18 can be disregarded in respect of the Main Committees, why could not another paragraph of the same Article also be disregarded? What would be required is a mere procedural rule that would introduce specified weighting into one or more Main Committees for the purpose of transacting particular types of business (i.e., the adoption of international legislation), and another rule that would prohibit the Assembly from acting on such business except on a recommendation from the Main

Committee.¹⁰⁹ The possibility of using this argument to introduce in the GA at least one branch of the BT is explored on pages 58-59.

This suggests that it might be possible to introduce at least the weighted voting element of the BT on an experimental basis before adopting a Charter amendment. However, a little reflection will show that this could not work. The two elements of the BT are inextricably connected and, as pointed out in the immediately following section, the GA cannot be endowed with any legislative capacity without a Charter amendment. As the GA will thus not be able to really legislate, it will not be considering the types of proposals as to which the BT weighted voting system is to be applied, i.e. carefully negotiated texts that could constitute international law if properly adopted. And to apply weighted voting to ordinary resolutions, thus making them more difficult to adopt than under the present OMOV system, is unlikely to be acceptable to the sponsors of those proposals, as they would see no benefits (i.e., the possibility of achieving a binding decision) and only the much greater likelihood of defeat.

b. Adopting Binding International Legislation

There can, however, be no doubt whatsoever that to grant the General Assembly the power to adopt international legislation binding on member states would, at the very least, require an amendment of the Charter.

Indeed, it is possible to argue that an ordinary Charter amendment would not be sufficient for this purpose. It will be recalled that under Charter Article 108 any amendment adopted by an absolute 2/3rds majority of the General Assembly and ratified by 2/3rds of all members including all the permanent members of the Security Council, enters into force for all members — including the holdouts that have refused or neglected to ratify. This Charter provision (which also appears in the constitutions of many IGOs) differs from the normal rules regarding the amendment of treaties, under which amendments either enter into force only when all parties have ratified them, or in any event only enter force for those that have done so.¹¹⁰ It is plain why the constitutional instruments of large IGOs usually depart from that rule: if ratification by all members were required, the process might take eternally long; if amendments only entered into force for those that

¹⁰⁹ This would be somewhat similar to the current compromise on budgetary procedures, whereby the Assembly has agreed not to act on the budget until that has been adopted by the CPC — see footnote 94 above.

¹¹⁰ See Art. 40.4 of the 1969 Vienna Convention on the Law of Treaties.

had ratified, then on the enlargement of the Security Council from 11 to 15 members, the Council would suddenly have 15 members for those that had ratified the enlarging amendment, but only 11 for the other states — an impossible situation. The legal question therefore is: can this Charter provision on amendment, which is designed to preserve the institutional coherence of the organization, also be used to impose, directly or indirectly, new substantive obligations on member states? If the answer is negative, then the proposed BT Charter amendment would have to secure unanimous ratification.

c. Next Steps

Any partial introduction of the BT's weighted voting system, even if legally feasible as suggested on pages 56-57, would almost certainly not be politically acceptable, because it would unbalance the bargain described on pages 54-55: the smaller states would be partially surrendering their power to control the GA under the OMOV system, without gaining the possibility of formulating binding international legislation.

It is, of course, always possible to recalculate any given vote taken in the GA under the BT's weighting formula and to determine whether it would have been adopted thereunder. Although by the use of computers this could be done quite easily (as almost all votes are taken by voting machines), it is unlikely that the GA would consent to participate in such an exercise, because it would merely emphasize the fact that many of its resolutions, while adopted with great majorities, do not really command the support of the large and powerful states. Although this fact is naturally recognized when evaluating the output of a given session (e.g., the many resolutions adopted on disarmament and arms control, or those on human rights), the great majority of the GA members are unlikely to wish to have this feature of its work emphasized.

Although such calculations could be performed by any outside observer without any UN blessing, the value of any systematic exercise to this end would be doubtful also from an academic point of view, because it would be clear that the resolutions that the GA addresses under the current system are not the ones that it would be considering if these were to become binding. Not only would the latter be subject to much more careful negotiations than is usual under the current system, even if the identical texts were under consideration many states are likely to vote differently on a proposal that constitutes a mere hortatory appeal than they would on one creating binding international obligations and law.

Consequently, the BT proposal, in whatever form, would have to be sold largely on its logical merits than on attempts to recalculate according to theoretical formulae current political actions. One selling point might be to examine participation in certain global treaties that have gained widespread but not universal acceptance (for example: the NPT, the Convention on the Rights of the Child, the Biological Diversity Convention). These treaties (many actually adopted by the GA after extensive negotiations) are designed to constitute international legislation and those states that have ratified them and thereby declared their willingness to be bound would evidently have voted for them in a BT system. However, while binding on the great majority of states that have ratified them, they are not binding on the few holdouts (e.g., in the case of NPT: Cuba, India, Israel, and Pakistan; in the case of the Child's Convention: Somalia and the US). If these texts had been put to a vote under the BT system they would have been adopted, all UN members would be bound and the treaties would thus be greatly strengthened. These examples might be the ones to use to persuade the majority of states of the value of the BT approach.

IX. Conclusions and Recommendations

Although the voting arrangements for the General Assembly were in effect novel and advanced when they were adopted at the conclusion of World War II, the past decades have brought some important defects to the fore. In particular, because of the unanticipated drastic change in the composition of the Assembly, the OMOV rule, coupled with the possibility of adopting any decisions by a mere 2/3rds majority of those present and voting, led to the practice of adopting numerous resolutions that did not in fact represent the will of a significant portion of the world community. This, in turn, led to the resort to consensus decision making, which though not without some advantages, in many respects constitutes a retreat to the unanimity principles of the League of Nations.

Though the voting rules of the UN General Assembly are also applied by many other IGOs, both world-wide and regional, it should be noted that numerous other such organizations use different voting formulae. In particular the IFIs (for example, the IMF, the World Bank and regional development banks, as well as MIGA and IFAD) weigh voting power heavily according to capital contributions. Some organizations (for example, MIGA and IFAD, and the Commodity Organizations) also divide their members into two or three categories — usually based on differing economic interests — with a specified voting balance between the categories.

Finally, some IGOs weigh representation or voting power according to population (for example, the Consultative Assembly of the Council of Europe, and most of the organs of the European Community); in some of these the voting members are not instructed governmental representatives (as in UNGA) but persons elected by and from national parliaments (the C/E Consultative Assembly) or are directly elected (the European Parliament)

It thus has become timely to think seriously of introducing some kind of weighting of votes in the General Assembly's decision-making process — particularly in respect of certain especially significant decisions. That could apply to some existing decisions, such as budgetary ones, but also to any that are meant to go beyond mere recommendations.

As to weighting, only two possible factors commend themselves: population and contributions. However as both of these would, if based on raw data, lead to apparent inequities in the opposite direction (i.e.. to excessive power to the most populous and richest states), some formula for compressing the raw figures should be developed to make any proposal even remotely politically acceptable. In addition, in respect of contributions, serious consideration should be given as to what items to take into account, both from the point of view of equity and also in order to stimulate contributions to the United Nations.

Arguably another defect in the operations of the General Assembly is that, except in respect of matters substantially internal to the organization, it only has the power to make recommendations. Although even with those limitations the Assembly has, through various devices, in particular the launching of multilateral treaties, succeeded greatly in expanding international law, various defects in the treaty—making and —adopting process make it desirable that this process be supplemented by one for the direct adoption of legislation by the General Assembly.

Both these deficiencies are addressed by the Binding Triad proposal. Though that initiative may not be adoptable in precisely its present form, for political and perhaps legal reasons, it should be used to stimulate discussion on this most important subject: a fundamental reform in the operations of the General Assembly, which should also address its perhaps dated composition.