Université de Montréal

BREAKING THE IMAGES AND MIRAGES OF THE DOCTRINE OF SOVEREIGN EQUALITY IN INTERNATIONAL GOVERNMENTAL ORGANIZATIONS:

IN PURSUIT OF FUNCTIONAL AND LEGITIMATE DECISION-MAKING

par

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ITHACA

When you set out on the voyage to Ithaca,
pray that your journey may be long,
full of adventures, full of knowledge.
Of the Laestrygones and the Cyclopes
and of furious Poseidon, do not be afraid,
for such on your journey you shall never meet
if your thought remain lofty, if a select
emotion imbue your spirit and your body.
The Laestrygones and the Cyclopes and
furious Poseidon you will never meet
unless you drag them with you in your soul,
unless your soul raises them up before you.

Pray that your journey may be long,
that many may those summer mornings be
when with what pleasure, what untold delight
you enter harbors you've not seen before;
that you stop at Phoenician market places
to procure the goodly merchandise,
mother of pearl and coral, amber and ebony,
and voluptuous perfumes of every kind,
as lavish an amount of voluptuous perfumes as you can;
that you venture on to many Egyptian cities
to learn and yet again to learn from the sages.

But you must always keep Ithaca in mind.
The arrival there *is* your predestination.
Yet do not by any means hasten your voyage.
Let it best endure for many years,
until grown old at length you anchor at your island
rich with all you have acquired on the way.
You never hoped that Ithaca would give your riches.

Ithaca has given you the lovely voyage.
Without her you would not have ventured on the way.
She has nothing more to give you now.

Poor though you may find her, Ithaca has not deceived you.
Now that you have become so wise, so full of experience,
you will have understood the meaning of Ithaca.

Constantine Cavafis, 1863-1933

Dedicated
with love
to my sister
Danielle

For, irrespective of our respective inequalities, we both have equal and sovereign will. But within our family unit, we recognize and respect each others' inequalities as life's decisions are legitimately being made in consideration of our family's functions.

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ACRONYMS AND ABBREVIATIONS

A.F.D.I	Annuaire français de droit international
AF.DB	African Development Bank
AM. J. INT'L L.	American Journal of International Law
AM. U. J. INT'L L. & POL'Y	American Journal of International Law and Policy
AM. U.L. REV.	American University Law Review
APEC	Asian-Pacific Economic Co-operation
ASDB	Asian Development Bank
AUST. Y.B. INT'L L.	Australian Yearbook of International Law
BIAC	Business and Industry Advisory Committee to the OECD
BINGOs	Business International Non-Governmental Organizations
B.U. INT'L L.J.	Boston University International Law Journal
B.U. REV.	Boston University Law Review
Benelux	Belgium, Netherlands and Luxembourg Customs Union
BRIT. Y.B. INT'L L.	British Yearbook of International Law
BROOKLYN J. INT'L L.	Brooklyn Journal of International Law
CDB	Caribbean Development Bank
CALIF. L. REV.	California Law Review
CAN. PUB. ADMIN.	Canadian Public Administration
CAN.-U.S. L.J.	Canada-United States Law Journal
CAN. Y.B. INT'L L.	Canadian Yearbook of International Law
CASE W. RES. J. INT'L L. REV.	Case Western Reserve Journal of International Law Review
C.F.S.P.	Common Foreign and Security Policy (EU)
CHI[-]KENT L. REV.	Chicago[-]Kent Law Review
CLS	Critical Legal Studies

CMEA	Council for Mutual Economic Assistance
COLUM. L. REV.	Columbia Law Review
COMMON MKT L. REV.	Common Market Law Review
COMP. INT'L L.J. SOUTH. AFR.	Comparative and International Law Journal of Southern Africa
COR	Committee of the Regions (EU)
COREPER	Permanent Representatives Committee (EU)
CORNELL INT'L L.J.	Cornell International Law Journal
CSCE	Conference on Security and Cooperation in Europe
DAC	Development Assistance Committee
DAYTON L. REV.	Dayton Law Review
DE PAUL BUS. L.J.	De Paul Business Law Journal
DUKE L.J.	Duke Law Journal
EBRD	European Bank for Reconstruction and Development
EC	European Community
E.C.J.	European Court of Justice
ECOSOC	Economic and Social Council (UN)
ECR	European Community Reports
ECS	Economic and Social Committee (EU)
ECSC	European Coal and Steel Community
ECU	European Currency Unit
EDC	European Defense Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EIB	European Investment Bank
EMORY INT'L L. REV.	Emory International Law Review

EMI	European Monetary Institute
EMS	European Monetary System
EMU	Economic and Monetary Union
ENVTL. L.	Environmental Law
EP	European Parliament
ESA	European Space Agency
ESC	Economic and Social Committee (EU)
E.T.S.	European Treaty Series
EU	European Union
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
FIAS	Foreign Investment Advisory Service
FORDHAM INT'L L.J.	Fordham International Law Journal
FORDHAM L. REV.	Fordham Law Review
FOR. AFF.	Foreign Affairs
GA	United Nations' General Assembly
GEF	Global Environment Facility
GEO. L.J.	Georgetown Law Journal
GNP	Gross National Product
HARV. INT'L L.J.	Harvard International Law Journal
HARV. L. REV.	Harvard Law Review
HAST. L.J.	Hastings Law Journal
IADB	Inter-American Development Bank
IAEA	International Atomic Energy Association
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice

ICJ STATUTE	Statute of the International Court of Justice
INT'L & COMP. L.Q.	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
IDA	International Development Association
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IGC	Intergovernmental Conference
IGO(s)	International Governmental Organization(s)
ILL. L. REV.	Illinois Law Review
ILO	International Labour Organization
IMF	International Monetary Fund
ILM	International Legal Materials
IMO	International Maritime Organization
INGO(s)	International Non-Governmental Organization(s)
INT'L AFF.	International Affairs
INT'L ORG.	International Organization
INT'L & COMP. L.Q	International and Comparative Law Quarterly
IO(s)	International Organization(s)
IOWA L. REV.	Iowa Law Review
ITU	International Telecommunications Union
J. EURO. INTEGR.	Journal of European Integration
J. WORLD TRADE L.	Journal of World Trade Law
KAN. L. REV.	Kansas Law Review
L.G.D.J.	Librairie Générale de Droit et de Jurisprudence
MAI	Multilateral Agreement on Investment
MEP	Member of the European Parliament
MICH. J. INT'L L.	Michigan Journal of International Law

MICH. L. REV.	Michigan Law Review
MIGA	Multilateral Investment Guarantee Agency
MIL. L. REV.	Military Law Rev.
N. ILL. U.L. REV.	Northern Illinois University Law Review
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NETH. INT'L L. REV.	Netherlands International Law Review
NGO(S)	Non-governmental Organization(s)
N.Y.L. SCH. L. REV.	New York Law School Law Review
N.Y.U.L. REV.	New York University Law Review
NETH. INT'L L. J.	Netherlands International Law Journal
NETH. INT'L L. REV.	Netherlands International Law Review
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
OHIO ST. L. J.	Ohio State Law Journal
O.J.	Official Journal of the European Communities
O.O.P.E.C.	Office for Official Publications of the European Communities
OPEC	Organization of Petroleum Exporting Countries
O.P.O.C.E.	Office des Publications Officielles des Communautés Européennes
OSGOODE HALL L.J.	Osgoode Hall Law Journal
PAS	Policy and Advisory Services
P.C.I.J.	Permanent Court of International Justice
P.U.F.	Presses Universitaires de France
PITT. L. REV.	Pittsburgh Law Review

R.C.A.D.I.	Recueil des Cours de l'Académie de droit international de La Haye
R.G.D.	Revue générale de droit
R.G.D.I.P.	Revue générale de Droit International Public
R.J.T.	Revue juridique Thémis
REV. TRIM. DR. EUR.	Revue Trimestrielle de Droit Européen
SANT CLARA L. REV.	Santa Clara Law Review
SC	United Nations' Security Council
SDRs	Special Drawing Rights
SE	Sovereign Equality
SEA	Single European Act
STAN. L. REV.	Stanford Law Review
TEMPLE L. REV.	Temple Law Review
TGOs	Trans-Governmental Organizations
TUAC	Trade Union Advisory Committee to the OECD
TNOs	Trans-National Organizations
U. CHI. L. REV.	University of Chicago Law Review
UK	United Kingdom
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
U.N.B.L.J.	University of New Brunswick Law Journal
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNHCR	United Nations High Commissioner for Refugees
UNIDO	United Nations Industrial Development Organization

UNMIH	United Nations Mission in Haiti
UNOSOM	United Nations Operation in Somalia
U.N.T.S.	United Nations Treaty Series
UPU	Universal Postal Union
US	United States
VA. J. INT'L L.	Virginia Journal of International Law
VAND. L. REV.	Vanderbilt Law Review
VM(S)	Voting Mechanism(s) (includes rules, methods, formulas, processes, procedures and systems).
VP(S)	Voting Practice(s)
WMO	World Meteorological Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WORLD BANK	International Bank for Reconstruction and Development
WORLD BANK GROUP	Includes five institutions: IBRD, IDA, IFC, ICSID & MIGA.
Y.B. INT'L ORG.	Yearbook of International Organizations
YALE J. INT'L L.	Yale Journal of International Law
YALE L.J.	Yale Law Journal

ABSTRACT

In the current study I challenge the dominant intellectual assumptions of mainstream international law scholarship regarding the principle of Sovereign Equality (SE). I situate the animus and scope of this challenge in the context of decision-making processes of *International Governmental Organizations*' (IGOs) organs which employ the 'one state, one vote' rule or the 'weighted voting' rule. The six IGOs which I examine (the United Nations (UN), the International Labour Organization (ILO), the International Monetary Fund (IMF), the Multilateral Investment Guarantee Agency (MIGA), the European Union (EU) and the Organisation for Economic Co-Operation and Development (OECD)) have been selected not only because of their decisive importance in global governance, but also because they are, in most respects, representative of many other international organizations. The four decision-making characteristics which are examined—i.e. (i) voting rules, (ii) membership composition, (iii) the value of decisions, and (iv) Voting Mechanisms (VMs) and Voting Practices (VPs)—are influenced by IGOs' adherence, or lack thereof, to the principle of SE. In pursuit of functional and legitimate decision-making processes, I seek to break the images and mirages of the doctrine of SE in IGOs. Accordingly, the perspective I employ is based on two theories which have dominated international institutional law and international relations in the twentieth century, namely Functionalism and Legitimacy.

Analyzing the legal implications and complications of the principal VMs and VPs of certain key IGOs *vis-à-vis* the principle of SE, I establish that IGOs' decision-making cannot be reconciled with the principle of SE without undermining the legitimacy of the Organizations' rules. Elaborating on the decision-making processes of the world's key universal political—the UN and the ILO—and financial—the IMF and MIGA—IGOs, I demonstrate that these processes are not, nor have they ever been, in line with the centuries-old principle of SE and, indeed, that this principle is neither functional nor legitimate in a world order composed of an ever growing number of states and IGOs. In the decision-making processes of non-universal organizations—the OECD and the EU—we find but a relative and/or haphazard functionality and legitimacy. Accordingly, I contend that despite its preeminence in international law, SE should not be universally applied, nor purported to be applied in IGOs' decision-making processes. Instead, it should be denounced from international institutional law and replaced by the norms of functionalism and legitimacy.

As it becomes increasingly evident, the ideal of SE not only hasn't been and, indeed, cannot be satisfactorily realized in IGOs but also that, in the context of their decision-

making processes, it has become so eroded and its functional legitimacy so doubted that it can no longer find justified and valid application. Given that the viability of the international legal system depends on its legitimacy, if *jus cogens* is perceived as illegitimate it would not only hamper the world community's development, but it would also, and most crucially, undermine global cooperation.

Forecasting with any degree of certainty the future development of global governance is not possible. However, it is safe to say that interdependence and globalization are irreversible phenomena. The fundamental transformation which the international community has been, and is, undergoing demands a revisiting of the very foundations of international law so as to reed ourselves of the shackles of dated or non-viable legal and/or political concepts and discover innovated solutions which address contemporary realities. As international institutions continue to strengthen their dominant decision-making role in the new world order of global governance, it is imperative that they both epitomize and reflect the character and norms of contemporary society.

Given that the human condition is first and foremost characterized by continuous change, it is only proper, if not essential, that juridical constructions (e.g. the principle of SE) and the legal system (e.g. international law and organizations) require continual adjustment to their foundations so as to conform to changing societal realities. The doctrine of SE has remained far too orthodox for realities of today. The structure and character of the contemporary world requires a reconsideration of this anachronistic and non-viable doctrine and its elimination from international law. It is in this context that the current essay emphasizes the importance of functional legitimate decision-making processes for global governance and advocates the abolition of the principle of SE from international institutional law. As an ancillary proposition, it also rejects the introduction of new principle—i.e. democratic governance—which will render decision-making equally dysfunctional or, indeed, less functional.

Interdependence and globalization provide exciting opportunities for intellectual development and for affecting real changes in IGOs. By exploring the principle of SE in the context of decision-making processes in certain key IGOs and by identifying some of the substantive problems which international institutions are being faced with today, I have sought to provide a better understanding of the present system of global governance and to enrich the debate by providing more viable approaches—i.e. functional and legitimate—for the resolution of these problems. Through this study I hope to further the process of discovery and dialogue, and to influence the evolution of legal thinking by helping to map

out innovative paths—e.g. repositioning the principle of SE and abolishing it from the context of international institutional law—by which international decision-making can become more responsive to the realities of the contemporary world, and, thus, more functional and legitimate.

RÉSUMÉ

Depuis le milieu du dix-neuvième siècle et surtout à partir du début du vingtième siècle, le monde a connu une prolifération spectaculaire d'*organisations gouvernementales internationales* (OGI). Une des raisons de cette expansion réside dans le fait que les progrès scientifiques et technologiques ont suscité des intérêts communs qui ont amené les États à coopérer entre eux, afin d'atteindre des objectifs qu'ils n'auraient pu envisager seuls. La globalisation des activités socio-économiques a de même transformé fondamentalement les fonctions structurelles de l'État, parce qu'il fut incapable de légiférer unilatéralement dans plusieurs situations au niveau national. Ces tendances ont contribué à élargir les paramètres du système juridique international contemporain, en conformité avec l'évolution d'un nouvel ordre mondial caractérisé par une gouvernance globale dans laquelle les OGI jouent un rôle-clé.

Nos vies sont de plus en plus affectées, directement et indirectement, par le nombre sans cesse grandissant d'OGI qui sont en compétition pour l'établissement de normes et de standards internationaux qui s'avèrent nécessaires devant la multitude de changements résultant de notre interdépendance grandissante. De nos jours existent littéralement des milliers d'accords internationaux, produits par les OGI, qui s'appliquent à une vaste gamme de sujets, allant des télécommunications à l'ingénierie génétique. En réalité, pendant presque tout ce siècle, un nombre extraordinaire de normes internationales ont été établies par les OGI. L'expansion du rôle et de la compétence des OGI les mène à un internationalisme grandissant et a fortement contribué au développement de 'législations' internationales. Aujourd'hui, les décisions rendues par les OGI constituent des *sources de droit international* généralement acceptées, un fait qui donne de plus en plus d'importance aux OGI sur l'échiquier mondial.

Cette réalité rend les processus de prise de décision des OGI importants dans le système juridique international, parce qu'en règle générale, les processus par lesquels se fait la prise de décision valident les décisions qui en résultent. La force et, finalement, l'influence des OGI repose sur la légitimité de leurs processus de prise de décision qui, à leur tour, influencent l'adhésion de la communauté internationale à ces décisions. Si l'on prend pour acquis que le *vote* fait partie intégrante de tous les processus de prise de décision, les règlements de vote que les OGI utilisent pour arriver à des décisions sont fondamentaux dans la réalisation de leurs mandats respectifs.

L'importance du droit de vote, à la lumière des philosophies et principes politiques et juridiques dominantes ainsi que la multitude de changements dans les relations entre les États et les peuples, observés dans le monde durant ce siècle, furent l'objet d'une grande controverse à la fois dans les cercles diplomatiques et juridiques internationaux à propos des *mécanismes de vote* (MV) et de *l'exercice du vote* (EV), tels qu'ils existent dans les OGI. Dans la plupart des cas, cependant, les débats sont demeurés théoriques et les critiques et demandes de réformes sont restées lettre morte.

Comme pour la décolonisation des années 1960, la fin de la guerre froide a provoqué l'entrée de nombreux États dans les OGI. Ces nouveaux venus ont modifié la composition de ces diverses organisations, faisant pencher la balance de la majorité numérique en faveur des pays en développement. Ceci a remis en cause non seulement la justesse des MV des OGI, mais a souligné aussi les faiblesses des principes fondateurs de certaines OGI dont les MV et l'EV étaient incompatibles avec le principe dominant en droit international d'*égalité souveraine* (ÉS) et, parfois, avec les règles fondatrices d'une organisation en particulier.

Comme en font foi de nombreux articles publiés ces dernières années, la controverse à propos des MV et de l'EV des OGI suscite un regain d'intérêt. Cependant, bien que la majorité de ces articles présentent avec éloquence les nouveaux défis posés par les MV et l'EV les plus utilisés chez les OGI, ils les analysent rarement en regard du principe de l'ÉS et ils évitent de défier ce principe. La plupart des juristes internationaux font état de l'ÉS comme si c'était une notion issue du vingtième siècle, sans en analyser les racines ni discuter de sa raison d'être au sein de la société internationale contemporaine. De plus, et c'est particulièrement troublant dans cette ère de gouvernance globale et d'importance croissante des OGI, on retrouve l'acceptation apparemment aveugle et la promotion non réfléchie de ce principe.

Dans l'étude en cours je conteste les suppositions intellectuelles dominantes des érudits en droit international concernant le principe d'ÉS. Je situe l'esprit et l'étendue de ce débat dans le contexte des processus de prise de décision des OGI qui utilisent la règle du "un État, un vote" ou la règle du "vote pondéré". Les six OGI que j'analyse (les Nations Unies (NU), l'Organisation internationale du travail (OIT), le Fonds monétaire international (FMI), l'Agence multilatérale de garantie des investissements (AMGI), l'Union européenne (UE) et l'Organisation de coopération et de développement économique (OCDE)) ont été choisies non seulement pour leur importance fondamentale dans la gouvernance globale, mais aussi parce qu'elles sont, dans la plupart des cas, représentatives de plusieurs autres

organisations internationales. Les quatre caractéristiques de la prise de décision qui sont analysées, (i) les règles de vote, (ii) la composition des membres, (iii) la valeur des décisions, (iv) les MV et l'EV, sont influencées par l'adhésion ou non des OGI au principe d'ÉS. Afin que les processus de prise de décision soient fonctionnels et légitimes, je cherche à briser les images et les mirages de la doctrine d'ÉS chez les OGI. En conséquence, la perspective que j'utilise est basée sur deux théories qui ont dominé le droit des organisations internationales et les relations internationales au vingtième siècle, le fonctionnalisme et la légitimité.

La théorie classique du fonctionnalisme fut élaborée par David Mitrany sur le postulat que *la forme suit la fonction* et que chaque situation doit être justifiée par *le besoin*. Mitrany postule que la co-activité internationale est essentielle pour le bien politique d'une collectivité, même si le sacrifice exigé est l'abandon de la souveraineté. Pour Mitrany et la plupart des autres fonctionnalistes, la forme moderne d'État-nation ne peut pas servir adéquatement les buts et intérêts des collectivités politiques contemporaines; elle ne peut pas, comme le postule la philosophie politique d'Aristote, assurer le bonheur de ses citoyens. Conséquemment, le peuple peut et devrait abandonner sa loyauté envers l'État et l'accorder à la société internationale. En d'autres mots, plutôt que de voir les États simplement coexister dans l'ordre mondial international, l'éthique fonctionnaliste pose en principe la coopération des États par le transfert de leurs loyautés aux institutions internationales et leur participation aux co-activités internationales de façon à maximiser l'utilité de leurs actions et de leur pouvoir.

En regard de la prééminence et du pouvoir toujours plus grands des OGI et, ainsi, du fait que la viabilité constante du système juridique international ne dépend plus exclusivement de la volonté des États, l'idée de *légitimité* est devenue une notion de plus en plus importante en droit international. En réalité, les États se conforment aux normes internationales parce que les processus de prise de décision par lesquels ces normes sont édictés, aussi bien que les organismes qui les édictent, sont perçus comme étant *légitimes*. Thomas Franck est le chef de file de la théorie de la légitimité en droit international. Son postulat est le suivant: bien qu'il n'y ait peu ou pas de mécanisme d'obligation coercitive en droit international, les États obéissent aux règles lorsque celles-ci et les institutions qui les promulguent sont perçues comme étant éminemment légitimes. Dans ce contexte, la légitimité est évaluée selon quatre critères: (i) *la clarté (determinacy),* (ii) *la validation symbolique,* (iii) *la cohérence,* (iv) *l'adhésion.* Le degré selon lequel un principe donné, par exemple l'ÉS, possède ces attributs au sein d'une OGI détermine le degré de légitimité de l'OGI et de ses décisions. Les normes, les principes et les règles qui sont perçus comme

illégitimes peuvent susciter l'insoumission et, par conséquence, compromettre le système juridique international dans son entier.

En analysant les implications juridiques et les complications des principaux MV et EV de certaines OGI clés vis-à-vis le principe d'ÉS, j'établis que les MV et l'EV des OGI ne sont pas compatibles avec le principe d'ÉS sans miner la légitimité des règles des organisations. En examinant les processus de prise de décision des OGI clés dans le monde politique universel, les NU et l'OIT, et financier, le FMI et l'AMGI, je démontre que ces processus ne sont pas et n'ont jamais été en conformité avec le principe d'ÉS et qu'en réalité, ce principe n'est ni fonctionnel ni légitime dans un ordre mondial composé d'un nombre sans cesse grandissant d'États et d'OGI. Dans les organisations non universelles comme l'OCDE et l'UE, nous trouvons une fonctionnalité qui n'est que partielle et une légitimité qui est laissée au hasard dans les processus de prise de décision. En conséquence, je soutiens que malgré sa prééminence en droit international, l'ÉS ne devrait pas être appliquée universellement ni avoir la prétention d'être appliquée dans les processus de prise de décision des OGI. Elle devrait plutôt être remplacée par les prémisses du fonctionnalisme et de la légitimité.

Les propositions ci-dessus soulèvent des corollaires importants en ce qui concerne le vote et le principe de l'ÉS. La première question est de savoir si les processus de prise de décision des OGI ont besoin, ou, de fait, s'ils ont jamais eu besoin d'être en conformité avec le principe d'ÉS pour être dotés du pouvoir légitime nécessaire au sein de la communauté internationale. En présentant les utilisations, les mauvaises utilisations, les non-utilisations et les abus d'ÉS dans les processus de prise de décision de quelques OGI, je démontre que la légitimité fonctionnelle des OGI n'est pas dépendante de l'application du principe d'ÉS. Le seul critère à respecter pour s'assurer de l'efficacité des OGI est la fonctionnalité et la légitimité de leurs processus de prise de décision. Les OGI peuvent atteindre cet objectif non pas en remplaçant le principe d'ÉS par un autre concept non-viable, comme la démocratie, mais plutôt en tenant compte des contextes et des situations sociétales.

Bien que le principe de démocratie, dans sa forme directe ou représentative, ne semble pas avoir été transplanté dans la gouvernance des OGI, la tendance vers une démocratie internationale s'accentue. En dépit de cette tendance, la plupart des OGI continuent à être créés selon une hiérarchie interétatique et demeurent non-démocratiques dans leurs processus de prise de décision. Cependant, la réforme des standards démocratiques au sein des OGI n'est pas une proposition fonctionnelle à faire. Nous devons nous souvenir des

leçons de l'histoire, et ne pas essayer d'appliquer sans distinction des principes non viables comme l'ÉS, pour éviter de répéter les erreurs du passé. La quête pour la démocratie ne doit pas être mal dirigée. Les mérites de la démocratie et son importance non équivoque en tant que principe internationalement respecté ne fait pas de doute, mais elle ne peut être entièrement conciliée avec le fonctionnement efficace des OGI ou d'un ordre juridique international fonctionnel. Dans ce cas, bien que l'ÉS et la démocratie peuvent continuer à être des principes largement et légitimement appliqués dans l'aspect général du droit international, les deux doivent être sacrifiés à l'intérieur des OGI.

Il devient de plus en plus évident que l'idéal de l'ÉS ne fut pas et, de fait, ne peut être mis en application de façon satisfaisante dans les institutions internationales. Dans le contexte de leur processus de décision, cet idéal a été si érodé et sa légitimité fonctionnelle tellement mise en doute et ne peut plus trouver une application justifiée et valide. Si l'on considère que la viabilité du système juridique international dépend de sa légitimité, si le *jus cogens* est perçue comme illégitime, non seulement cela pourrait entraver le développement de la collectivité mondiale mais, plus sérieusement, cela minerait la coopération globale.

La non-viabilité de la doctrine de l'ÉS dans le contexte des OGI soulève la question de savoir si la collectivité internationale devrait y renoncer. J'affirme que le principe n'a pas besoin, ne devrait pas et, de fait, ne peut pas être entièrement abandonné par le discours juridique international *général,* parce que dans un contexte universel, c'est une norme juridique internationale impérative et fonctionnellement légitime. Cependant, à cause de sa nature et sa non-viabilité dans le contexte des OGI, son abolition dans le discours juridique *spécifique* des institutions internationales est à la fois possible et souhaitable. En posant une telle limite à l'application de l'ÉS, l'érosion du principe dans le droit des institutions internationales cessera et la doctrine pourra commencer à retrouver sa légitimité dans le système juridique international considéré globalement.

Il n'est pas possible de prévoir avec un certain degré de certitude le développement futur de la gouvernance globale. Cependant on peut dire sans crainte de se tromper que l'interdépendance et la globalisation sont des phénomènes irréversibles. Les transformations en profondeur que la collectivité internationale a subies et continue à vivre exige que l'on revoit les fondements du droit international afin de le libérer des entraves de concepts juridiques et/ou politiques périmés et non viables afin de découvrir des solutions innovatrices en harmonie avec les réalités contemporaines. Au fur et à mesure que les institutions internationales continuent à renforcer leur rôle dominant dans la prise de décision dans le nouvel ordre mondial de la gouvernance globale, il est impérieux qu'elles

incarnent et reflètent le caractère et les normes de la société contemporaine.

Puisque la condition humaine est d'abord et avant tout caractérisée par le changement continuel, il est juste, sinon essentiel que les constructions juridiques (par exemple le principe d'ÉS) et le système juridique (par exemple le droit international et le droit des organisations internationales) requièrent des ajustements continuels à leurs fondements, pour se conformer aux changements des réalités sociétales. La doctrine de l'ÉS est demeurée beaucoup trop orthodoxe pour les réalités d'aujourd'hui. La structure et le caractère du monde contemporain exigent de revoir cette doctrine anachronique et non-viable et son élimination du droit des institutions internationales. C'est dans ce contexte que la présente étude met l'accent sur l'importance des processus fonctionnellement légitimes de prise de décision pour la gouvernance globale et appuie l'abolition du principe d'ÉS du droit des institutions internationales. Comme proposition subordonnée, elle rejette aussi l'introduction de nouveaux principes, par exemple la gouvernance démocratique, qui rendrait la prise de décision des OGI également dysfonctionnelle ou, de fait, moins fonctionnelle.

L'interdépendance et la globalisation procurent des occasions stimulantes de développement intellectuel et pour effectuer de véritables changements dans les OGI. En explorant le principe de l'ÉS dans le contexte des processus de prise de décision par certaines OGI clés et en isolant certains des problèmes de fond auxquels font face les institutions internationales aujourd'hui, j'ai voulu apporter une meilleure compréhension au présent système de gouvernance globale et un enrichissement au débat en fournissant des approches plus viables, c'est-à-dire fonctionnelles et légitimes, à la résolution de ces problèmes. Par cette étude, j'espère faire avancer le dialogue et influer sur l'évolution de la pensée juridique en contribuant à dégager des avenues, par exemple en repositionnant le principe de l'ÉS et en l'abolissant du droit des institutions internationales, par lesquelles la prise de décision internationale peut devenir plus attentive aux réalités du monde contemporain et, ainsi, plus fonctionnelle et légitime.

TABLE OF CONTENTS

The footnote references used in this work are based on the HARVARD LAW REVIEW ASSOCIATION, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (16th ed. 1996).

TABLE OF DIAGRAMS

I. INTRODUCTION TO INTERNATIONAL POWER AND INFLUENCE

> "We depend for our future on international order. Our destiny is increasingly influenced by the activities—or lack thereof—of international organizations."
>
> Henry G. Schermers & Niels M. Blokker[1]

A. THE STRUCTURE OF THE WORLD COMMUNITY

International law[2]—previously known as the 'law of nations' or *jus gentium*[3]—traces its modern origins to the sixteenth century when nations formally commenced the process of their transformation into the legal frontiers of modern statehood—comprising, amongst other things, a defined territory and population.[4] The seventeenth century marked an historical milestone of a new world order as nation-states emerged with a preeminent role in world affairs.[5]

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[1] HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY v (1995).

[2] Although international law is the contemporary term commonly used amongst both academics and practitioners, this wording is not without its critics. *See* Mark W. Janis, *International Law?*, 32 HARV. INT'L L. J. 371-372 (1991), arguing for the return of the term the 'law of nations' which he claims is more appropriate than the term 'international law' since the current actors in this legal system are no longer exclusively 'sovereign states'. *See also* PHILIP C. JESSUP, TRANSNATIONAL LAW 1-2 (1956), referring to international law as "misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states)", Jessup prefers the term 'transnational law' which "include[s] all law which regulates actions or events that transcend national frontiers."; REBECCA M.M. WALLACE, INTERNATIONAL LAW 1, n.2 (1986), who points out that the term 'international law' is a misnomer because "statehood and nationhood are not necessarily synonymous."; QUOC DINH ET AL., DROIT INTERNATIONAL PUBLIC 33-34 (5th ed. 1994), while recognizing that *droit international* is the generally accepted term, the authors also claim that it should be considered as synonymous to *droit interétatique*.

For the purposes of the present study, I use the terms 'international law' and 'law of nations' interchangeably.

[3] *See* DAVID M. WALKER, THE OXFORD COMPANION TO LAW 634, 675 (1980). International law was also known as *ius gentium* and *droit des gens*. For further discussion on the origins of the terms *ius gentium* and *droit des gens see also* QUOC DINH ET AL., *supra* note 2, pp. 33-34.

[4] *See* QUOC DINH ET AL., *supra* note 2, pp. 48-49, discussing the sixteenth century transformations of European monarchies into modern states. *See also* pp. 39-49 for an excellent historic summary of the pre-state aspects of the modern international legal system which are traced back to ancient times.

[5] The 1648 Treaties of Westphalia put an end to the thirty year power struggle between the state system, the Church and the Holy Roman Emperor. These treaties formally legalized the birth of new sovereign secular states and have been characterized as the first European Constitutional Charter. *See* THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 15 (1990); QUOC DINH ET AL., *supra* note 2, pp. 49-50; M.N. SHAW, INTERNATIONAL LAW 25, 742 (3rd ed. 1991);

During that era, the Dutch scholar and diplomat, Hugo Grotius (1583-1645), expounded a comprehensive system on the law of war and peace. With his treatise, *De Jure Belli ac Pacis* (1625), Grotius—widely regarded as the father of modern international law[6]—identified the state as sovereign and, as a result of this status, its actions are independent from any other power.[7] Henceforth, international law began its development as an ensemble of legal norms governing relations amongst states,[8] the said states recognizing the equality of each others' sovereign status. This phenomenon became known as the international law principle of **Sovereign Equality** (SE).[9]

In the eighteenth and nineteenth centuries international law matured into a well established system of rules of conduct governing an ever growing field of international relations. By the twentieth century, spurred by scientific and technological advances, it had become multifarious, necessitating extensive international regulation.[10] The contemporary international legal system has developed into a complex network of treaties, conventions, agreements, conferences, etc. which regulate innumerable rights and duties not only between states, but also within states, as well as between states and persons, between states and multinationals, between states and international institutions, etc.[11] As such, the

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Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, DUKE L.J. 748, 759 (1983). *See also* RENÉ-JEAN DUPUY, LE DROIT INTERNATIONAL 5-10 (Que sais-je?, 1993); Kéba Mbaye, *Article 2 Paragraphe 1, in* LA CHARTE DES NATIONS UNIES 79, 82 (Jean-Pierre Cot and Alain Pellet eds, 1985).

[6] QUOC DINH ET AL., *supra* note 2, pp. 53-54; SHAW, *supra* note 5, p. 22; BUERGENTHAL & MAIER, *supra* note 5, pp. 13-14; DUPUY, *supra*, note 5, p. 8. *But see* KOOIJMANS, *infra* note 12, p. 57 crediting the fifteenth century's Spanish theologian Francisco de Vitoria as the real founder of international law. For further discussion on SE *see infra* Part II.B.3.a.

[7] QUOC DINH ET AL., *supra* note 2, p. 54.

[8] Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 419 (1983). *See also* Joseph S. Nye Jr. & Robert O. Keohane, *Transnational Relations and World Politics*, *in* INTERNATIONAL ORGANIZATION: POLITICS & PROCESS 427-454, 427 (Leland M. Goodrich & David A. Kay eds, 1973), [hereinafter 'Nye & Keohane'], "[t]he classic state-centric paradigm assumes that states are the only significant actors in world politics and that they act as units."

[9] *See* QUOC DINH ET AL., *supra* note 2, p. 50;

The principles of equality, sovereignty and Sovereign Equality (SE) are addressed in *infra* Part II. B.

See also Albert Bleckmann, *Article 2 (1), in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 77-88, 87 (Bruno Simma et al. eds, 1994). Bleckmann, author of the commentary on Article 2, paragraph 1 of the UN Charter, [declaring that the "organization is based on the principle of the sovereign equality of all its members"] also suggests that the term 'sovereign equality' is interchangeable with the term 'equal sovereignty'. In the context of this study, I use the terms 'sovereign equality', 'state equality' and 'equality of states' interchangeably.

[10] *See* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW 6 (1995) [hereinafter 'FRANCK—FAIRNESS'], discussing some of the many factors responsible for the growth of international law. Franck suggests that space exploration has forced states to reflect on their common destiny and has introduced a myriad of environmental concerns. He further submits that, in today's world, issues relating to forestry, the ozone layer, fisheries, lakes, streams and ground water resources require management through international rules.

[11] *See id.* at 5. According to Franck,

classic assumption that the state is the only key actor in world affairs is now a parochial view of international law. Today, both state and non-state actors help shape the global legal system, as international law is now a heterogeneous field comprising not only states but also, increasingly and predominantly, **International Organizations** (IOs),[12] the latter owing their creation to the former.

> "International law has matured into a complete legal system covering all aspects of relations among states, and also, more recently, aspects of relations between states and their federated units, between states and persons, between persons of several states, and multinational corporations, and between international organizations and their state members...".

Cf. Charney, *supra* note 5, pp. 753-754, 760-767. Reviewing academicians and theorists' divergent views of international law, Charney indicates the presence and influence of other international law actors such as "individuals and business organizations [who] interact with international law indirectly through their national governments" and forcefully argues that, increasingly, transnational corporations are, not only participants but also, powerful actors in the development of the international legal system.

[12] The days when international law applied exclusively to states are long gone. Now, the quasi-totality of international legal literature recognizes that contemporary international law necessarily includes the system of rules governing the relationship between states and international organizations. *See e.g.* QUOC DINH ET AL., *supra* note 2, p. 34; J.-MAURICE ARBOUR, DROIT INTERNATIONAL PUBLIC 1 (1985); FRANCK—FAIRNESS, *supra* note 10, p. 5; BUERGENTHAL & MAIER, *supra* note 5, p. 2.

Of course, international law was originally the law for the world's *nations*—not for its citizens—and, therefore, it developed exclusively from legal acts of nation-states. *See* BERNARD GILSON, THE CONCEPTUAL SYSTEM OF SOVEREIGN EQUALITY 4 (1984). Contrary to domestic law, in international law the states, and not the citizens, have been the direct subjects of the rights and duties and the complex norms regulating inter-state relationships. *See* DUPUY, *supra* note 5, pp. 31-32 discussing the "*exclusion de l'individu du droit international public*". *But see also* P.H. KOOIJMANS, THE DOCTRINE OF THE LEGAL EQUALITY OF STATES 37 (1964) noting that we mustn't ignore that "[m]an is the reason for [the] existence and [the] *destinataire* of international law" (emphasis in original). Kooijmans also warns against the "conclusion that man is of no or of subordinate importance in international law", adding that "[m]an is the centre of Creation and as such the centre of each legal system, therefore also of international law. This element binds together the whole legal structure, whether it be private law, state law or international law; behind each of these we find Man as the keystone." After all, the state is an artificial political creation which does not lead a life, but rather it exists to protect the interests of its subjects. ROBERT A. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA 1, 5 (1974). Nevertheless, as Klein further postulates, the idea that the state has corporate personality—stemming from the irresistible analogy of the state as a moral person versus a physical person—is a myth which plays a vital role in world order.

1. INTERNATIONAL ORGANIZATIONS AS THE NEW KEY PLAYERS IN THE WORLD COMMUNITY

Since the mid nineteenth century, and especially since the turn of the twentieth century, the international legal system has been exposed to a spectacular proliferation of IOs—both international governmental organizations (IGOs) and international non-governmental organizations (INGOs or NGOs).[13] The *raison d'être* and activities of these organizations are varied, ranging from the political and financial, to the scientific and cultural.[14]

NGOs are constituted by private associations or groups of individuals.[15] IGOs are comprised by nation-states.[16] Although both IGOs and NGOs have contributed to the development of international law, IGOs have been by far the most influential organizations, primarily because of states' role as architects in the development of the international legal system. Accordingly, it is IGOs which are the focus of the present study.

Over the years, international legal scholars have provided varying definitions of IGOs. One commonly held definition is that of C. Archer (1992) who defines IGOs in terms of

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[13] *See* D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 4-9 (4th ed. 1982). Bowett traces the first form of a NGOs to the 1840s with the World Anti-Slavery Convention and indicates that between that period and W.W.I approximately 400 NGOs were created. As for IGOs, Bowett traces their origins to the 1815 Congress of Vienna and the creation of the Rhine Commission and lists IGOs which subsequently emerged in the latter part of the nineteenth century and the early part of the twentieth century. *See also* CLIVE ARCHER, INTERNATIONAL ORGANIZATIONS 38-45 (2nd ed. 1992). Archer classifies IOs (International Organizations) into IGOs (Inter-Governmental Organizations), NGOs or INGOs (Non-Governmental Organizations or International Non-Governmental Organizations), Hybrid INGOs (including IGOs and NGOs), BINGOs (Business International Non-Governmental Organizations), TGOs (Trans-Governmental Organizations), and TNOs (Trans-National Organizations).

[14] *See* BOWETT, *supra* note 13, pp. 4-9 for a list of a wide spectrum of mandates taken on by various IOs.

[15] *See* ARCHER, *supra* note 13, pp. 38-45.

[16] *See* FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 138-139, 149 (2nd ed. 1993) [hereinafter 'KIRGIS—INTERNATIONAL ORGANIZATIONS']; ARCHER, *supra* note 13, pp. 38-45; QUOC DINH ET AL., *supra* note 2, pp. 407-408, 497-499; SCHERMERS & BLOKKER, *supra* note 1, pp. 50-52, 113. Most IGOs' founding instruments require statehood as a prerequisite for membership. Exceptionally, however, certain non-state nations have been allowed a seat in some IGOs as 'associate' members. This type of membership was granted for colonies, other non-autonomous territories, liberation movements or governments in exile so as "to permit them to participate in the organization without granting them the rights of independent states" (e.g. Macau is an associate member of the International Maritime Organization (IMO); the Netherlands Antilles, the British Virgin Islands and Aruba are associate members of the United Nations Educational, Scientific and Cultural Organization (UNESCO); Namibia was an associate member of both UNESCO and the World Health Organization (WHO) for four years before it obtained full membership status; Tokelau and Puerto Rico are associate members of WHO; the Palestinian Liberation Organization has observer and participation status in the United Nations (UN)).

See also generally Jörn Sack, *The European Community's Membership of International Organizations*, 32 COMMON MKT L. REV. 1227-1256 (1995). Some IGOs also allow other IGOs to participate within

three key elements: first, they are formal and continuous structures; second, they are established by agreement between two or more sovereign states; and third, their objective is to pursue the common interests of their members.[17]

One of the main reasons for the dramatic expansion of IGOs over the years is that scientific and technological advances have created areas of common interest which necessitate *concerted action*—i.e. states working together so that they may achieve goals which they can not achieve alone.[18] For instance, protection of the environment cannot be accomplished by a single state. It requires global co-operation. The advancement of medical research into human diseases can also best be accomplished through a co-operative effort. In fact, the development of science and technology, together with the globalization of socio-economic activities,[19] are inextricably linked to the evolution of international law into a system of *global governance*,[20] in which IGOs play a leading role.

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their organization (e.g. the European Union (EU) participates in the Organisation for Economic Co-operation and Development (OECD)).

[17] ARCHER, *supra* note 13, p. 37. In the first chapter, the author provides an historical perspective of IOs and offers several working definitions of these entities from renowned international legal experts such as Virally, Reuter, Plano and Riggs as well as Wallace and Singer.

Cf. generally Wrap-up Panel: Are International Institutions Doing Their Job?, 90 PROC. AM. SOC. INT'L L. 583 (1996). Curiously, at the wrap-up session of the 1996 annual meeting of the American Society of International Law, the panel was deliberately reluctant to provide a definition of international institutions. Those who attempted to offer one gave an extremely large definition, encompassing virtually every type of organization. *See also* SCHERMERS & BLOKKER, *supra* note 1, pp. 22-23. While claiming that there is no generally accepted definition for an IGO, the authors provide their own definition of this term as a form of "cooperation founded on an international agreement creating at least one organ with a will of its own, established under international law."

[18] Manfred Lachs, *Views from the Bench: Thoughts on Science, Technology and World Law*, 86 AM. J. INT'L L. 695 (1992). *See* Charney, *supra* note 5, p. 759, indicating that "the role of intergovernmental organizations in international affairs has expanded substantially as a result of the international community's *need* to attain the goals that nation states could not reach alone." (emphasis added). *See also* BOWETT, *supra* note 13, p. 1, 6 holding that the proliferation of IGOs resulted from a human *need* and was not a response to philosophical or idealistic desires for a world government.

Cf. Brigitte Stern, *What, Exactly, Is the Job of International Institutions?*, 90 PROC. AM. SOC. INT'L L. 585, 589 (1996). Professor Stern believes that there are three key reasons which motivate states to mandate international institutions to act on their behalf, namely:

> "(1) States think collective action is more efficient to fulfill the pursued purpose...
> (2) States view collective action as second best—a way to hide the fact that they are incapable of dealing with the problem...
> (3) States need to legitimize their own unilateral or multilateral action, once they have determined that their interests are best satisfied by state action..."

For a further discussion on world organizations with common interest *see infra* Part II.A.1 on the theory of Functionalism.

[19] *See* COMMISSION ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBOURHOOD 2-12, 70, 303-308 (1995). Globalization is primarily used to describe the "key aspects of the recent transformation of world economic activity" where "deregulation, interacting with accelerating changes in communications and computer technology has reinforced the movement toward an integrated global market". This financial liberalization is said to have created "created a borderless world". Indeed, it "is now more difficult to separate actions that solely affect a nation's internal affairs from those that have an impact on the internal affairs of other states, and hence to define the legitimate boundaries of sovereign authority." *See also* Stern, *supra* note 18 pp. 591-592. Stern discusses the challenge to globalization in which world actors—i.e. IGOs,

As IGOs become more powerful actors within the world community, regulating many of our daily activities, their *decisions*[21] become increasingly more important for they contribute to the development of the international law-making process by establishing a multitude of international norms and standards of conduct.[22] In fact, both directly and indirectly, our lives are increasingly affected by international law as IGOs race to establish rules of conduct which address the multitude of changes brought about by the ever more rapid advances in science and technology.[23]

Today, there are literally thousands of international agreements, products of IGOs, which cover as wide a range of subject matters—e.g. from telecommunications to genetic engineering.[24] For instance, *inter alia*, there are international rules and treaties regulating our modes and content of communication,[25] our modes and methods of transportation (i.e. trains, airplanes, ships),[26] the quantity and quality of the pollutants we emit,[27] and a myriad of other activities of our lives.

The exponential growth and expanding jurisdiction of IGOs has resulted in a situation of

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individuals, states, multinational corporations and NGOs—increasingly partake in exchanges of economic and informational activities; Valticos—Conventions de l'OIT, *infra* note 602, p. 33 stating that "*la globalisation de l'économie pose des problèmes nouveaux, tout en ajoutant des raisons supplémentaires pour une action universelle.*" (footnote omitted).

[20] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, pp. 2-3. Governance is defined as the "sum of the many ways individuals and institutions, public and private, manage their common affairs." Global Govern*ance* is to be distinguished from World Govern*ment*. While the latter is associated with the world federalist movement the former is "viewed *primarily as intergovernmental relationships*, [...and also involves other actors such as] non-governmental organizations (NGOs), citizens' movements, multinational corporations, and the global capital market." (emphasis added); Lachs, *supra* note 18, p. 672.

[21] Throughout this study, unless the context indicates otherwise, I refer to 'decisions' in the larger sense of the term, encompassing resolutions, recommendations, conventions, directives, decrees, initiatives, guidelines, etc. on which IGO members are called upon to exercise their vote. Of course, this is not to ignore the reality that each decision—depending on the organ or even the wording of the decision rendered by a given IGO—has varying degrees of legal and binding value. In this respect, the appropriate distinctions will be made where applicable. *Cf.* Weil, *supra* note 8, p. 416, exploring the varying legal value of IGOs' recommendations, resolutions and decisions.

[22] *See* QUOC DINH ET AL., *supra* note 2, pp. 318-319.

[23] Lachs, *supra* note 18, p. 694. *See* FRANCK—FAIRNESS, *supra* note 10, p. 6.

[24] Lachs, *supra* note 18, p. 695. Justice Manfred Lachs reports that in a forty-three year period (1946-1989) an enormous number of "33,947 international agreements have been registered and deposited with the United Nations".

See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 622 (1991).

[25] I.e. Two such organizations are: the International Telegraph Union and the Universal Postal Union. An example of a related treaty is the International Telecommunications Convention.

[26] I.e. International Union of Railways; International Civil Aviation Organization (ICAO); the 1856 Declaration of Paris and the 1982 Law of the Sea Convention.

[27] I.e. the 1982 Vienna Convention for the Protection of the Ozone Layer.

growing internationalism and expanded law-making.[28] Indeed, for the greater part of this century, the overwhelming number of international laws and regulations have been established by IGOs.[29] Today, IGOs' decisions count among the generally accepted sources of international law including custom, court rulings, and treaty obligations.[30] This in turn has contributed to the expansion of the parameters of the contemporary international legal system to increasingly include laws regulating relations *between* and *within* IGOs.[31]

a) Decision-making Processes in International Governmental Organizations

As a rule, the process by which decisions are made validates the resulting decision. This rule holds true whether the decision-making process involves relatively trivial issues, like choosing the best Olympian, or more significant issues, like electing national governments or determining the fate of a country through referenda.[32] Similar to domestic decision-

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[28] FRANCK—FAIRNESS, *supra* note 10, p. 6; Elihu Lauterpacht, *Are International Organizations Doing Their Job? International Legislation*, 90 PROC. AM. SOC. INT'L L. 593 (1996).

[29] *See* Lauterpacht, *supra* note 28, p. 593, presenting the meaning of 'international legislation' Lauterpacht indicates that it originates first from "a multilateral treaty or other instrument directly laying down rules on a particular subject and, secondly, [from] the adoption by an international organization of particular rules within the scope of its activities". He further credits all IGOs for the extensive amount of international legislation. Of course, the term 'international legislation', as used by Lauterpacht and many other international scholars, is a misnomer in the literal sense of the term because there is obviously no such thing as an *international legislature* which enacts laws and regulations. Albeit erroneous in a traditional context, the term 'international legislation' is nonetheless widely accepted and commonly interchanged with the term 'international law-making' as numerous international institutions increasingly assume decision-making with binding effect on its member states. *See also* JACK C. PLANO & ROY OLTON, THE INTERNATIONAL RELATIONS DICTIONARY, 276-283 (1988) outlining "international lawmaking" and "international legislation" in a wide range of areas.

[30] The main sources of international law are enumerated in the *Statute of the International Court of Justice*, June 26, 1945 59 Stat. 1055, T.S. No. 933, art. 38 [hereinafter 'ICJ Statute']. For a further discussion on the key sources of international law *see also* John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 142 (1996); WALKER, *supra* note 3, p. 639; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 1-31 (4th ed. 1990) [hereinafter 'BROWNLIE—PRINCIPLES']; SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM 2 (3rd ed. 1988).

[31] FRANCK—FAIRNESS, *supra* note 10, p. 5 indicating that "[a] new international law is developing which governs relations between an international organization and its employees and between international organizations themselves."; QUOC DINH ET AL., *supra* note 2, p. 34; BUERGENTHAL & MAIER, *supra* note 5, p. 2. *See also supra* notes 11 and 12 for the diverse actors in the contemporary international legal system.

[32] The following three examples illustrate the importance of decision-making processes. In 1998, controversy arose regarding the judging of the figure skating competition at the winter Olympic Games held in Nagano, Japan. The legitimacy of the victors was put into question when it was alleged that there was bloc voting by certain judges, thereby, effectively pre-determining the winners according to the country the skaters represented and not only on the basis of merit. More serious cases involve the electoral processes during certain countries' national elections. Throughout the post World War II era, several organizations have sent observer missions to fragile democracies in order to supervise and ensure free and fair electoral processes and, therefore, legitimize the government elected. Another prominent example is the referenda, past and future, on Québec's secession. Recognizing that *how* the referendum process takes place legitimizes *what* is decided, a wide range of procedural issues—e.g. whether Québec can separate unilaterally after

making, "the way in which [... international] decisions are made—the formal procedures and informal practices followed by the organization's members—will have a direct and immediate effect on the member's observance of them."[33]

Because IGOs are important sources of international law,[34] their decision-making processes are critical to the international legal system. As the nerve centre of all IGOs, these processes are responsible for the creation of international rules dictating the legal norms of today's interdependent society. Indeed, IGOs' strength and, ultimately, their influence rests on the legitimacy of their decision-making processes and on the international community's adherence to their decisions.[35]

Membership to an IGO entails an exchange of rights and obligations—i.e. states are granted certain rights and assume certain obligations. One of the basic privileges of membership to any given IGO is the right to vote on its decisions, conventions, resolutions, directives, recommendations, guidelines, etc.[36] As an integral part of all decision-making processes, the voting rules employed to reach decisions within IGOs are fundamental to the achievement of their mandates. Indeed, IGOs' power and their ultimate success or failure rests, in considerable part, on the outcome of their voting processes.

However, IGOs' **Voting Mechanisms** (VMs) and **Voting Practices** (VPs)[37] have been subjects of much controversy. Since the inception of IGOs, members of the diplomatic community have been highly critical of certain organizations' VMs.[38] The international legal community has also expressed deep concerns and legal scholars have repeatedly called for reforms. For the most part, however, the debate has been academic

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holding its own referendum, the type of question to be put to a vote, the kind of majority required for separation (simple or a higher majority), etc.—are disputed by the Federalists and the Secessionists alike.

[33] Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566 (1980).

[34] *See supra* notes 12 and 30. *See generally* David Kennedy, *Sources of International Law*, 5 AM. U. J. INT'L L. & POL'Y 1 (1987). *But see* Robert O. Keohane & Joseph S. Nye, Jr., *Power and Interdependence Revisited*, 41 INT'L ORG. 725, 738 (1987) [hereinafter 'Keohane & Nye—Power & Interdependence']. These self-described institutionalists, espousing the interdependence theory, view international organizations as institutionalized entities of policy networks and not as "sources of definitive law". Although Keohane and Nye are eminent political scientists, they are not jurists and, as indicated earlier, the vast majority of the international legal community recognizes the significant role IGOs play in contemporary international law.

[35] *See* FRANCK—FAIRNESS, *supra* note 10, p. 26, asserting that when "a rule or its application is legitimate, two things are implied: that it is a rule made or applied in accordance with right process, and *therefore* that it ought to promote voluntary compliance by those to whom it is addressed."

[36] *See supra* note 21.

[37] In the context of this study, I use 'Voting Mechanisms' (VMs) as the general term to encompass all theoretical voting aspects of interest, namely: methods, formulas, processes, procedures and systems foreseen in the constituent instrument of a given IGO. The term 'Voting Practices' (VPs) is used to connote the actual voting scheme applied by a given organization in its decision-making processes.

[38] *See* Paul Tavernier, *Article 27 in* LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 500 (Jean-Pierre Cot and Alain Pellet eds, 1985).

and most calls for reform have remained unanswered.

b) The Nascent Emergence of New States and their Impact on Voting in International Governmental Organizations

As with the decolonization movement of the 1960s, the end of the Cold War spurred the entry of numerous states into IGOs. The new admissions, altering the majority standing of the membership of various organizations and tipping the scale of numeric majority in favour of the developing world, has challenged the adequacy of IGOs' VMs and has rekindled the controversy over voting. The defects of certain IGOs' constituent acts have been dramatically exposed, accentuating concerns about VMs' and VPs' fundamental incongruency with international law principles—i.e. SE—and also, at times, with the organizations' founding instruments.

It has become increasingly evident that the ideal of SE has not been satisfactorily realized in the international legal system.[39] In the context of IGOs, the principle has been so eroded, and its functional legitimacy so doubted that it can no longer find justified and valid application. Given that the viability of the international legal system depends on its legitimacy, if *jus cogens*[40] is perceived as illegitimate it would not only hamper the world community's development, but it would also, and most crucially, undermine global co-operation.

The issues and problems which have arisen as a result of fundamental incongruencies have been many and varied. In the late 1980s and early 1990s serious questions were raised about the imbalance between member states' voting power in relation to their ability to contribute to the resolution of world problems.[41] Political and legal problems have been further accentuated by the sudden influx of new states into IGOs and the failure of some of these to meet the financial obligations of membership.[42]

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[39] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 66, recognizing its failure, the Commission argues that "[i]t is time to make a larger reality of that 'sovereign equality' of states that the UN Charter spoke of in 1945, but that it compromised".

[40] The term *jus cogens* or *ius cogens* is defined as the peremptory norms of international law which are binding on the entire community of states. *See Vienna Convention on the Law of Treaties*, May 23, 1969, U.N. DOC. A/CONF. 39/27 *reprinted in* INTERNATIONAL LAW—SELECTED DOCUMENTS 65 (Barry E. Carter & Philip R. Trimble eds, 1991) art. 53. For further discussion on *jus cogens see infra* Part. II.B.4.b.

[41] *See* A. LEROY BENNETT, INTERNATIONAL ORGANIZATIONS, PRINCIPLES AND ISSUES 84 (5th ed. 1991).

[42] *See generally* John W. Head, *Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment of the IMF Charter*, 33 VA. J. INT'L L. 591-646 (1993); Rutsel

Recognizing that the structural rigidity of most IGOs does not lend well to the accommodation of contemporary realities, the international legal and diplomatic communities have now renewed their calls for amending, reforming and modernizing key political, financial and other IGOs, in general, and their decision-making processes in particular.[43] The international legal community has been busy rethinking the traditional views of the international legal system in an attempt to provide new approaches to international law and fresh solutions to the current problems facing IGOs.[44] Numerous suggestions have already been tabled for reforming the voting structure of the world's foremost political organization, the *United Nations*.[45] Recently, three key IGOs, the *Multilateral Investment Guarantee Agency*, the *European Union* and the *Organisation for Economic Co-operation and Development*, have mandated their respective executives to seek decision-making amendments, while a third, the *International Monetary Fund*, has already adopted voting-related reforms.[46]

Silvestre J. Martha, *Inability to pay under international law and under the Fund Agreement*, 41 NETH. INT'L L.J. 85-114 (1994).

[43] *See* BENNETT, *supra* note 41, p. 85.

[44] *See generally* David Kennedy & C. Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT. L.J. 417 (1994).

[45] There is a plethora of literature on UN reforms. *See generally e.g.* UNITED NATIONS REFORM: LOOKING AHEAD AFTER FIFTY YEARS (Eric Fawcett & Hanna Newcombe eds, 1995) [hereinafter 'Fawcett & Newcombe']; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 96 (Bruno Simma et al. eds, 1994); UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 1, 76 (Rüdiger Wolfrum and Christiane Philipp eds, 1995); COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19; ERSKINE CHILDERS AND BRIAN URQUHART, POUR RÉNOVER LE SYSTÈME DES NATIONS UNIES (1995); K.P. SAKSENA, REFORMING THE UNITED NATIONS: THE CHALLENGE OF RELEVANCE (1993). For a discussion on a selective number of proposals for UN voting-related reforms *see* Part III.A.4.b.

[46] *See* Parts IV & V where I discuss proposed and adopted decision-making reforms in all four of these IGOs.

2. *Problems and Opportunities Regarding the Principle of Sovereign Equality*

It is unequivocal that in today's interdependent international society with the increasing globalization of exchanges, the emergence of new actors—such as IGOs—have diffused the concentration of power traditionally found in the state.[47] Indeed, the relative devolution of power from states to institutions experienced in this century represents a monumental transformation of the structure of the international community.[48] Moreover, the contemporary world is no longer the same as it was when the international law principle of SE emerged in the seventeenth century. At that time there were only a handful of states in existence while, today, there exist 191 states.[49] These changes have exerted immense stress on the structure of our world community to the extent that "essential international institutions are facing imminent breakdown caused by widespread dissatisfaction with both what they do and how they do it."[50] However, these structural transformations need not be viewed as purely problematic for, along with the many problems they have created, they have also opened up new opportunities in the international legal order.[51]

The changes to the international community—brought about by the growing number of IOs and by the increasing number of sovereign states—necessitate a revisiting of the very foundations of international law and especially of the principle of SE which remains far too orthodox for the realities of today.[52] Indeed, given the fundamentality of continuous change

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[47] R.W. Tucker, The Inequality of Nations 173 (1977). *See also* Valticos—Conventions de l'OIT, *infra* note 602, p. 35 noting that it is "*la mondialisation de l'économie qui fait que, de plus en plus, des décisions sont prises par des acteurs extraterritoriaux*".

[48] *See* Commission on Global Governance, *supra* note 19, pp. 11-12 noting that the "last fifty years have radically and rapidly transformed the world and the agenda of world concern" the Commission points out that "this is not the first generation to live on the cusp of a great transformation" and compares the changes in the latter part of the twentieth century to historic milestones and declares that "[t]he turbulence of the last decade is not unlike [... that which] accompanied the rise of Islam in the century following the death of the Prophet, the European colonization of the Americas in 1492, the onset of the Industrial Revolution in the eighteenth century and the creation of the contemporary international system in this century." Moreover, it draws a distinction between our current structural transformation and that of earlier generations, arguing that "never before has change come so rapidly—in some ways, all at once—on such a global scale, and with such global visibility."

[49] There are 191 states currently in existence, of which 185 are members of the UN (for a list UN member states *see* Annex II) as well as six others which include: Switzerland, Vatican City, Tonga, Tuvalu, Kiribati, and Nauru.

[50] Franck—Fairness, *supra* note 10, p. 483.

[51] *See* Philip C. Jessup, A Modern Law of Nations 1 (1959) [hereinafter 'Jessup—Modern Law of Nations'].

[52] *Cf.* Kooijmans, *supra* note 12, p. 14, eloquently expressing that:

in the human condition, it is only right, if not imperative, that juridical constructions (e.g. the principle of SE) and the legal system (e.g. international law and organizations) require continual adjustments to their foundations so as to conform to changing realities.[53] As Kooijmans (1964) rightly reminds us, "only intellectual arrogance would design a legal system in this temporal reality for all times and all places."[54]

a) The Need to Rethink Sovereign Equality in the Decision-Making Processes of International Governmental Organizations

In this study I challenge the dominant intellectual assumptions of mainstream international law scholarship regarding the principle of SE.[55] The animus and scope of this challenge takes place in the context of decision-making processes of the main IGOs' organs which employ the 'one state, one vote' rule, as well as those which use the 'weighted voting' rule.

Analyzing the legal implications and complications of the principal voting mechanisms and practices of several key IGOs *vis-à-vis* the principle of SE, I establish the following propositions. Recognizing that the efficiency of the international legal system rests essentially upon the legitimacy of its rules,[56] I first demonstrate that the VMs and VPs of the world's key IGOs are not in line with the principle of SE and that they cannot be reconciled with the said rule without undermining the rule's legitimacy. Second, I contend that despite its preeminence in international law, the principle of SE is neither a functional nor a legitimate principle in a new world order composed of an ever-growing number of IGOs and states. In this respect, I postulate that SE should not be universally applied, nor claimed to be so applied in IGOs' decision-making processes, and that it should be banished from international institutional law.[57]

> "The acceptance of unchangeable legal rules, even within temporal reality, is nothing less than an under-estimation of historicity, of the value of man as culture-forming creature. This world is subject to continuous change; new social structures emerge; new views break through. These new social structures demand new legal systems; the new views call for serious and continuous reflection on the part of those who are engaged in concretizing the legal norms."

[53] *See* Gennady M. Danilenko, *The Changing Structure of the International Community: Constitutional Implications*, 32 HARV. INT'L. L.J. 353 (1991).

[54] KOOIJMANS, *supra* note 12, p. 29.

[55] *See* Diagram I, *infra* page 15.

[56] Charney, *supra* note 5, p. 787.

[57] *See* Diagram II, *infra* page 15.

These propositions raise important corollary issues concerning voting and SE. The first issue is whether IGOs' decision-making processes need—or, indeed, if they ever needed—to conform to the principle of SE in order to have the necessary power for compliance within the international community. By presenting the uses, misuses, non-uses and abuses of SE in the international decision-making processes of several IGOs, I demonstrate that SE is not a requirement for the functional legitimacy of an IGO. The only criteria that should be satisfied in order to ensure IGOs' efficiency are the functionality and the legitimacy of the decision-making processes. IGOs can realize this objective not by replacing SE by yet another inapplicable concept—i.e. democracy[58]—but rather by heeding societal contexts and circumstances.

A critical question raised by the above-mentioned propositions is whether it is indeed possible to banish the doctrine of SE from international institutional law. Several international scholars have expressed disdain for SE by calling it an empty principle, claiming that it is nothing more than a legal fiction and an ineffective concept in the law of nations.[59] However, my contention is that not only is SE a true principle but, because it is the essence of the international legal system, it *must* be preserved, albeit within its proper limits. In light of its history in the twentieth century, SE must be allowed to adapt and reform itself for the twenty-first century.

In this respect, I will argue that, the principle of SE need not, should not and, indeed, cannot be abolished from *general* international legal discourse altogether because, in the universal context, it is a functionally legitimate and peremptory international legal norm. However, I shall also maintain that SE should be abandoned in the *specific* legal discourse on voting in international institutions because—although SE may be a peremptory norm in the broad field of international law—it is not of peremptory character in international institutional law and its abolition is, therefore, possible in that limited context.

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[58] There is currently a new (and, I believe, a hazardous) trend to democratize IOs. COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, pp. 66-67. Declaring that "the democratic principle must be ascendant", the Commission on Global Governance does not merely suggest the pursuit of democratic norms in global governance but also—contrary to the thesis of the current study—argues that it "is time to make a larger reality of ... 'sovereign equality'". Curiously, however, the Commission does not propose the means by which it seeks to realize the principle of SE in IGOs. *See generally* Franck—Democratic Governance, *infra* note 365. For a further discussion on the democratization of the decision-making processes of IGOs *see infra* Part II.B.4.c.

[59] *See* MITRANY—WORKING PEACE, *infra* note 87, p. 28 arguing that "even in the League [of Nations] the principle of state equality was at best a fiction, and at worst the currency of diplomatic bargaining[...]; and it remained a stumbling block in every formal scheme proposed". *See also* Mbaye, *supra* note 5, pp. 87-96. Kéba Mbaye, Judge of the International Court of Justice, discusses Kelsen's, Treitschke's, Guggenheim's and Gidel's critical views on the principle of SE, examines the evolution of this principle and reports that "*certains estiment que le principe de l'égalité souveraine n'est pas un vrai principe*".

This raises the issue of the impact the exclusion of SE in the context of IGOs will have on the entire international legal system. I postulate that the new, limited role of SE will impact favourably on international law in general. In fact, by its banishment from IGOs, the principle of SE will stop its erosion in international institutional law and regain its legitimacy in the global international legal system.

The principle of SE, therefore, requires to be re-positioned so as to limit its employment in the context of voting. Of course, its critical reform must be subject to certain limitations. For instance, any re-positioning must seek to establish legitimacy by locating SE within a narrower structure of values embodied in contemporary international law. However, any redefinition must not undermine the legitimacy of international institutions and, more importantly, must stress the relationship of SE to the principles that underlie the existing system of nation-states and the evolving body of IGOs' law. This can be accomplished with relative ease. The critical application of the principle of freedom of speech in domestic law—i.e. freedom of speech is limited in the context of expressions of hate which are considered to be crimes—is an apt analogy in this instance. With this critical application the fundamental freedom of speech is not abolished but simply critically limited.

DIAGRAM I CURRENT POSITION OF SOVEREIGN EQUALITY IN THE INTERNATIONAL LEGAL COMMUNITY

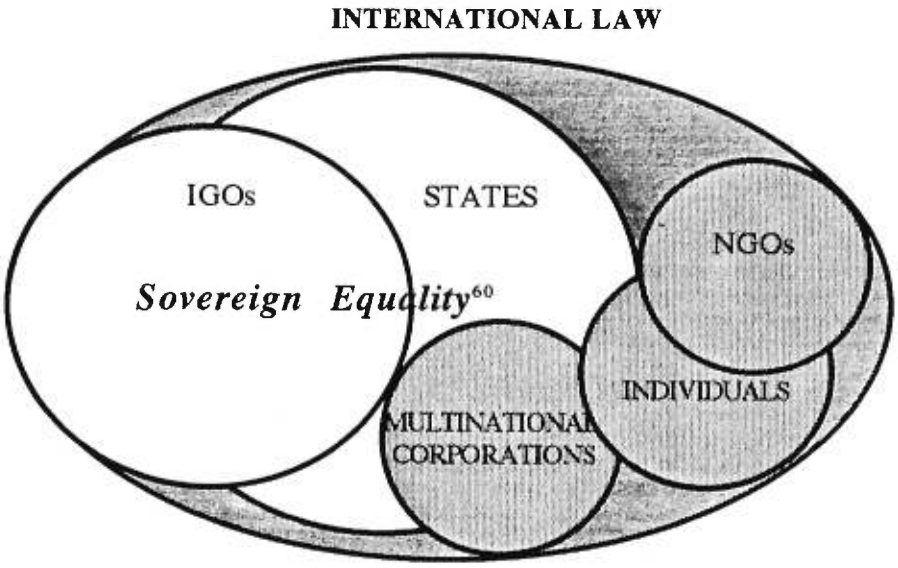
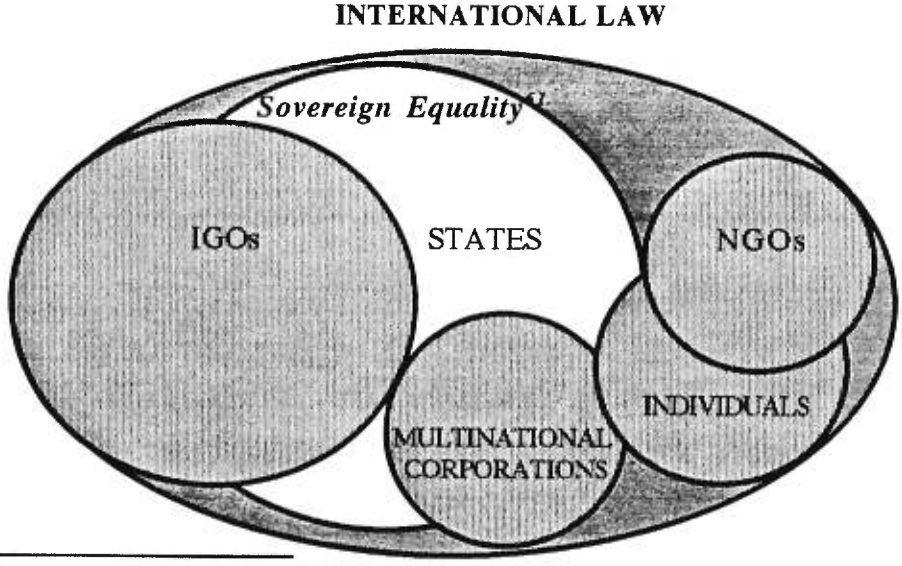


DIAGRAM II PROPOSED POSITION OF SOVEREIGN EQUALITY IN THE INTERNATIONAL LEGAL COMMUNITY—EXCLUSION FROM INTERNATIONAL GOVERNMENTAL ORGANIZATIONS



[60] Currently, the international legal community views SE as applicable within IGOs as well as between states.

[61] The proposal of the present study would make SE inapplicable to IGOs by limiting its application strictly to bilateral or multilateral relations between states outside the confines of an internationally organized structure.

b) Scientific Scholarship and Interest on the Issues of Sovereign Equality and International Governmental Organizations' Voting Mechanisms and Practices

Voluminous material has been amassed on the principle of *sovereignty* since the formal establishment of the modern law of nations. Similarly, a plethora of critical examinations have been undertaken of the concept of *equality* from the various disciplines of the social sciences—i.e. juridical, political science, philosophy and sociology. However, despite the fact that SE is considered by most international legal scholars and practitioners as the very foundation of modern international law,[62] it has attracted limited attention in the academic discipline of international law. In fact, there are but a handful of publications dedicated to the study of SE and fewer still examine seriously the observance or breach of this principle, while standard manuals of international law and international organizations usually mention the matter but briefly and often superficially.[63]

International legal scholars who have studied and written on the subject of decision-making in IGOs have usually limited themselves to reporting the controversies over rules and practices without undertaking a more substantive analysis of their guiding principles.[64] Some international law manuals which do allocate an entire chapter on the issue generally address the subject in a descriptive manner, giving little more than an historical account of VMs and VPs.[65]

In recent years there has been a resurgence of interest in the controversy over IGOs' VMs and VPs, as the numerous articles published in books and legal periodicals attest.[66]

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[62] *See infra* Part II.B.3. *See also* Bleckmann, *supra* note 9, p. 97. In this outstanding and comprehensive commentary on the most influential political IGO of our times, Bleckmann admits that "the principle of [sovereign] equality has only been partially explored in the theory and practice of international law". Still, even in this extensive treatise, the concept of SE is but summarily addressed.

[63] *See generally* major international law and organizations manuals—*e.g.* BROWNLIE—PRINCIPLES, *supra* note 30; SHAW, *supra* note 5; SCHERMERS & BLOKKER, *supra* note 1; BOWETT, *supra* note 13; KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16; QUOC DINH ET AL., *supra* note 2,—extending but a few pages on the subject of SE, most of which is descriptive in nature.

[64] *See generally e.g.* SHAW, *supra* note 5; BOWETT, *supra* note 13; QUOC DINH ET AL., *supra* note 2; ARBOUR, *supra* note 12; Karl Zemanek, *Majority Rule and Consensus Technique in Law-Making Diplomacy, in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 857 (R. St. J. Macdonald & Douglas M. Johnston eds, 1983); Barry Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 AM. J. INT'L L. 324; Zamora, *supra* note 33, p. 566.

[65] *See e.g.* KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, pp. 189-238; SCHERMERS & BLOKKER, *supra* note 1, pp. 470-582. *See also* BROWNLIE—PRINCIPLES, *supra* note 30, pp. 297-297, who takes but ten pages to discuss the 'Sovereignty and Equality of States' without a single reference to this principle *vis-à-vis* voting in IGOs.

[66] *See generally e.g.* Zemanek, *supra* note 64; Kendall W. Stiles & Maryellen MacDonald, *After Consensus, What? Performance Criteria for the UN in the Post-Cold War Era*, 29 J. PEACE RESEARCH 299-

Although most of these articles address eloquently contemporary challenges in voting mechanisms and practices, they rarely examine VMs and VPs *vis-à-vis* the principle of SE and they usually fall short of challenging this principle. Remarkably, there are but a handful of studies devoted to the doctrine of SE in the context of voting in IGOs.

By exploring the principle of SE within voting in certain IGOs this study not only fills this important gap in international legal literature but it also rethinks traditional categories and new approaches of international law and organizations in order to bring to the surface new ways of talking about SE. Through this study, my hope is to influence the evolution of legal thinking and to open new paths which help initiate functionally legitimate decision-making. In this respect, via a re-positioned principle of SE, I aim to further the process of discovery and dialogue which would encourage and facilitate voting-related reforms within IGOs and thus contribute in the transformation of their decision-making processes into a functionally legitimate legal order.

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311 (1992); CHILDERS & URQUHART, *supra* note 45; SAKSENA, *supra* note 45; Fawcett & Newcombe, *supra* note 45.

B. METHODOLOGY

1. THE ECLECTIC ROUTE TO DECISION-MAKING IN INTERNATIONAL GOVERNMENTAL ORGANIZATIONS

a) The Choice of Decision-Making Organs and Voting Processes

In this study, I am interested in the principal decision-making organs and the voting processes of IGOs. Specifically, I explore the role that SE plays in four contexts. Using their constituent instruments, I examine IGOs' decision-making organs in relation to (i) their composition and (ii) the legal value of the various decisions (incarnated in the form of resolutions, recommendations, conventions, directives, decrees, initiatives, guidelines, etc.) they adopt. I then focus on voting processes in relation to (iii) the voting rules ('one state, one vote' or 'weighted voting'), the various voting rights, procedures, systems and formulas set up in these organs and, I examine (iv) the divergent voting mechanisms and practices established throughout the existence of IGOs—i.e. *simple majority, 2/3 majority, qualified majority, 3/4 majority or 4/5 majority, special majority, unanimity, consensus, weighted voting, veto, double veto, bloc voting* and *caucusing*—in their historic context, as well as in relation to contemporary conditions. I determine whether and why SE is not observed within certain IGOs' voting processes—rules, VMs and VPs—and examine the role that this principle plays within the international decision-making community.

For instance, in the first part of this century, *unanimity* was the voting rule in all political IGOs. It was however an impracticable VM. Accordingly, in the post W.W.II era there was a shift to *majority* voting. Recently, the trend has been toward *consensus* voting. These changes raise important questions *vis-à-vis* the doctrine of SE. I attempt to evaluate the impact of SE in voting in IGOs and to determine which VMs and VPs, if any, have been established in the interests of SE, as well as the type of impact—if any—this principle has had in the international legal system.

b) The Choice of International Governmental Organizations

As previously noted, there are literally hundreds of IGOs.[67] Within the confines of this study it is obviously not possible to conduct a comprehensive study of all organizations' VMs and VPs without surpassing several thousands of pages, nor is it desirable to do so as many IGOs share similar voting processes. Thus, it is both necessary and right to delimit the number of organizations whose VMs and VPs will be examined. I have chosen six important organizations which are representative of a wide spectrum of regional, universal, political and financial IGOs. They are: (1) the **United Nations** (UN), (2) the **International Labour Organization** (ILO), (3) the **International Monetary Fund** (IMF), (4) the **Multilateral Investment Guarantee Agency** (MIGA) of the World Bank, (5) the **European Union** (EU), and (6) the **Organisation for Economic Co-operation and Development** (OECD).

This choice has been facilitated, firstly, by my desire to have a representative sample of both political and financial organizations because, for the most part, their voting rules are broken down along these lines.[68] The principal voting rule for political IGOs is the ***one state, one vote*** system representing formal and numerical equality. Financial IGOs, on the other hand, employ a mechanism known as ***weighted voting.*** This method represents formal and numerical inequality and grants votes according to the economic position and/or contribution of a member state. Accordingly, in Part III, I examine political IGOs (UN and ILO), while in Part IV, I study financial IGOs (IMF and MIGA) and in Part V, I probe into IGOs which are in a league of their own (EU and OECD).

Second, my selective coverage of IGOs has been guided by the will to study these organizations throughout the course of history, and to examine the development of voting

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[67] *See* PAUL TAYLOR, INTERNATIONAL ORGANIZATION IN THE MODERN WORLD: THE REGIONAL AND THE GLOBAL PROCESS 24-27 (1993) [hereinafter 'TAYLOR—IO IN THE MODERN WORLD'] providing a breakdown of the hundreds of IGOs and the thousands of NGOs of which states are members per geographic regions of Europe, Africa, Asia and America. *See generally* WERNER J. FELD & ROBERT S. JORDAN, INTERNATIONAL ORGANIZATIONS: A COMPARATIVE APPROACH (1988) enumerating hundreds of IGOs. *See also generally* ACCORDS ÉCONOMIQUES INTERNATIONAUX: RÉPERTOIRE DES ACCORDS ET DES INSTITUTIONS (Bernard Colas ed., 1990) [hereinafter 'RÉPERTOIRE DES ACCORDS ÉCONOMIQUES'] providing an extensive directory of international agreements and organizations.

[68] The distinction between political and financial or otherwise economic IGOs is often obscure because many IGOs have dual or multiple functions. For the most part, political IGOs have world peace and security as their prime objective and seek to fulfill their purpose by providing for collective security (e.g. League of Nations, United Nations, North Atlantic Treaty Organization) or social justice (e.g. International Labour Organization). On the other hand, financial IGOs' prime objective is economic development and they pursue their goal by providing loans (e.g. World Bank, International Monetary Fund), guarantees and other financial-related benefits or services (e.g. Multilateral Investment Guarantee Agency, Global Environment Facility). For the purposes of this study and, particularly, Parts III & IV, I categorize IGOs into either political or financial because this dichotomy reveals distinctive decision-making structures, processes and voting rules between these two types of organizations.

of some of the oldest IGOs of this century (e.g. UN and ILO) to one of the most recent ones (e.g. MIGA).

The third reason behind my choice has been the desire to study, along with universal organizations of the twentieth century (e.g. UN, ILO, IMF, MIGA) the world's foremost regional and non-universal organizations (e.g. EU and OECD) and examine how their institutional VMs differ, if at all, from those found in universal organizations, particularly *vis-à-vis* the doctrine of SE.

Finally, my choice of organizations has also been guided by the desire to study IGOs which have undergone or are undergoing changes within their decision-making structures. In this respect, I examine the IMF which has implemented voting-related changes to its decision-making, the UN, which has *de facto* affected voting changes and is in the process of examining further decision-making changes, as well as MIGA and the OECD which are also in the process of discussing changes to their respective decision-making processes.

2. *The Path Leading To Our Destination*

a) The Juridical Scope of the Study

Decision-making in any context, and particularly in international relations, does not take place in a political or economic vacuum, and there are a great many divergent political and economic forces behind the decisions of IGOs. However, the complexities of political and economic contexts fall within the domains of the political and economic sciences and, therefore, are beyond the scope of the current study. Accordingly, reference to these forces will be of a general nature—i.e. noting the general political climate, economic conditions, interests and circumstances in a given period, but not delving into political and economic analyses *per se*. In this respect, the scope of the present study will focus on the juridical domain and decision-making in IGOs will be considered from this perspective.

b) The Path of Inquiry and Presentation

The research method employed for this study assumes a normative, rather than an

empirical, point of view. Given that this dissertation was finalized in 1998 most research material pre-dates this year. Furthermore, in addition to the Introduction and the Conclusion, the study's plan is divided into four parts: legal theories and fictions are addressed in Part II; decision-making of political and universal IGOs are examined in Part III; decision-making of financial and universal IGOs are explored in Part IV; and decision-making of regional, non-universal and mixed IGOs are studied in Part V.

Having provided an overview of the research problem in the Introduction, in Part II, I survey the dominant legal theories of international law and specifically explore the international law theory of Legitimacy and the IOs theory of Functionalism. I then consider these two legal theories *vis-à-vis* the doctrine of SE. Using basic international law material, I examine how this artificial construct—SE—is embodied in international law and investigate how it functions within IGOs. I argue that the doctrine of SE is currently non-functional and illegitimate within the specific context of decision-making in IGOs. I then consider whether the abolition of SE appears warranted in international law and specifically in IGOs. While I advocate for the preservation of SE in *international law*, I argue that its application in *international institutional law*, as is currently perceived in the legal community, must inevitably be reduced to its proper proportions—i.e. abolished.

In the third, fourth and fifth parts, I survey various ways in which SE is viewed, in theory, and whether it is functionally and a legitimately applied, in practice, in the main decision-making organs and voting processes of political, financial and other mixed IGOs. Concurrently, I introduce various points of view prevailing in the 1990s and advocate my abolitionist thesis on the subject.

Specifically, in Part III, I examine the IGOs which utilize the 'one state, one vote' VM, focusing on two principal international political organizations, the UN and the ILO. Using the UN Charter and the ILO Constitution as my data, I study decision-making within these two political and universal IGOs and then evaluate them *vis-à-vis* the principle of SE. I explore the theoretical provisions for VMs and their practical applications and determine whether they help or fail to conform with their respective constitutive acts and the principles of the law of nations.

In Part IV, I explore the IGOs which employ 'weighted voting'. I examine decision-making within two key international financial organizations, namely IMF and MIGA. Using their respective constituent instruments, I study their VMs and VPs I evaluate the

reasons for the differences between political and financial IGOs and I establish why they do not conform to the principle of SE.

In Part V, I explore the unique role that the doctrine of SE plays in the EU, the world's foremost regional politico-financial organization, and in the OECD, one of the world's non-universal but most influential organizations. Due to their respective limited membership and multi-functional aims, the EU and the OECD embody many features which differ from the conventional forms of IGOs. As a result, their decision-making processes depart from those found in more traditional international institutions. Using their respective constituent acts, I trace the evolutive role of their VMs and VPs and the projected decision-making reforms upon their anticipated enlargements.

Finally, in Part VI, I discuss the results of my study which conclude that there is no functionally legitimate justification for this principle within the context of voting in IGOs. Therefore, I call for the critical repudiation of SE and argue against its erroneous application in the decision-making organs of IGOs.

II. LEGAL THEORIES & CONSTRUCTS: A VIEW FROM SOMEWHERE

> "No theory develops in a vacuum, but is conceived and brought to fruition in a definite cultural and social environment. To ignore this is to distort the theory itself."
>
> M.N. Shaw[69]

It has been correctly put that the 'view from nowhere' approach is a hazardous illusion in scholarship[70] for it lacks perspective. Indeed, the defining point of one's position rests on the theoretical angle by which a given issue is addressed because, generally, if one accepts the way the problem is posed one accepts the resulting views and or conclusions.[71]

The labyrinth of interrelated theoretical approaches which have been devised for the study of international politics, relations, institutions and law is astounding. It would seem that virtually every term that can contain the "ism" suffix has been established as a scientific theory at some time in the course of history.[72] The international law arena has not escaped the bewildering number of theoretical perspectives.

Amongst the intricate maze of legal theoretical labels of the twentieth century, *Functionalism* has been the foremost theory for IOs while *Legitimacy* has been espoused in

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[69] SHAW, *supra* note 5, p.23.

[70] *See* MARK NEUFELD, THE RESTRUCTURING OF INTERNATIONAL RELATIONS THEORY 6 (Cambridge Studies In International Relations: 43, 1995) arguing "that the 'view from nowhere', which serves as a regulative ideal for much of mainstream International Relations scholarship, is not only not attainable but a dangerous illusion"; *See* Hilary Putnam, *Replies*, 1 LEGAL THEORY 75 (1995), discussing Dworkin's and Rorty's rejection of the 'view from nowhere' approach in legal scholarship.

[71] *Cf.* Putnam, *supra* note 70, p. 69, replying to Brian Leiter's comments about the middle way between Relativism and Realism, Putnam suggests that, "[i]n general, if you accept the terms in which a philosopher poses a problem you have accepted the philosopher's views."

[72] For instance, of the myriad of "ism" theories postulated in the legal field—to name but a few—there are: Constructivism, Deconstructivism, Determinism, Feminism, Functionalism, Idealism, Institutionalism, Jus Naturalism, Liberalism, Modernism, Neo-Functionalism, Neoliberalism, Neorealism, Neoliberal Institutionalism, Pluralism, Positivism, Post-Modernism, Processualism, Realism, Systematism, etc.

In addition, there are many other established theories which, although do not contain the suffix "ism", have influenced legal discourse. They include, Alternative Epistemologies, Autopoïesis, Critical Legal Studies, Juridical Epistemologies, Regime Theory, Sociological Jurisprudence, etc.

the wider spectrum of international law. These two legal theories, which will guide this study, are explored in Part II.A.

In Part II.B, I examine the notions of equality and sovereignty. I then discuss the origins and the history of the principle of SE, as well as the role this legal creation plays in the international legal system. Particularly, I focus my analysis on how the principle of SE is or is not interpreted and applied in contemporary international law and IGOs.

A. LEGAL THEORIES IN INTERNATIONAL LAW

1. FUNCTIONALISM AND INTER-RELATED THEORIES IN INTERNATIONAL GOVERNMENTAL ORGANIZATIONS

> "Functionalism knows only one logic, the logic of the problem, and of a problem apt to be always in flux in its elements, its spread and its effects. Function is never still, but it attaches to society the things that brought it there; and to be true to its social purpose it must implicitly be self-adjusting. At no point of action are conditions exactly as they were before or likely to be later; and at no point of action are the policy-makers likely to know all the facts or foresee all the effects of their decisions."
>
> David Mitrany[73]

a) The Choice of Functionalism

Functionalism is a multifaceted theory employed in multiple social sciences disciplines.[74] Even within the juridical domain, there is no single school of functionalism but, rather, diverse expressions of functionalist legal doctrine.[75] Although the meaning of this theory differs according to the field of study (i.e. sociology, philosophy, psychology, law, etc.),

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[73] DAVID MITRANY, THE FUNCTIONAL THEORY OF POLITICS 258 (1975) [hereinafter 'MITRANY—FUNCTIONAL THEORY'].

[74] *See* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, 288-289 (Robert Audi ed., 1995) for various definitions of the theory of Functionalism in the various disciplines of the social sciences including social philosophy, sociology, psychology etc. Even within the juridical domain, there is no single school of Functionalism but, rather, diverse expressions of the Functionalist legal doctrine.

[75] Notwithstanding the various definitions which Functionalism has been given in the numerous sciences in which it is applied, remarkably, at times, this theory does not even have the same meaning within the same discipline. For instance, in the domestic legal sciences Functionalism has been given a host of divergent interpretations and applications. *See e.g.* Samuel W. Cooper, *Considering Power in the Separation of Powers*, 46 STANF. L. REV. 361, 368 (1994). In American domestic law and, specifically, on issues dealing with the doctrine of Separation of Powers, Cooper regards Functionalism as being "concerned with whether one branch's action disturbs the balance of power among the [executive, legislative and judicial] branches". In this context, he finds the Functionalist theory inadequate, opting for the different approach which he names "power analysis". *See also* L-J. Sharpe, *The Failure of Local Government Modernization in Britain: a Critique of Functionalism*, 24 CAN. PUB. ADMIN. 92, 95 (1981) emphasizing the need for more democratic—versus more functional—criteria in the modernization of local government systems, Sharpe defines his Functionalism as "the tendency to see the local government system primarily in terms of its capacity to provide its major services."

as well as according to different inter-related branches of disciplines (i.e. domestic law, international law), certain characteristics of functionalism are common to all social sciences—e.g. its sociological foundations, the pragmatism and versatility of the concepts it encompasses, its techniques and logic. Indeed, the fact that functionalism has been adopted and applied in all the different disciplines of the social sciences testifies that it is not a rigid approach but rather allows for a great deal of flexibility.[76]

From the multitude of theoretical currents in the legal field, I am interested in functionalism as a theory developed within the sphere of international relations and as it was subsequently adapted in the international legal domain.[77] Although no single theoretical perspective can deal with the complexity of international legal institutions, I have chosen functionalism and its inter-related theories for this study primarily for three reasons.

First, since my interest is in IGOs, my analyses cannot ignore the modern theory of international co-operation which has, to a large extent, been responsible for the growth of all IOs. Functionalism, in itself, is the epitome of the international law of co-operation.[78]

Secondly, the exceedingly formalistic and anachronistic view of the principle of SE has resulted in inflexible rules within IGOs and has proved ineffective and inapplicable within their VMs and VPs. The functional approach adapts to contextual needs offering pragmatic as well as versatile concepts, techniques and logic.[79]

Finally, the globalization of transactions have changed the functions of the state and, consequently, the functions of IOs.[80] From a legal perspective, the functionalist school of jurists is concerned with "what the law does and how it operates in society, rather than with

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[76] *See* Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

[77] *Cf.* Douglas M. Johnston, *Functionalism in the Theory of International Law*, 26 CAN. Y.B. INT'L L. 3, 56 (1988) [hereinafter 'Johnston—Functionalism in International Law'], stating that "[i]n conformity with the heritage of functionalism in political science, legal functionalism bases its ethic on the need for efficiency (effectiveness) as well as equity (justice) in international law."

[78] *See* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 275-277 (1964). *See also generally* MITRANY—FUNCTIONAL THEORY, *supra* note 73.

See also Robert E. Riggs, *One Small Step for Functionalism: UN participation and congressional attitude change*, 31 INT'L ORG. 515, pp. 515, 518 (1977) basing his analysis on speeches of United States senators and congressmen of their pre- and post service era as delegates to the United Nations General Assembly between 1950-71, Riggs explains the "functionalist thesis that participation [in the international arena] brings support for functional activities" and suggests that—by developing international co-operation—Functionalism has thus contributed to the proliferation of IOs.

[79] *See* INIS L. CLAUDE JR., SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION, 386 (4th ed. 1971) [hereinafter 'CLAUDE—SWORDS INTO PLOWSHARES']. Claude characterizes Functionalism as a practical, flexible and opportunistic theory which opposes rigidity and operates according to needs.

law as a system of axioms and logical deductions ...[It regards] law as a social institution which may be improved, developed and remodeled ..." and whose ultimate function is the regulation of factual social problems and relationships.[81] Functionalists believe that in order for international institutions to function effectively they need to be reformed and re-conceptualized. Re-conceptualization is essentially a functionalist notion.[82] We must always ask ourselves, "Towards what end?". Changing perceptions of the role of the state and altering the paradigm is possible with a functionalist approach for it enables re-engineering by taking into account societal facts and changes in circumstances—i.e. the economic and scientific interdependence of the twentieth century. In this respect, Functionalism and its interconnected theories will be a key perspective employed in the present study.

In today's global governance it is important to evaluate whether the doctrine of SE plays a functional role in international institutions and, more particularly, whether it is functional doctrine in their decision-making organs. In this respect, I will examine whether and how the principle of SE functions in the context of: (i) the membership of IGOs and their decision-making organs (global or restrictive); (ii) the type of decisions they emit (binding or non-binding); (iv) the type of voting rules used ('one state, one vote' or 'weighted voting') and; (v) the type of VMs and VPs employed (unanimity, majoritarianism, etc.).

b) The many faces of Functionalism

(i) Classic Functionalism: Form Follows Function

During the pre World War II period, the world of international relations was dominated by the *Realist* theory which presented a pessimistic outlook on the capabilities of IOs.[83] The

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[80] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, pp. 10-11, 306-307.

[81] WALKER, *supra* note 3, p. 508. *See* T.P. Van Reenan, *Major Theoretical Problems of modern comparative legal methodology (1) The nature and role of the tertium comparationis*, 28 COMP. INT'L L.J. SOUTH. AFR. 175, 186 (1995). Referring to the law as social engineering, Van Reenan writes that "[l]aw is regarded as a function of social life..." and the "*function* of law is to regulate *factual social problems* and relationships" (emphasis in original).

[82] *See* Charles Pentland, *Functionalism and Theories of International Political Integration, in* FUNCTIONALISM: THEORY AND PRACTICE IN INTERNATIONAL RELATIONS 9, 16 (A.J.R. Groom & Paul Taylor eds, 1975) discussing the reforming ethos of Functionalism.

[83] *See* WALKER, *supra* note 3, pp. 488, 536, 576, 774, 1037, Legal Realism emerged in the 1920s and the 1930s with the writings of Karl Llewellyn, Jerome Frank, John Chipman Gray et al. These Realists held that *power* was the most significant element in international relations. *See generally* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973) for a most interesting biography of Karl Llewellyn, offering an insightful profile of the rise and significance of Realism. *See also* BENNETT, *supra* note 41, p. 14, naming Hans Morgenthau's the most esteemed exponent of Realism in international

Realists held that "international anarchy fosters competition and conflict among states and inhibits their willingness to cooperate even when they share common interests [and] that international institutions are unable to mitigate anarchy's constraining effects on interstate cooperation".[84] Rejecting this negative assessment, Functionalism developed as an alternative organizational ideology, offering an optimistic approach to international society. Ultimately, Functionalism came to be widely recognized as being the impetus to the creation of the burgeoning role of IOs.[85]

Classic Functionalism as a theory[86] of international organization was fathered by David Mitrany.[87] A self-described pragmatist and eminent international scholar, he introduced the

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relations in the post World War II era. Morgenthau postulated that the core of all politics is the pursuit of power. *See also* PLANO & OLTON *supra* note 29, p. 7 discussing that Realists' contention that the use of a state's power is the determining factor in the establishment of its foreign policy.

[84] *See* Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, in NEOREALISM AND NEOLIBERALISM, THE CONTEMPORARY DEBATE 116-117, (David A. Baldwin ed., 1993). The Realist argued that the world's non-hierarchical order—i.e. based on SE of all states—hinders the prospects for international co-operation. *See also* Paul Taylor, *Introduction, in* DAVID MITRANY, THE FUNCTIONAL THEORY OF POLITICS ix, xix (1975) [hereinafter 'Taylor—Introduction to the Functional Theory of Politics']. In the introductory chapter of Professor Mitrany's work, Professor Paul Taylor (one of Mitrany's former students, and a Functionalist himself) cites one of the leading Realists of the 1930s, Professor Hans Morgenthau, who believed that "international politics like all politics is a struggle for power".

[85] Paul Taylor & A.J. Groom, *Introduction: Functionalism and International Relations, in* FUNCTIONALISM: THEORY AND PRACTICE IN INTERNATIONAL RELATIONS 1, 5 (A.J. Groom & Paul Taylor eds, 1975).

[86] Although Functionalism is widely and generally accepted as a 'theory', there have been some people who have disputed its theoretical significance. *See* CLAUDE—SWORDS INTO PLOWSHARES, *supra* note 79, p. 390. Having reviewed Mitrany's work, Claude—a critic of Functionalism—concludes that "in the final analysis, [Functionalism is] not so much a theory as a temperament, a kind of mentality, a style of approach to international affairs." *But see* Taylor—Introduction to the Functional Theory of Politics, *supra* note 84, pp. ix, xix. In his introductory remarks, Professor Taylor discusses how Functionalism's theoretical status has been called into question because there is no range of hypotheses which would enable it to test findings according to the modern social science. Since Functionalism is not a rigidly organized theory, some scholars refer to it as an *approach* (Inis Claude et al.). However, Taylor, (supported by Franciszek Golemski et al.) argues that, although it may lack specific scientific rigour traditionally found in theoretical schools, Functionalism can be considered as a *general* political theory related to liberal thought.

[87] *See generally* DAVID MITRANY, A WORKING PEACE SYSTEM: AN ARGUMENT FOR THE FUNCTIONAL DEVELOPMENT OF INTERNATIONAL ORGANIZATION, 60 (1943) [hereinafter 'MITRANY—WORKING PEACE']; DAVID MITRANY, A WORKING PEACE SYSTEM 221 (1966) [hereinafter 'MITRANY—PEACE SYSTEM']; MITRANY—FUNCTIONAL THEORY, *supra* note 73. This last publication is an excellent memoir of Mitrany's Functionalist theory, providing a retrospect in an historic context and offering insightful accounts of the theory's birth to its later development, as well as its future prospects. On page 239, Mitrany traces the evolution of his theory by listing his writings from the 1930s until the 1970s. The Functional idea as a theory of international organization initially emerged in 1932 in Mitrany's paper entitled *The Communal Organisation of World Affairs, in* THE PROGRESS OF INTERNATIONAL GOVERNMENT (Dodge lectures at Yale University, 1933). This theory was elaborated nine years later in 1943 in the now famed pamphlet titled *A Working Peace System* and in a paper which was reproduced in many books under the title *The Functional Approach to World Organisation.* Mitrany continued to promote and develop Functionalism by his writings throughout the fifties and sixties. In the seventies, he produced two of his last papers on Functionalism. The first was titled *The Functional Approach in Historical Perspective, in* INTERNATIONAL AFFAIRS, (London, 1971) and the second was titled *A Political Theory for the New Society, in* FUNCTIONALISM: THEORY AND PRACTICE IN INTERNATIONAL RELATIONS 53 (A.J.R. Groom and Paul Taylor eds, 1975).

international relations theory of Functionalism in the 1930s and 1940s.[88] Mitrany spent the greatest part of his life working for peace,[89] and he found no better weapon against war and no greater friend for peace than international co-operation.[90]

Recognizing well before others of his time that we are living in an increasingly interdependent world, Mitrany argued that international co-activity is imperative for the political good of a community, even if the sacrifice demanded was sovereignty.[91] For Mitrany, the modern form of the national state no longer served the purpose of political communities in the twentieth century. The state could no longer secure the happiness of its citizens—as Aristotle's political philosophy believed that it should.[92] Mitrany thus postulated that people can be drawn away from their loyalty to the nation state in order to build a productive international community.[93] In other words, instead of merely co-existing in the international society, the Functionalist ethic is based on the premise that states transfer their loyalties to international institutions and participate in international co-activities for utilitarian purposes.[94]

Another major tenet of Functionalism is the well known adage **form follows function** which postulates that every situation must be guided by *need*.[95] Moreover, the function depends, and is limited or delimited, by an organization's objective. For example, the United Nations' function (*infra* Part III.A) stems from the need, which has in turn become its objective, for international peace.

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[88] *See* MITRANY—FUNCTIONAL THEORY, *supra* note 73, p. 239 discussing the genesis of the Functionalist theory and its subsequent development. *But see* Grieco, *supra* note 84, p. 116. The author places the genesis of the Functional approach a decade later, in the 1940s and 1950s.

[89] MITRANY—FUNCTIONAL THEORY, *supra* note 73, 268. *See also* pages 3-82 for Mitrany's extraordinary autobiographical notes tracing his remarkable life and historic opportunities in peace making from the pre-W.W.I to the post-W.W.II era.

[90] *See generally id.*

[91] *See* CLAUDE—SWORDS INTO PLOWSHARES, *supra* note 79, p. 384. Discussing Mitrany's theory for peace, Claude indicates that "functionalism proposes to promote peace by eliminating objective conditions ... and initiating the development of subjective trends which may cause the 'erosion' of sovereignty".

[92] Of course, Aristotle's philosophy on this issue was but an ideal.

[93] *See* MITRANY—FUNCTIONAL THEORY, *supra* note 73, p. 257, stipulating that "functionalism circumvents issues of national sentiment and tradition and ideology".

[94] *See* Taylor—Introduction to the Functional Theory of Politics, *supra* note 84, pp. ix, x; CLAUDE—SWORDS INTO PLOWSHARES, *supra* note 79, pp. 380, 385; Pentland, *supra* note 82, p. 16. *See also* Johnston—Functionalism in International Law, *supra* note 77, p. 46, discussing how Functionalists advocate a universal ethic and the development of common heritage institutions.

[95] MITRANY—FUNCTIONAL THEORY, *supra* note 73, p. 249. *See* David Mitrany, *The Prospect of Integration: Federal or Functional?, in* FUNCTIONALISM THEORY AND PRACTICE IN INTERNATIONAL RELATIONS 53, 70-72 (A.J.R. Groom & Paul Taylor eds, 1975) [hereinafter 'Mitrany—Prospect of Integration']. FELD & JORDAN, *supra* note 67, p. 115. *Cf.* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 19 (2nd ed. 1985) [hereinafter 'FRIEDMAN—AMERICAN LAW']. Postulating a Functionalist ethic, Friedman states that "[t]he history of law has meaning only if we assume that at any given time the vital portion is new and changing, form following function, not function following form."

With this century's increase of scientific and economic interdependence, Functionalists advocate that international legal norms must be established according to functional concerns, and not by political or ideological concerns.[96] Thus, Functionalism channels "the course of international relations along less politicized and ideological lines, leading eventually to political cooperation ... among states."[97]

Finally, Mitrany and his followers believed that benefits for individuals are greater under a system of purpose specific internationally organized activities than they would be under the single state system.[98] In other words, with internationalism, an organization operating across national borders would be able to solve problems common to, and for the benefit of, all humanity.[99] By their belief that complex issues are better resolved when confronted collectively, Functionalists have encouraged the expansion of the international institutional legal system and have thus contributed to the development of international law in general.[100]

(ii) Sociological Jurisprudence

The mid-fifties saw the emergence of an interconnected and, perhaps, interchangeable theory of functionalism known as ***Sociological Jurisprudence***.[101] At that time, Sociological Jurisprudence was a prevalent theory in the American legal community, spearheaded by such jurists as Oliver Wendell Holmes, Louis David Brandeis, Roscoe Pound and Felix Frankfurter.[102] Although the theory—like Functionalism—is not univocal,

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[96] Alberto R. Coll, *Functionalism and the Balance of Interests in the Law of the Sea: Cuba's Role*, 79 AM. J. INT'L L. 891, 891 & 911 (1985) [hereinafter 'Coll—Functionalism in International Law']. Providing a classic definition of Functionalism, Coll believes that: "as economic and technological interdependence grows, diplomacy and the elaboration of international legal rules will be shaped increasingly by functional concerns and less and less by ideology and 'high politics'", but finds that, nonetheless, states still consider ideology as well as politics in their diplomatic exchanges with other states. He argues his point in the context of the *United Nations Convention on the Law of the Sea*. While discussing functional aspects of this Convention, Coll finds that for symbolic and political points, the Cuban state used ideological considerations into areas which required a functional approach and resolution. Of course, Coll's conclusions were written during the cold war era and although this stance might have been valid in 1985, the nineties has—by and large (with only minimal exceptions in a world of 191 nation-states)—proven to be a decade of international co-operation, where the Functionalist forces have taken precedence on ideologies.

[97] *Id.* at 911.

[98] *See* Taylor—Introduction to the Functional Theory of Politics, *supra* note 84, pp. ix, x.

[99] *See* CLAUDE—SWORDS INTO PLOWSHARES, *supra* note 79, p. 383.

[100] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 57.

[101] WALKER, *supra* note 3, pp. 508, 1153.

[102] BRANDEIS ON DEMOCRACY 10, 47 (Philippa Strum ed., 1995) [hereinafter "BRANDEIS ON DEMOCRACY"]. Holmes and Brandeis were Justices of the U.S. Supreme Court, Frankfurter was Associate

it does contain certain widely held premises as it is principally concerned with the relation between the legal system and society (i.e. people, groups and/or institutions).[103]

For Sociological jurists, legal science falls within the realm of the social sciences[104] and the essential *raison d'être* of law is *social engineering*.[105] Their basic premise is that legal institutions, concepts, rules and procedures must reflect societal conditions[106] and, therefore, they must be periodically reformed so as to reflect societal developments.[107] As such, Sociological jurists have a broad conception of the law. They look on "legal institutions, doctrines, and precepts functionally; [for them] the form of legal precepts is the means only"[108] and they believe that the law must evolve with, and be based on, societal conditions.[109] In this respect, exponents of the Sociological—as those of the Functionalist—school view the law as a regulator of social relationships.[110]

c) From International Co-operation to Regional Integration: Neo-Functionalism

Functionalism, as the first international co-operation theory of international organizations, and the core concepts of Functionalist logic are said to have spun a number of related theories.[111] ***Neo-Functionalism***[112] was the first such offspring which,

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Justice of the same court and Pound was Dean of Harvard Law School; Andrée Lajoie, *The Implied Bill of Rights and the Role of the Judiciary* 44 U.N.B.L.J. 337, 340 (1995). *See also generally* definitions of *Functional* and *Sociological Jurisprudence* in WALKER, *supra* note 3, where other European (Philipp Heck, Eugen Ehrilch, Rudolph von Jhering) and Australian (Julius Stone) jurists are also credited with earlier formulations of the legal theory of Sociological Jurisprudence.

[103] CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 74, p. 394. *See* WALKER, *supra* note 3, p. 1153, explaining that Sociological jurists adhere to the widest concept of law which includes "the legal system [...] the administration of law, and the insistence on observing the operations of law".

[104] Van Reenan, *supra* note 81, p. 185.

[105] ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (1954); BRANDEIS ON DEMOCRACY, *supra*, note 102, p. 203, discussing the need for the law to be "remolded from time to time to meet the changing needs of society".

[106] WALKER, *supra* note 3, p. 1154.

[107] POUND, *supra* note 105, p. 47. WALKER, *supra* note 3, p. 973; Lajoie, *supra* note 102, p. 340.

[108] WALKER, *supra* note 3, p. 1153.

[109] BRANDEIS ON DEMOCRACY, *supra* note 102, p. 66 discussing how the law must "change along with, and be based upon, societal facts".

[110] Van Reenan, *supra* note 81, p. 185.

[111] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 23. Some of the theories which have spun off from Functionalism include, *Neo-Functionalism, Functional Integration, Systems Theory, Behaviour Theory, Games Theory, Strategy Theory, Organization Theory* and, more recently, *International Regimes Theory*.

[112] Neo-Functionalism is primarily associated with the writings of Ernst B. Hass and L. Lindberg. *See generally* E.B. HAAS, UNITING OF EUROPE 1958 (2nd rev. ed. 1968) [hereinafter 'HAAS—UNITING OF

paradoxically, is somewhat incompatible with its roots.

Neo-Functionalism emerged as a functional *integration* theory—and not merely an international *co-operation* theory as its precursor. This newer and more ambitious theory is defined as a process of integration where more than two states converge to form a new political structure which shapes their community.[113] As such, Neo-Functionalists stress the need for international co-operation via integration on a regional scale in politically important and controversial areas as well as in routine and technical sectors, while Functionalists are concerned with the global issues of co-operation.

Neo-Functionalism is often known as a 'spill-over' process from one sector to another[114] whereby, functions linked together within various policy areas are said to produce progress.[115] More specifically, the so-called 'spill-over' effect allows IGOs to expand further by increased integration, or by the creation of new institutions, in order to pursue tasks which the original IGO could not in itself perform and which could have resulted in jeopardizing the goals of the original member states.

Perhaps the most striking difference between Functionalists and Neo-Functionalists is that the latter believe that the international community can acquire the procedural characteristics of a national political system while the former do not envision this scenario.[116] This is otherwise known as *supranationalism* where "the existence of

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EUROPE']; E.B. HAAS, BEYOND THE NATION STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION 1964 [hereinafter 'HAAS—BEYOND THE NATION STATE']; LEON LINDBERG, THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION 1963.

See also Dorette Corbey, *Dialectical Functionalism: Stagnation as a Booster of European Integration*, 49 INT'L ORG. 253, 254, 264, 271, 273, 280-281 (1995). Neo-Functionalism has in turn spun off its own theories. One such theory is *Dialectical Functionalism* which has emerged as an amended version of the theory of Neo-Functionalism. Originating in the stop and go process of European integration, this theory is named "dialectical" because it is believed that "action (decision to integrate) and reaction (increased intervention in neighboring areas) lead to a new demand for integration." Dialectical Functionalism postulates that a stalled or declining integration process is not indicative of a systemic crisis, but rather a natural part of the integration cycle. As such, it is theorized that a stagnant integration movement will regain momentum when the intervention of states is counter-productive to its nations' progress and when governments prove unable to defeat opposition to policy changes. *See* HAAS-BEYOND THE NATION STATE, *supra* note 112, pp. 108-109. Originally, Haas also posited that integration is a dialectical process.

[113] Pentland, *supra* note 82, p. 11.

[114] The "spill-over" concept was originally introduced by Haas. *See* HAAS—UNITING OF EUROPE, *supra* note 112, pp. 291-298; HAAS—BEYOND THE NATION STATE, *supra* note 112, p. 111. *Cf.* Ernst B. Haas, *International Integration: The European and the Universal Process*, *in* INTERNATIONAL ORGANIZATION: POLITICS & PROCESS 397, 399 & 403-404 (Leland M. Goodrich and David A. Kay eds, 1973) [hereinafter 'Haas—Integration'], surveying lessons of European integration and concluding that "functional contexts are autonomous".

[115] *See* Corbey, *supra* note 112, pp. 255-256, 263 explaining that "the spillover concept assumes that integration in one area leads to a demand for integration in adjacent areas, that is, policy fields functionally linked to the sector subject to integration."

[116] *See* Nina Heathcote, *Neofunctional Theories of Regional Integration*, *in* FUNCTIONALISM: THEORY AND PRACTICE IN INTERNATIONAL RELATIONS 38, 39 (A.J.R. Groom and Paul Taylor eds, 1975).

governmental authorities [are] closer to the archetype of federation than any past international organization, but not yet identical to it."[117] Due to this prototype of supranationality, Neo-Functionalists have been accused of being crypto-federalists.[118] Fearing that this type of regional integration would transpose the traditional problems of international society on a larger scale, classic Functionalists—e.g. Mitrany—oppose the Neo-Functionalist theory.[119]

Notwithstanding their significant differences, however, there is an important commonality between Functionalism and Neo-Functionalism and that is that both theories dismiss the concept of sovereignty as an anachronism.[120] In fact, while Functionalists posit the 'surrender' of sovereignty by its gradually transfer according to needs,[121] Neo-Functionalists—postulating that it is no longer necessary in a regionally organized community—go one step further and, envision the erosion of sovereignty.[122]

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[117] HAAS—UNITING OF EUROPE, *supra* note 112, p. 59. *See* Pentland, *supra* note 82, pp. 16-17.

[118] Heathcote, *supra* note 116, p. 40. *See also* Pentland, *supra* note 82, p. 17 discussing yet another appellation for Neo-Functionalists who are often referred to as "functional federalists ... working for a United States of Europe".

[119] Taylor—Introduction to the Functional Theory of Politics, *supra* note 84, p. xiv; Pentland, *supra* note 82, p. 21; Heathcote, *supra* note 116, pp. 38-39, Classic Functionalists, like Mitrany, reject the Neo-Functionalist concept of supranationalism because they believe that the replacement of nation-states with similar but larger structures "would recreate at the regional level the fundamental problem of power-politics".

[120] Heathcote, *supra* note 116, p. 38.

[121] MITRANY—FUNCTIONAL THEORY, *supra* note 73, p. 127; MITRANY—WORKING PEACE, *supra* note 87, p. 31; CLAUDE—SWORDS INTO PLOWSHARES, *supra* note 79, pp. 380-385. *See* Pentland, *supra* note 82, p. 15.

[122] Heathcote, *supra* note 116, pp. 38, 41.

2. THE THEORETICAL PERSPECTIVE OF LEGITIMACY IN INTERNATIONAL LAW

> "[L]egitimacy has the power to pull toward compliance those who cannot be compelled."
>
> "[I]t remains rather idealistic to expect justice of the rules and institutions that operate among states. It is perfectly realistic, however, to demand of them a high degree of legitimacy."
>
> Thomas M. Franck[123]

a) The Choice of Legitimacy

The second key theory employed in the present study is Legitimacy. As with Functionalism, Legitimacy is a multi-disciplinary theory which does not always produce universally acknowledged interpretations. In domestic law, legitimacy has been used synonymously with 'lawfulness' connoting the legality of an act.[124] In the international sphere, however, legality plays virtually no role in the theory of Legitimacy. For the purpose of the present study, I am interested in the Legitimacy-oriented theory as developed by and applied in international legal scholarship.

Legitimacy has been an important notion in the development of legal principles both in the national as well as in the international domain. Contrary to the common and simplistic definitions provided in most dictionaries, the notion that a given rule is legitimate in the national domain does not necessary mean that it is lawful[125] and, conversely, a rule that is illegitimate does not necessarily mean that it is unlawful. Indeed, if a given rule is *perceived* as illegitimate by the people, even if it was lawfully enacted, it can result in its public repudiation. In the international field legitimacy is an even more important concept because, although this field lacks the enforcement mechanisms found in domestic law,[126] states

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[123] THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24, 246 (1990) [hereinafter 'FRANCK—POWER OF LEGITIMACY'] (emphasis omitted).

[124] WALKER, *supra* note 3, p. 759; BLACK'S LAW DICTIONARY 811 (5th ed. 1979).

[125] *See* BLACK'S LAW DICTIONARY, *supra* note 124, p. 811; WALKER, *supra* note 3, p. 759; MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1559, 665 (10th ed. 1996).

[126] *See generally* AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., 1995). The lack of a coercive system in international law—similar to the one found in domestic law, i.e.

nonetheless comply with international law because they perceive it as legitimate.[127]

The proliferating number and the growing importance of IGOs in our daily existence has been the principal consideration for selecting Legitimacy as the second theory to guide the present study. As a result of globalization, our lives are increasingly governed by the rules enacted by IGOs. In order to foster compliance with these rules it is imperative that the decision-making processes of international institutions be perceived as legitimate. Indeed, this is a circular phenomenon because a legitimate VM and VP will inevitably promote the legitimacy of the IGO and the rules which it enacts. In this respect, although international law does not have the enforcement mechanisms of domestic law, legitimate voting processes will secure the compliance of international rules because these rules will be perceived as legitimate and, therefore, adhered to by the international community.

Moreover, it is important to evaluate the role that the doctrine of SE plays in international law and, more particularly, in the VMs and VPs of IGOs. Is SE a legitimate principle in the contemporary international legal system? In this respect, I will examine the principle of SE, in the context of IGOs' decision-making, according to the criteria of the Legitimacy theory (noted in the following subsection) in order to determine whether it is or is not a legitimate notion in international institutional law.

b) The Meaning of Legitimacy in International Legal Scholarship

The leading authority of this school of thought in the field of international law is Professor Thomas Franck. Promoting a legitimacy-oriented approach to the law of nations, Franck provides the following definition:

> "Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right and process."[128]

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the sovereign—was the key point of contention of early Positivists, like Austin, who disputed international law's status as 'law'. For a further discussion on legal Positivism *see infra* Part II.B.4.a.

[127] *See generally* FRANCK—POWER OF LEGITIMACY, *supra* note 123; Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) [hereinafter 'Franck—Legitimacy in the International System'].

[128] FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 24.

Thus, Franck believes that, although there is little, if any, coercive enforcement mechanism in international law, nations obey rules when there is a perception that they, or the institutions from which they emanate, have a high degree of legitimacy.[129] According to Franck, there are four characteristics of a rule which increase or decrease its legitimacy: 1) *Determinacy*, 2) *Symbolic Validation*, 3) *Coherence* and 4) *Adherence*.[130] The degree to which a given rule—e.g. SE—displays these attributes determines the extent of its legitimacy.

Determinacy refers to the clarity of a given rule's meaning.[131] Thus, if a rule's textual meaning is transparent, or specific, or, at least, sufficiently ascertainable, the rule is deemed determinate and, therefore, has a high degree of legitimacy.[132] The rationale behind this criterion is that if nations clearly understand a given rule they are more likely to comply with it than if they were unclear as to its meaning. Of course, some degree of indeterminacy is normal in most body of rules and therefore, this notion of clarity or determinacy is relative and not intended to be an absolute factor.[133] In fact, we often find determinate notions co-existing together within indeterminate rules or, conversely, indeterminate notions co-existing together within determinate rules.

For instance, the *Vienna Convention on the Law of Treaties* contains both determinate as well as indeterminate rules.[134] Article 26, entitled *Pacta Sunt Servanda*, dictates that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." The 'binding' force of every treaty foreseen in this article is a determinate notion for its meaning is clearly understood and the text leaves little, or no, room for an alternate interpretation.[135] On the other hand, the 'good faith' aspect of this rule's meaning is unclear and susceptible to a panoply of interpretations, and therefore, it is considered a highly indeterminate notion.[136]

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[129] Franck—Legitimacy in the International System, *supra* note 127, p. 705; FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 25.

[130] FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 49; Franck—Legitimacy in the International System, *supra* note 127 p. 711; *See* FRANCK—FAIRNESS, *supra* note 10, p. 26.

[131] FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 52; Franck—Legitimacy in the International System, *supra* note 127, p. 712.

[132] FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 52; FRANCK—FAIRNESS, *supra* note 10, pp. 30-31.

[133] FRANCK—POWER OF LEGITIMACY, *supra* note 123, pp. 53-54.

[134] *See* Setear, *supra* note 30, pp. 164-168; FRANCK—POWER OF LEGITIMACY, *supra* note 123, pp. 59-60.

[135] *See* Setear, *supra* note 30, p. 166. *See also* Franck—Legitimacy in the International System, *supra* note 127, pp. 712-714 for a further discussion on—and numerous examples illustrating—the importance of clarity and transparency as key factors in the establishment of the legitimacy of a textual message.

[136] *See* Setear, *supra* note 30, p. 166.

The second key component of legitimacy, ***Symbolic Validation,*** communicates a rule's authority.[137] Gestures, like rituals or pedigree, act as symbolic cues. These cues—varying between objects (i.e. emblems or flags[138]), songs (i.e. anthems), acts (i.e. diplomatic relations)—are considered to validate the rule-making authority by authenticating it symbolically.[139] Ultimately, these symbolic cues evoke legitimacy by bestowing authority thus compelling the rules' observance.[140]

For instance, in the international legal system, a state's legitimacy is directly dependent on it being recognized by the community of nations.[141] In this respect, a state's recognition commonly entails two acts which, among other functions, have symbolic significance. The first cue is the exchange of diplomats with other states, and the second is the state's admission into and representation in IGOs.[142] Both these cues symbolically validate a state's sovereign authority and bestow legitimacy on the state's status in the world community.[143]

Interestingly, states have been known to use their armies also as symbols of their sovereignty over their territory. For instance, during the July 1st, 1997 turnover of Hong Kong from British sovereign rule to Chinese sovereign rule, the Chinese officials chose to send in the Chinese Red Army across the border on the eve of the turnover. Reminiscent of the 1989 crackdown on Pro-Democracy demonstrations in Beijing's Tiennamin Square, the world community was quick to criticize this move by the Chinese government, contending that it represented a negative signal to the world which had the Tiennamin Square crackdown still fresh in its memories. However, Tung Chee-hwa, Hong Kong's Chief

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[137] *See* FRANCK—FAIRNESS, *supra* note 10, p. 34; Franck—Legitimacy in the International System, *supra* note 127, p. 725.

[138] *See* Abba Eban, The *U.N. Idea Revisited*, 74 FOR. AFF. 39, 54 (1995) declaring that "[n]othing does more to excite the identity of new nations than the sight of their flags and names around U.N. tables."

[139] *See* Setear, *supra* note 30, p. 168; FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 91.

[140] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 92.

[141] *See* Franck—Legitimacy in the International System, *supra* note 127, p. 754.

[142] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 92; *See also* BROWNLIE—PRINCIPLES, *supra* note 30, pp. 96-98 discussing collective recognition of states by membership to IOs. *Cf.* Eban, *supra* note 138, p. 45. The author—who was the Israeli Ambassador to the UN from 1948 to 1959 and, concurrently, to the US from 1950 to 1959—interestingly comments that "[n]o historian has ever suggested a scenario in which Israel's sovereignty could have been *recognized* so quickly in a world that lacked an international organization to fill the vacuum that the end of British power left in the region." (emphasis added).

[143] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 112.

executive, appointed by China, justified the Red Army's entry into Hong Kong as merely a "symbol" of China's sovereignty of the territory.[144]

Coherence, the third component of Franck's Legitimacy-oriented theory, means that a rule must be consistently applied in order to obtain or maintain legitimacy.[145] This signifies that for a rule to be considered legitimate, its application must rest on rational principles and be free of discretion, caprice and arbitrariness. However, there is an exception to this coherence criterion. Franck explains that if there is no consistency to a rule's application it will nonetheless be considered legitimate so long as there are satisfactory explanations given as to the reasons behind the inconsistencies.[146]

For instance, in the present study, establishing whether the decision-making structures and processes of IGOs are consistent with the international law principle of SE will determine whether they satisfy the criterion of coherence for legitimacy.[147] If these structures and processes are found to be consistent with the principle of SE it will be indicative of legitimacy. However, if inconsistencies are found, their decision-making, as well as the principle of SE, may still be considered legitimate provided that the inconsistencies can be satisfactorily explained. Of course, since a good explanation for one party may not necessarily suffice for another, there is evidently a discretionary element to the coherence criterion which allows for flexibility in its application.[148]

Adherence, the fourth and final component of Franck's Legitimacy theory, is the connection criterion to a normative hierarchy in the international community. Contrary to the absence of hierarchy in the formal *sources* of international law,[149] international *rules* enjoy a hierarchical classification.[150]

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[144] *ABC News with Peter Jennings-Special coverage of the Hong Kong Turnover: Interview with Tung Chee-hwa* (ABC television broadcast, June 30, 1997).

[145] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, pp. 150-153.

[146] *See* FRANCK—FAIRNESS, *supra* note 10, p. 41; FRANCK—POWER OF LEGITIMACY, *supra* note 123, pp. 153, 163.

[147] This examination will be undertaken in the next three parts of this study.

[148] *But see* Setear, *supra* note 30, p. 173 criticizing Franck's Legitimacy-oriented theory because of the subjective evaluation of the notion of coherence.

[149] *See* QUOC DINH ET AL., *supra* note 2, pp. 113-115 for a discussion on the absence of hierarchy in the formal sources of international law enumerated in art. 38 of the ICJ Statute. These prominent legal scholars argue that in the international legal system IGO decisions have the same value as conventions, ICJ rulings or customary practice. Therefore, they reason that this differs from domestic law where hierarchy exists between rules emanating from municipal, sub-national (state or provincial) and national governments. *But see* SHAW, *supra* note 5, p. 98, contradicting Quoc Dinh et al.'s findings and arguing that there are indeed some sources of international law which are subordinate to others. For example, in relation to treaty law and customary law, court rulings and legal publicists' writings are of secondary significance.

Cf. Harold K. Jacobson, *Introductory Remarks—Wrap-Up Panel: Are International Institutions Doing their Job?*, 90 PROC. AM. SOC. INT'L L. 583, 584 (1996) claiming because of the ever increasing

A two level rule classification was developed by H.L. Hart in 1961.[151] He argued that a legal system is composed of both *primary* and *secondary* rules. The first are substantive rules which confer rights and duties while the latter are rules of process which create and govern the first.[152] For example, in domestic law the requirement to have a driving license in order to drive is provided in most Highway Traffic Acts (*primary rules* of substance) which are mandated through the legislature or a similar rule-making institution (*secondary rules* of process). Although Hart does not delve into a third tier of rules, he contends that an even more significant order of rules are the "unifying rule[s] of recognition specifying 'sources' of law and providing general criteria for the identification of its rules."[153] Franck elaborates further by referring to this as the legal system's *ultimate rules* of recognition, meaning that these *secondary rules of process* derive their authority from a supreme source—e.g. a state's constitution.[154]

While acknowledging that international law had numerous *primary rules* of obligation, which were usually found in treaties and custom, Hart argued that they were not produced by *secondary* rules of process. In other words, international law lacked the infrastructure required in a legal system—i.e. "legislature, courts with compulsory jurisdiction and centrally organized sanctions"[155] (*secondary rules*)—for the governance and validation of its substantive rules of obligation—(*primary rules*).[156] As such, Hart contended that the international legal system is unsophisticated and that international law is not really 'law'.[157]

Using Hart's hierarchical rules, Franck challenges his concept of the international legal system by showing that, although there is clearly no conventional legislative body or

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multiplicity of both governmental and non-governmental institutions, and as a result to their non-hierarchical status and their overlapping jurisdictions, the international community of nations is overburdened with coordination problems amongst the numerous organizations.

[150] *See infra* Diagram III Hierarchy of Basic International Norms.

[151] *See* H.L. HART, THE CONCEPT OF LAW 79-99 (2nd ed. 1994).

[152] *See id.* at 81, 94.

[153] *See* Franck—Legitimacy in the International System, *supra* note 127, p. 751; HART, *supra* note 151, p. 214.

[154] *See* Franck—Legitimacy in the International System, *supra* note 127, pp. 751, 753. Franck describes these so-called ultimate rules as "autochthonous [meaning the said rule ...] 'sprung from the earth itself.'" *See also* FRANCK—POWER OF LEGITIMACY, *supra* note 123, pp. 192-194 for a discussion on the ultimate rule of recognition.

[155] HART, *supra* note 151, p. 214. Hart also states that "international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing criteria for the identification of its rules."

[156] *See id.* at 214, 233.

[157] *See id.* at 227. For further discussion on Positivism's challenge of the status of international law as 'law' *see infra* Part II.B.4.a.

authority which can enact rights and duties, international law does indeed have multiple *secondary rules* of process and *ultimate rules* of validation.[158] According to Franck, these *secondary rules* of recognition are the international legal system's procedural rules and sources (i.e. IGOs, IGO's Charters, Conventions, Treaties, *International Court of Justice* (ICJ) rulings, etc.) which are used to enact, interpret or apply substantive rules of rights and duties (*primary rules*). Moreover, he argues that the vertical link between *primary substantive rules* and *secondary process rules* validates the former.[159] In addition, the *ultimate rules* (at times also referred to as the *ultimate secondary rules*) validate either the *secondary* or the *primary rules*.[160] Thus, when the *primarily rules* emanate from an institutional framework (be it *secondary* or *ultimate rules*) as opposed to originating simply from an *ad hoc* arrangement between the parties, there is deemed to be adherence, and thus a high degree of legitimacy.[161]

For instance, VMs and VPs of IGOs (*primarily rules*) must emanate from a normative hierarchy and adhere to the principles—e.g. SE—of IGOs' Charters, Convention, Treaties or other such instruments (*secondary or ultimate rules*) in order to be considered to have a high degree of legitimacy. Thus, if VMs and VPs of IGOs are deemed to be unconnected (and therefore, do not adhere) to the international legal system's higher rule—be it the organization's constituent act, ICJ rulings, customary law etc.—they will not have a high pull towards compliance and, thus, will not benefit from a high degree of legitimacy.

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[158] *See infra* Diagram III Hierarchy of Basic International Norms.

[159] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 184; Franck—Legitimacy in the International System, *supra* note 127, p. 751.

[160] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 184; Setear, *supra* note 30, p. 163; Franck—Legitimacy in the International System, *supra* note 127, p. 751.

[161] FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 184; Franck—Legitimacy in the International System, *supra* note 127, p. 752. *See also* FRANCK—FAIRNESS, *supra* note 10, p. 41 indicating that "rules are better able to pull towards compliance if they are demonstrably supported by the procedural and institutional framework within which the community organizes itself, culminating in the community's ultimate rule, or canon of rules, of recognition".

B. Legal Constructs of Law: Equality, Sovereignty and Sovereign Equality

Equality and Sovereignty and, their composite, Sovereign Equality (SE) are the legal constructs profiled in the following three sections. At the outset, I lay out the groundwork for a discussion of the principle of SE. Specifically, in Section 1, I ponder the concept of equality from its meaning in antiquity to its contemporary significance in the legal sciences. In Section 2, I focus my analysis on the principle of sovereignty by tracing its roots (II.B.2.a) and examining its evolution (II.B.2.b & c). In Section 3, I explore the genesis of the principle of SE along with that of the modern law of nations (II.B.3.a). I then outline SE's elusive existence and evolution in international law as well as its failed application in international institutional law (II.B.3.b & c). Finally, I ponder the role that SE plays in voting within IGOs (II.B.3.d).

In the fourth section, I focus my analysis on the principle of SE *vis-à-vis* key international norms. First, I examine the intricate relation that the principle of SE has with the notion of voluntarism in international law (II.B.4.a). I then consider the status of SE as *jus cogens* and ascertain why and how it can be abolished from international institutional law (II.B.4.b). Finally, I explore the principle of SE in relation to the age-old principle of democracy (II.B.4.c). Specifically, I examine the recent calls for democratization of IGOs and, in light of SE's failed experience, argue that we must reject such non-functional principles in the decision-making processes of our international institutions.

1. THE LEGAL CONCEPT OF EQUALITY

> "[I]t is thought that justice is equality: and so it is, but not for all persons, only for those that are equal. Inequality also is thought to be just; and so it is, but not for all, only for the unequal."
>
> Aristotle[162]

Equality has been the subject of much discourse and reflection within all areas of society.[163] Throughout history, jurists, politicians, state-persons and philosophers alike have engaged in great debates over its definition.[164] Aristotle and his disciples believed that equality is synonymous with justice.[165] They were the first to proclaim that equality meant that 'likes should be treated alike'.[166] In other words—because, in the real world people are neither born nor exist on equal terms—they believed in equality for the equals and in inequality for the unequals.[167] Since then, and by most accounts, equality has been considered to be one of the central characteristics and ideals of justice.[168]

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[162] ARISTOTLE, THE POLITICS 195 (T.A. Sinclair trans. 1951, T.J. Saunders rev. & re-pres., Penguin, 1957) [hereinafter 'ARISTOTLE—POLITICS'].

[163] *See* DOUGLAS RAE ET AL., EQUALITIES 210, 133 (1981). According to Rae there are at least 108 kinds of equality. JOHN RAWLS, A THEORY OF JUSTICE 538 (1971) [RAWLS—A THEORY OF JUSTICE'] Discussing the principles of justice, Rawls recognizes that "there are many forms of equality". WALKER, *supra* note 3, p. 423. Walker differentiates between *equality* and *equality of states*, acknowledging that the former has "many facets of application in legal contexts" while presuming [I contend erroneously] that the latter is univocal under international law.

[164] *See generally* ARISTOTLE, THE NICOMACHEAN ETHICS (D. Ross trans., J.L. Ackrill, J.O. Urmson rev. 1980) [hereinafter 'ARISTOTLE—NICOMACHEAN']. According to Aristotle, humans are not simply political animals. They are very much moral beings. Particular moralities (i.e. equality) and philosophies underlie all social systems—whether legal, political, economic or cultural.

[165] *See* ARISTOTLE—POLITICS, *supra* note 162, p. 207; Bleckmann, *supra* note 9, p. 88; Peter Westen, *The Empty Idea of Equality*, 95 HARV. L.R. 537, 542 (1982). *Cf.* TUCKER, *supra* note 47, p. 67 holding equality to be synonymous with independence.

[166] *See* ARISTOTLE—POLITICS, *supra* note 162, p. 207; Westen, *supra* note 165, pp. 542-543.

[167] *Cf.* RONALD DWORKIN, A MATTER OF PRINCIPLE 207 (1985) [hereinafter 'DWORKIN—PRINCIPLE'] discussing liberalism based equality, Dworkin admits the obvious by stating that "in the real world people do not start their lives on equal terms; some begin with marked advantages of family wealth or of formal and informal education.... people are not equal in raw skill or intelligence or other native capacities; on the contrary they differ greatly...".

[168] *See* WALKER, *supra* note 3, p. 423. *See also* RAWLS—A THEORY OF JUSTICE, *supra* note 163, p. 11. Rawls' principles of justice are whatever "free and rational persons concerned to further their own interests would accept in an initial position of *equality* as defining the fundamental terms of their association" (emphasis added). *See generally* HART, *supra* note 151, associating the concept of equality with that of justice throughout his treatise.

In contemporary society, equality is instinctively perceived as justice and, likewise, inequality is thought of as injustice. For the most part, some form of the concept of equality finds application in virtually every aspect of our daily existence. Moreover, it would seem that equality is not a learned value but rather an innate part of human nature. Most people—at some point during their existence, and quite often early on in life—exhibit an intuitive sense of justice by demanding equal treatment.[169]

Beyond its historic and intuitive value, the notion of equality continues to be one of the underlying issues of judicial theory. In fact, for most states, equality is not merely a concept but also a fundamental principle enshrined in nearly all of their basic legislative acts and institutions.[170] This is what is commonly known as a liberal-based equality—i.e. committed to an egalitarian morality and holding that governments must treat all people equal.[171] In Canada, the 1982 *Canadian Charter of Rights and Freedoms* enshrined the principle of equality before the law, and equal protection and benefit of the law without discrimination.[172] Similarly, in the United States, the *American Bill of Rights* and the *Fourteenth Amendment* assert rights and protection of equality to all Americans.[173]

Yet the value of equality goes beyond the fundamental laws and institutions of a state. Indeed, entire political and social movements were born, and continue to live, on the basis of the value of equality. For instance, rhetoric on equality was and remains an integral part of the Woman's movement in North America, in particular, and throughout the western hemisphere, in general. Equality has also been the most significant value of the Civil Rights movement in the United States. In fact, equality is the reason behind the *affirmative action* and *equal opportunity* programs which were enacted in most American states attempting to right all the unequal wrongs of the past.[174]

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[169] *See also* Sarah Salter, *Inherent Bias in Liberal Thought*, *in* EQUALITY AND JUDICIAL NEUTRALITY 50 (Sheilah L. Martin & Kathleen E. Mahoney eds, 1987) arguing "that an intuition of equality develops from the experience of separation of *self* from other." (emphasis in original).

[170] *See* WALKER, *supra* note 3, p. 423.

[171] DWORKIN—PRINCIPLE, *supra* note 167, p. 205.

[172] CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) [hereinafter *'Canadian Charter of Rights and Freedoms'*] § 15 (1), entitled "Equality Rights" states that "[e]very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Prior to the 1982 *Canadian Charter of Rights and Freedoms*, Canada had the 1960 *Canadian Bill of Rights* which also advocated equality but did not carry the same pull because, unlike the former which is a constitutional document, the latter was but a statute which, due to the hierarchical normative order, lacked the constitutional authority to make fundamental and institutional changes in Canadian society.

[173] U.S. CONST. amends. I-X (Bill of Rights) were enacted in 1791 and U.S. CONST. amend. XIV was enacted in 1868.

[174] *See* LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 229 (1982). *But see* DWORKIN—PRINCIPLE, *supra* note 167, p. 207 claiming that 'equality of opportunity" is a fraudulent concept "because in a market

Although equality may be a simple notion in the abstract, its application and enforcement in the world stage renders it highly complex and contentious.[175] Moreover, because it is not a one dimensional issue—transcending, amongst others, legal, political, philosophical and sociological frontiers—equality has come to mean different things to different people. In fact, the various disciplinary meanings of equality have led to confusion.[176] For instance, *legal equality* signifies equality before the law which effectively means that the law will be equally administered to those subject to it, irrespective of any differences.[177] On the other hand, *political equality* means that although there are important differences amongst individuals, all share equally in their national political decision-making processes.[178] Therefore, today, a person's financial status, race, gender, etc. are irrelevant factors with regard to the right to administer society.[179]

Unlike *rights* which are characterized as diverse, complicated, individualistic and non-comparative, *equality* is believed to be a singular, simple, uniform, social and, most often, comparative notion.[180] As a comparative principle equality is rooted in the treatment of others and, as such, some argue that it has no substance of its own but rather derives its content exclusively from rights.[181] In fact, some learned scholars contend that the concept of equality is an empty idea which thrives at the expense of rights and vice-versa.[182] Others

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economy people do not have equal opportunity who are less able to produce what others want."

[175] RAE ET AL., *supra* note 163, p. 3.

[176] Westen, *supra* note 165, p. 537.

[177] KLEIN, *supra* note 12, pp. 4, 7; SHAW, *supra* note 5, p. 148. *See also* DWORKIN—PRINCIPLE, *supra* note 167, pp. 360-361 indicating that standard utilitarianism holds that "government treats people as equals, or, ... respects the fundamental requirement that it must treat people as equals." *See also* RONALD DWORKIN, LAW'S EMPIRE 297 (1986) [hereinafter 'DWORKIN—EMPIRE'] discussing the libertarian notion of equality that government treat its citizens equally.

But see KOOIJMANS, *supra* note 12, p. 2., arguing that "[t]he term 'legal equality' as such is—no less than 'equality'—a meaningless notion, and the prefix 'legal' only defines the field of study."

[178] *See* KLEIN, *supra* note 12, pp. 4-5, stating that: "[t]he utilitarian formula: every man to count for one, no man to count for more than one, has been transferred to the ballot box. Here the vote of each citizen is entitled to the same weight and the principle of majority rule prevails." *See* SHAW, *supra* note 5, p. 148. *See also* DWORKIN—PRINCIPLE, *supra* note 167, p. 273 indicating that "[t]he utilitarian account of equality ... holds that people are treated as equals when goods and opportunities are so distributed to maximize average utility among them."

[179] *See* KLEIN, *supra* note 12, pp. 4-5, stating that "an individual's economic power, race, sex, etc. are no longer accepted criteria for deciding who has the right to sanction the political management of the community."

[180] Westen, *supra* note 165, p. 537.

[181] *Id.* at 596. Ironically, while he provides some of the key characteristics of the concept of equality, Westen postulates that equality is an empty concept because it lacks content.

[182] *Id. But see* DWORKIN—PRINCIPLE, *supra* note 167, p. 370 claiming that the "idea that government must treat people as equals" may be an extremely abstract notion but it is far from an empty concept.

still not only claim that equality is a hollow notion, devoid of any substantive meaning, but that it can be interpreted to hold many divergent and personal views.[183]

Coming to the defense of the general concept of equality, some scholars postulate that the substance and meaning of this abstract notion is realized when it is brought to life in its confrontation with the world.[184] Indeed, Rae and al. (1981) argue that, the "success and importance [of equality] lie not in its crystalline beauty among abstract conceptions, [nor] in its wonderful symmetry, [nor] in its moral power, but in countless attempts to realize equality in polity, economy and society".[185] Still, others, while acknowledging that equality is an imperfect myth, recognize that it is nonetheless an important democratic principle[186] which continues to appeal to the human mind and which has been championed along with such fundamental concepts as freedom.[187] Even the Critical Legal Studies movement[188]—which is highly critical of law for it considers it to be indeterminate[189]—postulates support for egalitarian and democratic values.[190] Indeed, it is believed that the myth of legal or political equality, however imperfect it may be in its application, has enabled the vitality and the advancement of democratic society.[191]

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[183] KOOIJMANS, *supra*, note 12, p. 1, indicating that "[e]quality is ... a notion devoid of sense, an empty shell capable of holding all kinds of personal ideas." *See* Westen, *supra* note 165, p. 537, 596.

[184] RAE ET AL., *supra* note 163, pp. 4-5. According to Rae, the "fascination with equality lies not in mere theory or established practice, but in the repeated moment of transition from theory into practice".

[185] *Id.* at 1-3.

[186] KLEIN, *supra* note 12, p. 5

[187] KOOIJMANS, *supra* note 12, p. 1. *See* KLEIN, *supra* note 12, pp. 198, 5.

[188] The Critical Legal Studies (CLS) movement emerged in the 1970s as a movement radically opposing liberal legalism. *See* David J. Bederman 33 VIRG. J. INT'L L. 239, 244 (1992) (reviewing OSCAR SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1991)). Using a deconstructive process, the Critical Legal Studies movement has provided a skeptical examination of the international legal system by reducing it to 'international relations'. Critical Legal Scholars have argued that if international law deviates from international relations it is rendered ideal and, therefore, irrelevant law; if it is pushed in the other direction, it "will lose its normativity and become too apologetic." *See also generally* Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. (1991) providing an excellent historiography of recent international legal scholarship followed by a Critical Legal Studies analysis as well as the New Stream CLS analysis of the international law, Purvis concludes on a negative note by indicating that "[i]n the modern world ... public international law seems [in]capable of constructing an adequate vision of international social life."

[189] *See* Donna Greschner, *Judicial Approaches to Equality and Critical Legal Studies*, *in* EQUALITY AND JUDICIAL NEUTRALITY 59 (Sheila L. Martin and Kathleen E. Mahoney eds, 1987).

[190] *See also id.* discussing that the Critical Legal Scholars general support for egalitarian and democratic values.

[191] KLEIN, *supra* note 12, pp. 4-5.

2. *Sovereignty Then and Now*

> "Of all the rights that can belong to a nation, sovereignty is doubtless the most precious".
>
> Emerich de Vattel[192]

Sovereignty has been, and remains, a universal and variable concept which—like the concept of equality—has incited much discourse in the legal community and, particularly, in the international arena. A panoply of literature exists on the subject, offering multifaceted accounts of its origins, its current status and its future.[193] I address these issues in the following subsections.

a) Origins and Meaning of Sovereignty

The concept of sovereignty emerged along with the nation-state in the sixteenth century[194] and was crystallized in the seventeenth century with the writings of Grotius and the Treaties of Westphalia.[195] It is said that sovereignty was what made a nation a state.[196] Fowler and Bunck (1995) trace the roots of sovereignty and provide its original meaning to be "the *absolute* supremacy of the ruling monarch".[197] The wording 'absolute' is not used haphazardly. Originally, sovereignty was not a relative concept but, rather, was deemed to be indivisible and inalienable.[198] A nation-state was thus *completely* sovereign as it enjoyed

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[192] EMERICH DE VATTEL, THE LAW OF NATIONS 154 (Joseph Chitty ed., 1883).

[193] *See* Selected Bibliography *infra* Part VII.

[194] *See* QUOC DINH ET AL., *supra* note 2, pp. 48-49.

[195] *See supra* note 5; QUOC DINH ET AL., *supra* note 2, pp. 53-55.

[196] *See* CYNTHIA WEBER, SIMULATING SOVEREIGNTY: INTERVENTION, THE STATE AND SYMBOLIC EXCHANGE xi (1995).

[197] MICHAEL ROSS FOWLER AND JULIE MARIE BUNCK, LAW, POWER AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 11 (1995) [hereinafter 'FOWLER & BUNCK'] (emphasis added).

[198] *See* QUOC DINH ET AL., *supra* note 2, p. 49 discussing Jean Bodin's (1530-1596) views on the birth of sovereign states, the authors remark that Bodin postulated "*Pas d'État sans souveraineté*" and regarded the principle of sovereignty indivisible, perpetual and supreme. A similar view was held two centuries later by the Swiss born French philosopher Jean-Jacques Rousseau (1712-1778) who postulated that sovereignty is inalienable and indivisible. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 70 (Maurice Cranston trans., 1984) (1762).

full jurisdiction and *ultimate* authority over *all* its affairs, whether they were economic, political or social. As such, the state was not subject to any higher power.[199]

Through time, the concept of sovereignty expanded to include the term 'independence'.[200] A state's independence signaled not only freedom to master its own affairs—which was the original concept—but also freedom from external interference into the state's affairs.[201] This newest expanded definition of sovereignty progressed into internationally recognized principles and became what is now known as the of non-intervention rule[202] and the rule of inviolable territorial integrity—or *uti possidetis*.[203] These have since been enshrined in multiple international law treaties, conventions, charters etc.

Although the quintessence of a sovereign state remains that it is not subject to a higher authority, in contemporary society sovereignty has undergone significant changes. These transformations are addressed in the following sub-section.

b) The Shrinking of Sovereignty in the Twentieth Century

> "Unlimited sovereignty is no longer automatically accepted as the most prized possession or even as a desirable attribute of states."
>
> Philip C. Jessup[204]

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[199] *See* KLEIN, *supra* note 12, p. 36, stating that "[s]overeignty meant supreme power". *See also* Franck—Legitimacy in the International System, *supra* note 127, p. 755, stating that a true sovereign is "unbindable" even *vis-à-vis* a treaty to which it is party because it has the freedom to withdraw at all times.

[200] *See* FOWLER & BUNCK, *supra* note 197, p. 36; Mbaye, *supra* note 5, p. 87; QUOC DINH, *supra* note 2, pp. 409-410.

[201] *See* FOWLER & BUNCK, *supra* note 197, p. 11, defining sovereignty as "the independence of states: their supremacy at home and their freedom from interference in external affairs"; KLEIN, *supra* note 12, p. 36.

[202] *See generally* WEBER, *supra* note 196, p. xi, arguing that "[t]he sovereignty / intervention boundary is the very location of the state." *Cf.* FRANCK—FAIRNESS, *supra* note 10, p. 284. According to Franck, belligerence has also long been considered an integral part of sovereignty.

[203] *See* Johan D. Van Der Vyver, *The Self-Determination of Minorities and Sphere Sovereignty*, 90 PROC. AM. SOC. INT'L L. 211, 213 (1996). *Cf.* FRANCK—FAIRNESS, *supra* note 10, p. 147-149, noting that the principle of territorial integrity emerged in the nineteenth century with the dissolution of the Spanish empire in Latin America. During that time, new nation-states obtaining sovereign status were obligated to accept the territory in existence at the time of Spanish rule. Franck further notes that in the post W.W.II era, the principles of self-determination and territorial integrity were reformulated and "synthesized into the doctrine of decolonization".

[204] JESSUP—MODERN LAW OF NATIONS, *supra* note 51, p. 1.

The concept of sovereignty continues to be a key component in all areas of international law, albeit, the functional necessities of contemporary society have eroded its inviolability.[205] Today, sovereignty is not only a divisible concept, it is also an alienable one.[206] As they recognize the increasingly larger role of the international community, states accept and, indeed, participate in bringing about the decline of their sovereignty by transferring their sovereign rights to international institutions.[207] In fact, in the current era of globalization international rules constrain the liberty of sovereign states[208] to the point where we can no longer talk about *full* and *absolute* economic and political sovereignty but rather of *partial* and *relative* state sovereign powers.[209]

Modern technologies have spurned national frontiers. They have enabled the transfer of information around the world with little regard for the sovereignty of states. As Mitrany rightly asserts "with satellites and space travel we have in truth reached the 'no man's land of sovereignty'."[210] Indeed, the fact that states choose to join IGOs signifies voluntary surrender, either expressly or implicitly, of their partial sovereign rights in specific contexts. By agreeing to respect and adhere to the decisions taken by any given IGO, they *de jure* and/or *de facto* renounce their absolute right to be masters of their own affairs—even if, for the most part, these are but *partial* transfers of *specific* state powers. Since this represents neither the transfer of a state's *complete* nor *full* sovereign powers, states are deemed to maintain residual sovereignty. This evolved meaning is phrased as the "globalization of sovereignty" which means that states should address "issues from a global perspective, and work at the international level to fulfill their domestic responsibilities".[211]

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[205] *See* Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 368-369 (1996) [hereinafter 'Franck—Clan and Superclan']. Franck claims that "[e]ven the best-established states can daily be observed *yielding more and more of their sovereignty* to regional and global systems of governance. They do this not necessarily out of an evolving sense of human kinship but in recognition of *functional necessity*" (emphasis added). *See* Stern, *supra* note 18, p. 592, indicating that the trans-border communication of transfers of data "disregard state sovereignty". *See also* Franck-Democratic Governance, *infra* note 365, p. 78, reporting that "state sovereignty, by operation of technological advances as much as of heightened humanistic sensitivity, is not what it used to be."

[206] *See* JESSUP—MODERN LAW OF NATIONS, *supra* note 51, p. 41. *See also* pp. 12-13. Jessup disputes the notion of "absolute state sovereignty" by arguing that this legal creation is a paradox, an impossibility and an "archfiction of international law".

[207] *See* Franck—Legitimacy in the International System, *supra* note 127, p. 754. *See* Janis, *supra* note 2, p. 369, discussing the new era being ushered in by "[t]he decline of the sovereign state and its replacement by a multitude of structures and institutions that share in political and legal authority".

[208] COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, pp. 305-306.

[209] *See* Franck—Legitimacy in the International System, *supra* note 127, p. 758. Franck argues that in the contemporary interdependent community "statehood is incompatible with sovereignty". Of course, this view is contrary to the original conception of state sovereignty which emerged in the sixteenth century. *See supra* Part II.B.2.a.

[210] Mitrany—Prospect of Integration, *supra* note 95, p. 70.

[211] Arthur E. Appleton, *Open Forum, The Globalization of Sovereignty: The Evolution of Sovereignty Viewed from an Environmental Perspective*, 88 AM. SOC. INT'L L. PROC. 389 (1994). *See also*

For example, upon joining an IGO like the **Global Environment Facility** (GEF) states consent to adhere to this organization's principles as set out in its constituent act and, specifically, to place global environmental issues relating to climate change, biodiversity, international waters and ozone layer depletion under its authority.[212] Thus, with regard to these four specific sectors, member states accept to exercise their sovereignty collectively. In so doing, they recognize the GEF as a higher authority and, therefore *de jure* and *de facto,* subordinate their own individual sovereign powers.

Moreover, the latter half of this century has witnessed even more significant changes in the concept of sovereignty. The **European Union** (EU) is exemplary of this trend as its member-states have transferred a broad range of their sovereign rights to the governing bodies of this powerful regional IGO.[213] Indeed, the Organization has exclusive jurisdiction—i.e. over and above member-states—in an extensive number of areas. The scope of the EU's powers has become so wide ranging that the sovereignty of its member states is regarded as an anachronism.[214] Yet some continue to insist on the inviolability of sovereignty, arguing that the member-states of this Neo-Functional Organization have not truly transferred their sovereign rights but rather that they chose to *share* them with the EU governing bodies.

c) The Counter Trend for the Future of Sovereignty

The profound transformations which the concept of sovereignty has undergone during this last century has led some to conclude that the future of this notion is bleak. However, writing sovereignty's obituary would be premature as the idea continues to remain powerful in the minds of people. Although the twentieth century has indeed been witness to events which indicate that the international community is increasingly moving in the direction of limited sovereignty, the last few years have also bore witness to happenings which indicate what can be characterized as a counter trend.[215]

COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 67 referring to the countries' needs to adapt to old norms by accepting "that in certain fields sovereignty has to be exercised collectively."

[212] INSTRUMENT FOR THE ESTABLISHMENT OF THE RESTRUCTURED GLOBAL ENVIRONMENT FACILITY, (1994) art. 2, [hereinafter 'GEF INSTRUMENT'].

[213] For a further discussion on the European Union *see infra* Part V.A.

[214] *See* Heathcote, *supra* note 116, pp. 38-39 discussing Haas' stance on the erosion of sovereignty within the context of Neo-Functional institutions like the EU.

[215] Stern, *supra* note 18, p. 590.

Despite the growth in the number of universal and regional IGOs, and the devolution of powers—in the form of partial, shared or full transfer from states to IGOs—which this has entailed, the idea of sovereignty continues to be vigorously defended by states who possess this status and sought by nations who wish to be recognized and respected as sovereign states. The following three cases—representing the defense of, aspiration for, and the re-appropriation of sovereignty—attest clearly to this smaller yet significant competing trend regarding the future of this concept.

(i) Defending Sovereign Rights and the International Norm of Non-Intervention

History abounds with examples of nation-states defending their sovereignty against violations over their land, their airspace and/or their territorial waters. The most frequently used venue for the defense of sovereign rights and the resolution of international disputes is *diplomacy,* which is often accompanied with economic or other sanctions. If diplomacy fails, states submit their dispute to *international adjudication.*[216] In more extreme cases, states engage in *acts of unilateral aggression* or even in *concerted military action* against the violator.

Diplomacy—Encroachments of sovereign rights have often been vigorously contested via diplomatic channels combined with sanctions. Exemplary is the 1996 Helms Burton Act in the United States which enabled Americans to sue foreigners in the US who were doing business in Cuba with property owned by Americans before Fidel Castro's communist regime took power and expropriated all foreign owned property.[217] The Helms-Burton Act was condemned by the international community as an extra-territorial law for it was deemed to intervene in the affairs of a sovereign state, thus infringing upon its sovereign rights and

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[216] *Cf.* Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 AM. J. INT'L L. 284, 285-286, 305 (1992) [hereinafter 'Johnson—Covert Operations']. Examining violations of sovereignty, Johnson categorizes four levels of strategic intelligence options (extreme, high risk, modest and routine) for such infringements and suggests a checklist of eleven guidelines for the decision-making process of covert operations—the first of which is to attempt a diplomatic approach for dispute resolution prior to considering covert action.

[217] An American Senator of North Carolina, Republican Jesse Helms, and an American Representative of Indiana, Republican Dan Burton, were the key instigators of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. NO. 104-114, § 110 Stat. 785 (1996) [commonly, and hereinafter, referred to as the 'Helms-Burton Act'].

violating international law.[218] In particular, Canadian and European governments—whose nationals were doing business in Cuba and were, thus, directly and adversely affected by this legislation—vigorously contested the legality of this extraterritorial law and protested its application. As a result of these protests, the implementation of the contentious parts of Helms-Burton Act were suspended by the Clinton administration on three occasions.[219] In order to resolve this contentious issue, the EU initially filed a challenge against the Helms-Burton Act before the *World Trade Organization* (WTO). This challenge was subsequently suspended as EU and Canadian governments entered negotiations with US officials.[220] An amicable settlement was eventually reached between EU and US officials with potentially favourable repercussions for Canada.[221]

International Adjudication—Some of these disputes have led to challenges before international fora such as the ICJ, the WTO, the *European Court of Justice* (ECJ), etc. For example, in the late 1980s, a dispute between Canada and France emerged with regard to their sovereign jurisdictional rights over fishery zones off the Canadian coast and the two small French islands, St-Pierre and Miquelon. This dispute was peacefully settled by the Court of Arbitration which, in 1992, awarded France a narrow corridor for fishing.[222]

Unilateral Acts of Aggression—Others acts in defense of a state's sovereign rights have not bore such pacific results but have resulted in tragic international incidents with loss of life. Some well-known cases involve the shooting down of airplanes reported to

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[218] *Cf.* BROWNLIE—PRINCIPLES, *supra* note 30, p. 307, discussing the international law principle regarding the prohibition of extra-territorial enforcement of a state's national laws on the territory of another sovereign state. *Cf. also* SHAW, *supra* note 5, p. 423. Professor Shaw articulates a controversial American exception to extra-territorial jurisdiction. This so-called American *effects doctrine* allows US Courts to assume "jurisdiction on the grounds that the behaviour of a party is producing 'effects' within its territory."

[219] Laura Eggertson, *U.S., Europe far apart in talks on Helms-Burton Law: Canadian companies could benefit from accord on Cuba sanctions*, THE GLOBE AND MAIL, July 17, 1997, at B11.

[220] *Id.* In April 1997, the European Union agreed to suspend its challenge of the Helms-Burton Act before the World Trade Organization and entered into negotiations with the US government for an amicable settlement of this issue.

[221] *See* David White, Robert Graham and Stefan Wagstyl, *Companies welcome deal on US sanctions*, FINANCIAL TIMES, May 19, 1998, at. 11; Heather Scoffield and Paul Koring, *U.S. bends on Helms-Burton, Europe cuts a deal Canada could join: Firms that deal with Cuba can't get government aid*, THE GLOBE AND MAIL, May 19, 1998, at A1; Peter Morton, *Canada hopes to be part of U.S.-EU deal*, THE FINANCIAL POST, May 19, 1998 at 1; Helen Cooper, Steve Liesman and John Harwood, *U.S. Ends Penalties Against Cuba Trade: Pact With EU Includes Iran And Libya, but Congress is Likely to Fight Move*, THE WALL STREET JOURNAL, May 19, 1998 at A2; Guy De Jonquieres and Gerard Baker, *US and Brussels end Iran sanctions dispute*, FINANCIAL TIMES, May 19, 1998, at 1; *Transatlantic Relations*, FINANCIAL TIMES, (Comment & Analysis) May 19, 1998 at 17.

[222] *See generally* Keith Highet, *Case Note, Delimitation of the Maritime Areas Between Canada and France, 31 ILM 1145 (1992) Court of Arbitration, June 10, 1992*, 87 AM. J. INT'L L. 452; Jonathan Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT'L L. 227 (1994) [hereinafter 'Charney—Maritime Delimitation Law']. With regard to problems relating to the enforcement of fisheries jurisdiction off coastal states and other claims of maritime sovereign rights *cf. also generally* Donald M. McRae, *State Practice in Relation to Fisheries*, 84 AM. SOC. INT'L L. PROC. 283 (1990); J. Ashley Roach, *Excessive Maritime Claims*, 84 AM. SOC. INT'L L. PROC. 288 (1990).

have been violating a state's sovereignty via its territorial airspace or waters. In the 1980s, during the Cold War period, Korean commercial airliner flight 007 was shot down while flying over the former Soviet Union's for allegedly conducting intelligence surveillance. More recently, in the late 1990s, a single engine American private plane flying over Cuban waters had a similar fate.

Concerted Military Action—In more extreme circumstances the defense of a state's sovereignty has led to war. For example, the Iraqi invasion of Kuwait in 1990 and its subsequent annexation resulted in the 1991 international military response.[223] Leaving aside political and economic dimensions, from a legal perspective the Gulf War was waged in defense of Kuwait's sovereign rights which, under international law, entitled it to its territorial integrity and inviolability.[224]

(ii) Aspiring and Acquiring Sovereignty

The aspiration for sovereignty by various peoples and regions[225]—e.g. the province of Québec in Canada,[226] the Basque region of Spain, the Punjab province of India, the Biafra area in Nigeria, Tibet in China, Kurdistan in Turkey and Iraq, Palestine in the Middle East, etc.—exemplify the continuing importance and popularity of the concept of sovereignty.[227] In these contexts, sovereignty is not simply legal jargon. It represents the aspirations of peoples seeking to become a sovereign nation-state and attain all the corollary rights by obtaining autonomy over a defined territory.[228]

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[223] *See generally* Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42 (1993) [hereinafter 'Richardson—Gulf Crisis']; Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519 (1994); Oscar Schacter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452 (1991) discussing the collective security action taken, under the aegis of the UN, to combat blatant aggression by Iraq.

[224] *See* Johnson—Covert Operations, *supra* note 216, p. 294.

[225] *See generally Theme Panel II: The rise of Nationalism and the Breakup of States* 88 PROC. AM. SOC. INT'L L. 33 (1994); GASTON ADAM, MICHELLE GÉRIN-LAJOIE AND CAROLINE GUIMOND, INTRODUCTION: RELATIONS INTERNATIONALES 221-226 (1992) [hereinafter 'ADAM ET AL.'].

[226] Since 1980, two direct referendums seeking 'sovereignty' for the Canadian province of Québec were held and defeated, the second narrowly, on the province's secession from the rest of the country.

[227] FOWLER & BUNCK, *supra* note 197, p. 17. *See* ADAM ET AL., *supra* note 225, p. 225.

Cf. FRANCK—FAIRNESS, *supra* note 10, p. 144. Franck names the secessionist movements within Canada, Czechoslovakia and Yugoslavia as 'Postmodern tribalism' which he defines as "politically assertive clans, 'nations', denominations, and ethnic groups, [...seeking] to promote both a political and a legal environment conducive to the breakup of existing sovereign states."

[228] *See* Edward Shils, *Nation, Nationality, Nationalism and Civil Society*, 1 NATIONS & NATIONALISM 93, 108 (1995).

The irony is that the contemporary concept of sovereignty no longer holds the values of absolute authority and inalienable rights originally associated with an autonomous nation-state.[229] In today's interdependent world it is inconceivable for a sovereign state to exist in isolation from the structure of the world community.[230] It is unlikely that these regions, aspiring to become sovereign states, are oblivious to the new era of globalization and the new world order of global governance. It is implausible that they are unaware that an ever-growing number of decisions are made outside the national legislative processes of states and within the decision-making processes of IGOs. Nonetheless, the paradoxical reality is that sovereignty remains an alluring concept as sovereignty movements persist. Presumably, therefore, they aspire not to acquire absolute sovereignty but rather to accede to whatever residual sovereign powers a state holds in the contemporary international community.

In the 1990s several regions opted for and attained sovereign status and membership in the community of nation-states. In 1993, following an overwhelming vote for independence from Ethiopia, Eritrea became a sovereign state.[231] In the same year, a "velvet divorce" in the former Czechoslovakia resulted in the creation of two sovereign states, Slovakia and the Czech republic.[232] The dissolution of the former Soviet Union resulted in the creation of a plethora of sovereign states (e.g. Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan). The violent break-up of the former Yugoslavia led to the establishment of yet more states (e.g. Bosnia, Croatia, the Former Yugoslav Republic of Macedonia and Slovenia).[233] These newly created states opted for and obtained sovereignty despite the fact that the concept now holds limited rights. Furthermore, they opted for sovereignty in knowledge of the uncertainties and sacrifices which would ensue. Indeed, most paid a high price for the status of sovereignty for, besides the harsh economic sacrifices which "independence" forced upon their peoples, secession for many took place in the midst of violence, as once peaceful neighbours waged war on another.

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[229] *See generally Theme Panel III: Multiple Tiers of Sovereignty: The Future of International Governance*, 88 PROC. AM. SOC. INT'L L. 51 (1994).

[230] *See* Edward L. Morse, *Transnational Economic Processes, in* TRANSNATIONAL RELATIONS IN WORLD POLITICS 23, 43 (Robert O. Keohane & Joseph S. Nye Jr. eds, 1971) who rightly notes that "no society, however economically advanced, can achieve the entire spectrum of its goals in isolation."

[231] Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 87 AM. J. INT'L L. 595, 597 (1993).

[232] *See* Eric Stein, *Discussion, Theme Panel II: The Rise of Nationalism and the Breakup of States*, 88 AM. SOC. INT'L L. PROC. 46 (1994).

[233] *See generally* Paul C. Szasz, *The Fragmentation of Yugoslavia*, 88 AM. SOC. INT'L L. PROC. 33 (1994); Steven R. Ratner, *Controlling the Breakup of States: Toward a United Nations Role*, 88 AM. SOC. INT'L L. PROC. 42 (1994).

(iii) Re-appropriating Sovereign Rights

In the latter part of this century we have seen signs of states re-appropriating sovereign rights which they had earlier transferred to IGOs, and some have speculated that this trend will continue.[234] One of the reasons for states withdrawing their membership from certain IGOs is that the given organization has been judged incapable or unable or even unwilling to act in a given situation. States have, accordingly, taken matters into their own hands and pursued unilateral, bilateral or multilateral action.[235]

The first and blatant sign in this direction occurred in 1975 when the US, charging the **International Labour Organization** (ILO) with excessive politicization, gave notice of its intent to withdrew from this IGO.[236] The American departure signaled the re-appropriation of its sovereign rights relating to labour issues which it had transferred to the ILO upon its accession.

In the 1990s, certain states—notably the US and France, which are members of the UN and, as such, have theoretically entrusted international peace and security issues to this IGO—undertook military operations separate from, although concurrent with or preceding, other UN missions. For example, a US led coalition intervened in the war-torn country of Somalia and was concurrently assisted by UN forces (American *Operation Restore Hope* along with *United Nations Operation in Somalia* (UNOSOM I)). A similar mission took place by the French-led coalition to Rwanda and was subsequently assisted by UN forces (France's *Opération Turquoise* and *United Nations Assistance Mission for Rwanda* (UNAMIR)). Another mission headed by the US took place in Haiti and was subsequently followed by UN troops (American *Operation Sustain Democracy* and *United Nations Mission in Haiti* (UNMIH)). More recently, a US military intervention in Iraq was narrowly averted when the UN Secretary-General, Kofi Annan, reached agreement with Saddam Hussein.[237] All of these operations could have been handled exclusively by the

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[234] Stern, *supra* note 18, pp. 590-591.

[235] *Id.*

[236] *See* KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 260.

[237] The US military operation was meant in response to Saddam Hussein's refusal to provide unfettered and unconditional access to *United Nations Special Commission Observer Mission* (UNSCOM) inspectors looking for weapons of mass destruction in Iraq. *See* Craig Turner, *Baghdad's 'bunny huggers': UN office divided into two worlds*, THE GAZETTE, March 1, 1998, at A7; Claude Lafleur, *Les nouvelles armes de la téléguerre*, LA PRESSE, March 1, 1998 at B12; Jocelyn Coulon, *Que faire de Saddam Hussein?*, LE DEVOIR, Feb. 28, 1998, at A7; Associated Press, *UN members work to block military action against Iraq*, THE GAZETTE, Feb. 28, 1998, at A19; Hugo Gurdon and Tim Butcher, *Britain, U.S. Keep attack card*, THE GAZETTE, Feb. 27, 1998, at B1.

UN, which has the mandate to secure world peace and security. However, the fact that states continue to undertake these national operations demonstrates their adherence to, and will to re-appropriate, their sovereign rights—rights which they had previously transferred or shared with IGOs.[238]

[238] Stern, *supra* note 18, pp. 590-591.

3. *The Birth, Life and Future of Sovereign Equality*

> "The equality of states as affected by common usage is really their inequality or status".
>
> Edwin DeWitt Dickinson[239]

Despite the fact that it is widely acknowledged that the principle of SE is one of the most important tenets of the international community[240] and that the very foundation of this community rests on this principle,[241] SE has not incited great reflection by legal scholars and practitioners.

Remarkably, most international jurists casually report on SE as if it was a twentieth century phenomenon, without examining its roots nor questioning its *raison d'être* in the reality of today's international society.[242] In fact, most publicists afford but a few lines or, at best, a few paragraphs on the issue, offering little, if any, analysis of this doctrine. This apparent lack of interest for such a pivotal principle of international law has indeed been surprising. Particularly troubling also is the seemingly blind acceptance[243] and often thoughtless promotion of this principle, particularly in the new world order which is characterized by an ever increasing number of IGOs.

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[239] EDWIN DEWITT DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW, 424, vii (1920). *See also The Antelope*, 23 US (10 Wheat.) 66, 122 (1825) *cited in* FRANCK—FAIRNESS, *supra* note 10, p. 45, quoting a nineteenth century judicial decision rendered by the American Chief Justice of the time—John Marshall—who stated that "[n]o principle of general law is more universally acknowledged than the perfect equality of nations."

[240] *See* QUOC DINH ET AL., *supra* note 2, p. 50; Louis J. Halle, *Forward, in* ROBERT A. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA, xii (1974) proclaiming that SE is the "most important development of modern times."; *See also generally* KLEIN, *supra* note 12, echoing the significance of the principle of SE in modern society.

[241] *See* BROWNLIE—PRINCIPLES, *supra* note 30, p. 19; QUOC DINH ET AL., *supra* note 2, p 50; Weil, *supra* note 8, p. 419. *See also* Lori Fisler Damrosch, *Politics Across Borders: NonIntervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 34 (1989). Damrosch qualifies SE as one of the fundamental principles of the 'state system values' along with such other fundamental principles as the non-use of force and the political independence of states.

[242] *See* BROWNLIE—PRINCIPLES, *supra* note 30, p. 19;

[243] *See* Halle, *supra* note 240, p. xii, claiming that SE, the "single most important development in the evolution of international relations has remained unexamined—presumably because the concept of sovereign equality has been [...] accepted without question [as much by the] academic communit[y] as by everyone else." In fact, Halle suggests that the doctrine of SE is so well entrenched in the world community that examining it "critically would seem to almost all of us as dangerous as the first critical examination of the Holy Scripture by the historians of the nineteenth century seemed to their orthodox contemporaries."

In the following subsections, I address the origins and initial meaning of the principle of SE in the law of nations, as well as its evolution into its current status in contemporary international law and, more specifically, in IGOs.

a) The Genesis and Meaning of the Principle of Sovereign Equality

By most accounts, the principle of SE has been cultivated for many centuries in the law of nations,[244] although the origins themselves are disputed, as it is unclear which of the early writers of modern international law was the first to introduce it. Depending on whose writings one consults, SE is said to have originated somewhere between the fifteenth and the eighteenth century.

(i) Hugo Grotius as Founder of Sovereign Equality

Most international law publicists' claim that SE was developed in the seventeenth century by the father of international law, Hugo Grotius,[245] who—through his treatise on the Law of War and Peace (1625)—elaborated many of the rules of the modern law of nations. Believed to have provided the most refined account of the principle of the equality of states of that period, Grotius postulated a correlation between the notions of sovereignty and equality. He argued that because states are sovereign—and therefore, not subject to any other authority nor accountable for the observance of rules made by others—they co-exist on a level plane field, limited only by law.[246] More precisely, Grotius held that the sovereign state is subordinated only to the superior principles of natural law.[247]

However, in the wake of the then current dominant theory of *jus naturale,* Grotius' naturalism differed significantly from that of his predecessors, as well as that of many of his contemporaries who rooted natural law in the divine.[248] While he proclaimed his fidelity

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[244] *See* FRANCK—FAIRNESS, *supra* note 10, p. 122; Franck—Democratic Governance, *infra* note 365, p. 78.

[245] QUOC DINH ET AL., *supra* note 2, pp. 53-55; FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 113.

[246] *See* QUOC DINH ET AL., *supra* note 2, pp. 50, 54.

[247] *Id.* at 55.

[248] *See* DICKINSON, *supra* note 239, p. 31, discussing how "[t]he law of nature was regarded as a body of ideal principles grounded in the being of God...".

to Christianity, for him natural law was rooted in *reason*. In other words, he postulated that natural law was a compilation of principles which allowed one to determine if a given action is honest or dishonest according to its connection with reasonable or sociable nature.[249] As a result, Grotius was the first to base the principle of SE on *rational* natural law principles.

Drawing an analogy between natural persons and states, Grotius deduced that since all men are equal under domestic law, all states are also equal under international law.[250] Of course, legal equality of states, as with legal equality of persons, entails perfect equality before the law and no exceptions should be made other than those foreseen in the law—i.e. the legal principle of justified discrimination.[251] In practical terms, this means that under international law[252] sovereign states recognize and accept that the law applies equally to and amongst all, irrespective of real differences in power, size, economic or political strength etc.[253]

Because the concept of equality is an inherent and instinctive human belief in natural justice, Grotius' rational naturalist argument allows it to be propounded three centuries later. As will be evidenced through the examination of voting in political and financial IGOs (Parts III-V), many continue to parallel an *individual's* legal equality with a *state's* legal equality. Clearly, these irresistible analogies—between individuals (who are real) and states (which are artificial creations)—continue to exist because of their simplistic connotations. However, although such analogies may have been appropriate in the eighteenth and nineteenth centuries, when international law revolved mainly around the unraveling and building of political interests in diplomatic conferences, they are not applicable in the sphere of contemporary international law. Indeed, in the twentieth century's society of global governance, organized in a sophisticated international legal system where IGOs increasingly regulate and govern conduct and mechanisms world-wide, the equality of

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[249] QUOC DINH ET AL., *supra* note 2, p. 54;

[250] *But see generally* ARISTOTLE—POLITICS, *supra* note 162, discussing his philosophy of the inequality of human nature. Of course, Aristotle had not really been interested in the concept of the state of nature—as other philosophers who had been translating the idea of natural equality into the law of nations—because he believed that, by nature, man adapted to political society.

[251] Justified discrimination implies that an inequality based on a good or just reason is lawful. Conversely, unjustified discrimination implies that a particular inequality is not well founded or just and is therefore considered unlawful. For instance, a rule that prohibits women from obtaining equal salary with men for equivalent work would be unjustified and, therefore, unlawful, but a rule which prohibits women from obtaining equal salary with men who have more experience, more seniority, etc. would be justified and would, therefore, be considered lawful. *See e.g.* QUÉBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS, R.S.Q., c. C-12 § 19.

[252] *See* SHAW, *supra* note 5, pp. 148-149; BENNETT, *supra* note 41, p. 82; IGNAZ SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 22 (1992).

[253] KLEIN, *supra* note 12, p. 7.

states is a non-functional ideal.[254] Moreover, and as noted earlier, the notion of equality has *uniformity* as one of its core characteristics.[255] As such, one would logically assume that the equality of states should be recognized as governing the legal personality of the community of nations by granting *uniform rights.*[256] Remarkably, however, Grotius distinguished between states' *right to equal status* versus states' *equal rights* in the law of nations.[257] While he recognized sovereign states standing of being equal in principle, he did not consider legal equality to mean that every state would have uniform rights and duties.[258] In other words, Grotius' system considered the principle of SE to be fundamental to the law of nations because it signaled states' equal protection by the law but it did not espouse for states' equal capacity for rights.[259]

(ii) Challenging Grotius as the Founder of Sovereign Equality

Most international law publicists hold that Grotius was indeed the person who laid down many of the rules for the modern system of international society. Some international scholars, however, have disputed Grotius' credentials with regard to the elaboration of the principle of SE, cautioning against the tendency to attribute to Grotius everything related to the modern law of nations.[260]

Dickinson, (1920) who gave us one of the first classic treatises of the twentieth century on the equality of states in international law, disputed Grotius' credentials with regard to the principle of SE.[261] Furthermore, he maintained that the principle of SE did not originate from the concept of sovereignty.[262] Arguing that Grotius' definition of sovereignty "provided neither an adequate premise for the conclusion of state equality, nor a satisfactory explanation for such a principle", Dickinson held that "[t]he doctrine of

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[254] *See* Boutros Boutros-Ghali, *Le Principe d'égalité des États et les organisations internationales*, 100 R.C.A.D.I. 1, 14 (1960).

[255] Westen, *supra* note 165, p. 537. Westen introduces the concept of equality as a singular, simple, social, comparative notion, concerned with relative deprivation and meaning *uniformity*.

[256] *See* BROWNLIE—PRINCIPLES, *supra* note 30, p. 287.

[257] DICKINSON, *supra* note 239, p. 35.

[258] KLEIN, *supra* note 12, p. 7.

[259] DICKINSON, *supra* note 239, p. 35.

[260] *Id.* at 34-36; KOOIJMANS, *supra* note 12, p. 62.

[261] *See* DICKINSON, *supra* note 239 pp. 34, 61-62.

[262] *Id.* at 56.

sovereignty was offered later as an analytical explanation and justification; it was never an historical reason for the origin or the principle."[263]

Dickinson established the four sources of the principle of SE to be "(a) the law of nature, (b) the idea of natural equality, (c) the conception of the state of nature, and (d) the analogy between natural persons and separate states in the international society".[264] From these he traced the first three sources to the publicists of antiquity and the last one to the writings of modern international law publicists.

Examining the writings of early publicists of international law—e.g. Francisco Vitoria, Alberico Gentili, Gabriel Vasquez, Balthazar Ayala, Fransisco Suárez, Hugo Grotius etc.—he found that *all* of them contributed to the discourse and understanding of the principle of SE but *none*, not even Grotius, could be credited with its creation.[265] He concluded that the principle of SE was developed by a series of post Grotian publicists like Pufendorf, Thomas Hobbes, Emerich de Vattel, etc.[266] In fact, in his in-depth analysis of the Grotian system, Dickinson argued that although Grotius was inspired by many of his predecessors' ideas regarding the law of nature and the concept of natural equality, he neither developed nor applied (save for some limited exceptions) the theory of natural equality to the society of sovereign states.[267] Indeed he found that Grotius' notion of sovereignty was altogether too imprecise to give rise to, or support for, the principle of SE. Moreover, while drawing a distinction between states' rights to "equal protection of the law" and states' "equal capacity for rights", [268] Dickinson held that both are an integral part of the principle of SE. However, he argued that, because the Grotian system may have espoused the former without ever entertaining the latter,[269] it was erroneous to attribute the genesis of the principle of SE to Grotius.

Kooijmans (1964), one of the few publicists to conduct an in-depth study on the meaning of the doctrine of SE, also argued that, contrary to popular belief, Grotius was not the first to develop the principle of SE in the law of nations.[270] However, Kooijmans also disputed Dickinson's findings regarding the contribution of Grotius' predecessors to the

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[263] *Id.*

[264] *Id.* at 6. *See also* p. 56.

[265] *Id.* at 34-35.

[266] *See id. at* 68-99.

[267] *Id.* at 34-35, 40.

[268] *Id.* at 34-35.

[269] *Id.* Indeed, Dickinson argues that not only was "equal capacity for rights" not an essential element in the Grotian system but that it was also likely that Grotius would have repudiated this definition of SE.

[270] KOOIJMANS, *supra* note 12, p. 62.

principle of SE. Conducting his own analysis of the fifteenth and sixteenth centuries publicists he concluded that they were indeed influential in bringing about the genesis of the principle of SE. In particular, he argued that the origins of SE were most evident in the writings of Spanish Dominican theologian Francisco de Vitoria (1480-1546).[271] Indeed, according to Kooijmans SE was an integral part in all of Vitoria's writings, and constituted the essence of his doctrine. Kooijmans, therefore, concluded that the idea of the legal capacity of states emerged in the fifteenth century and that SE was subsequently developed as a coherent theory by the *jus naturale* theoreticians of the sixteenth, seventeenth and eighteenth centuries (including Hugo Grotius).[272]

Finally, Klein (1974) who studied the history of SE, also disputes Grotius' credential with regard to the origins of the principle of SE. Klein credits Emerich de Vattel (1714-67), the eighteenth century Swiss lawyer, for introducing the principle of SE in international law.[273] An exponent of Naturalism, and a precursor of Positivism, Vattel published *Le Droit des gens ou principes de la loi naturella appliquée à la conduite et aux affaires des nations et des souverains* (1758).[274] In this treatise Vattel postulated that nations, like men, are equal by nature and, therefore, they all enjoyed the same rights and duties, otherwise qualified as "perfect equality".[275] According to Vattel, "[p]ower or weakness does not ... produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom."[276]

Vattel's eighteenth century version of SE was a notable deviation from Grotius' stance. While Grotius' excluded equality of rights and duties from discourse on the principle of SE, Vattel held that rights were an integral part of this principle. Vattel's treatise is said to have advanced significantly natural law and practical principles of international law[277] by creating a *de facto* guide for diplomatic rights, which were adhered to until the nineteenth

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[271] *Id.*; WALKER, *supra* note 3, pp. 1279-1280.

[272] KOOIJMANS, *supra* note 12, p. 62; DICKINSON, *supra* note 239, p. 334; Robert Feenstra, 86 AM. J. INT'L L. 181, 182 (reviewing ANTONIO TRUYOL Y SERRA, HENRY MECHOULAN, PETER HAGGENMACHER, ANTONIO ORTIZ-ARCE, PRIMITIVO MARINO AND JOE VERHOEVEN, ACTUALITÉ DE LA PENSÉE JURIDIQUE DE FRANCISCO DE VITORIA, (1988)).

[273] *See* SHAW, *supra* note 5, p. 25; James Crawford, *Islands as Sovereign Nations*, 38 INT'L & COMP. L. Q. 277, 284 (1989) [hereinafter 'Crawford—Islands as Sovereign Nations'].

[274] QUOC DINH ET AL., *supra* note 2, p. 56.

[275] KLEIN, *supra* note 12, p. 6; VATTEL, *supra* note 192, p. lxii. Discussing the equality of nations Vattel states: "Since men are naturally equal, and a *perfect equality* prevails in their rights and obligations, as equally proceeding from nature—Nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the *same obligations and rights.*" (emphasis added).

[276] VATTEL, *supra* note 192, p. lxii.

[277] SHAW, *supra* note 5, p. 25.

century.[278] In fact, it is thought that one of the ways Vattel's version of the principle of SE continues to manifest itself in international life in the twentieth century is through the benefit of various rights—i.e. privileges and immunities—which are bestowed upon Heads of State, ambassadors, and other diplomats.[279]

b) The Evolutive Role of the Principle of Sovereign Equality in the Twentieth Century

Since SE is a centuries-old principle, one would think that it would be an unambiguous and clearly understood concept by now. However, from the outset this composite term has conjured considerable confusion[280] as it has been vested with a wide range and often incompatible meanings. This elusiveness of meaning—which is undoubtedly related to, if not a result of, inadequate reflection[281]—has resulted in a *de facto* endorsement of all informal definitions of it.[282] Remarkably, despite—or perhaps because of—its indeterminate meaning, the principle of SE has, from its inception to this day, enjoyed a pre-eminent role in international law and, for the most part, the international community has paid, and continues to pay, homage to this ideal.

Perhaps paradoxically, the principle of SE was important even in Germany in the post World War I era and in the early Nazi years. In the aftermath of W.W.I, Germany was not only excluded from membership to the newly created **League of Nations**,[283] but was also subjected to the Versailles Treaty which the defeated Germans considered to constitute

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[278] BUERGENTHAL & MAIER, *supra* note 5, p. 15.

[279] GILSON, *supra* note 12, p. 60. *See also* SHAW, *supra* note 5, pp. 450-480 for a discussion on a wide range of immunities from jurisdiction resulting from the principle of sovereignty.

[280] DICKINSON, *supra* note 239, p. 336.

[281] *See* KOOIJMANS, *supra* note 12, p. 3, claiming that the confusing meaning of SE is "due [...] in no small measure to an insufficient reflection on the juridical meaning". *See also* KLEIN, *supra* note 12, p. 7 attributing the confusion surrounding the meaning of SE to "muddled thinking over the rights which a state may assert in law and the degree of political influence it possesses." *See also* TUCKER, *supra* note 47, p. ix maintaining that the intellectual confusion that has plagued the principle of SE is related to the "extension of the confusion that continues to attend discussions of equality in relation to domestic society" as well as "to the failure to distinguish properly between domestic society and the greater society beyond."

[282] *See* Thomas K. Plofchan, Jr., *A Concept of International Law: Protecting Systemic Values*, 33 VA. J. INT'L L. 206 (1992).

Of course, in the legal sciences jurists often do not explicitly define a rule so as to avoid restricting its application. In domestic law this practice gives the courts the ultimate task of applying and—either implicitly or explicitly—defining a given rule. However, in the international field court rulings are not as frequent and in the particular case of SE there has not been a single ruling by the ICJ. Thus, until the United Nations passed a resolution in 1970—*see infra* note 290—the meaning of SE had been left to the writings of international law publicists, of which only a handful had traced the origins of the concept of SE to its roots.

[283] *See infra* Part II.B.3.c(i) for a discussion on the League of Nations.

harsh punishment.[284] Because Germany was not conferred a "place of equality among the peoples of the world", in 1919 the Germans appealed for respect of the principle of equality of states.[285] Their calls were, however, in vain for it was inconceivable for the victors to forgive Germany in the immediate aftermath of the war and to afford this rogue state equality amongst the world of nations.[286]

Germany continued to protest against the terms and conditions of the Versailles settlement, claiming that the Treaty violated the principle of SE[287] and that Germany had been placed in an impossibly inferior position in relation to other states. For self-evident and self-serving reasons, the Third Reich initially upheld this line of argument and claimed that it espoused such principles as inalienable sovereign rights and the equality of states.[288] Of course, as history has bore witness, their position changed in 1939 when the Nazis, after their initial triumphs, discarded their espousal for the principle of the equality of states in favour of German hegemony and Aryan supremacy.[289]

Despite its centuries-old heritage, the first formal attempt to define the principle of SE was made only in the 1960s by the **United Nations** (UN). By 1970, the UN passed a resolution entitled *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, [hereinafter *Declaration on Friendly Relations*].[290] This resolution not only

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[284] KLEIN, *supra* note 12, p. 83.

[285] *Id.*

[286] *Id.* Using expressions like "revenge", "vindictive", "punish", etc., Klein describes the somewhat severe mood reigning in the post W.W.I period, explaining that it was not possible in that era for the victors to forgive Germany and forget the devastating destruction which it had caused.

[287] Detlev F. Vagts, *International Law in the Third Reich*, 84 AM. J. INT'L L. 661, 687-689 (1990).

[288] *Id.* at 692. Vagts provides a highly referenced account of the Third Reich's stance on international law rules and principles such as SE.

[289] *Id.* at 688-689.

[290] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states in Accordance with the Charter of the United Nations*, G.A. Res. 2625 U.N. GAOR Annex at 9, U.N. Doc. A/Res. 2625 (1970) [hereinafter '*Declaration on Friendly Relations*'], *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW 36-45 (Ian Brownlie ed., 1995). This Declaration elaborates on the seven most fundamental principles of international law which include the following:

> "a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;
>
> b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;
>
> c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;
>
> d) The duty of States to co-operate with one another in accordance with the Charter;
>
> e) The principle of equal rights and self determination of peoples;

embodied the customary law principle of SE but also provided an official definition of it by declaring the following:

> "All states enjoy sovereign equality. They have *equal rights and duties* and are *equal members* of the international community, notwithstanding differences of an economic, social, political or other nature.
>
> *In particular*, sovereign equality includes the following elements:
>
> (a) States are juridically equal;
>
> (b) Each State enjoys the rights inherent in full sovereignty;
>
> (c) Each State has the duty to respect the personality of other states;
>
> (d) The territorial integrity and political independence of the State are inviolable;
>
> (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
>
> (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States".[291]

Evidently, since the words "in particular" precede the said list, this definition of SE is not meant to be exhaustive. However, the *Declaration on Friendly Relations* is of great significance as it is the first indication of its intended meaning provided by agreement of the UN members states. As such, this resolution was the only authoritative manifestation of the role of the principle of SE in international law for it reflects not merely the views of international publicists but also the views of the world community.[292] More importantly, as there has not been a subsequent formal definition to update or elaborate on the principle of SE by any other IGO, this 1970 UN resolution *remains* the sole authoritative tenet of SE in international law.

Unlike the notions of SE articulated by the various early publicists of the modern law of nations, the definition expounded in the *Declaration on Friendly Relations* is not founded upon *jus naturale* principles—although it may be considered to be an abstraction of the law of nature. Rather, it represents a state's fundamental right as a consequence of its sovereignty. The inclusion of the phrase "equal rights and duties" brings the UN definition

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f) The principle of sovereign equality of States;

g) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter"

[291] *Id.* (emphasis added).

[292] *See generally* Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations with an Appendix on the Concept of International Law and the Theory of International Organisation*, 137 R.C.A.D.I. 419-742 (1972).

closer to Vattel's version of SE than that of Grotius, as the former envisioned 'rights' to be an integral part of the principle while the latter did not.

Remarkably, however, the UN definition is contrary to the interpretation of the principle of SE provided by the majority of contemporary publicists in international law. Indeed, despite this UN resolution, a considerable part of the international legal community considers the principle to mean that each state possesses supreme legal authority and that states have an equal right in ascertaining their rights, not that they have equal rights.[293] More importantly for the purposes of the present study, and as I will show in Parts III-V, the definition of SE provided in the *Declaration on Friendly Relations* does not find a functional or legitimate application in contemporary international institutional law. Evidently, this UN definition did not completely resolve the issue and, in today's reality of global governance, the confusion surrounding the meaning and function of the principle of SE continues to be rife.

c) The Quixotic Quest for Sovereign Equality in International Governmental Organizations

With this century's phenomenal proliferation of IGOs, the doctrine of SE has played a prevalent role in the new structure of the world community as it has been used, misused or abused in novel and diverse ways in various organizational contexts.[294] In fact, SE has been referenced, either directly or indirectly, in the organizational structure and decision-making processes of many prominent twentieth century IGOs, albeit its influence has varied as per the functional requirements of each organization in which it has been applied.

(i) International Governmental Organizations' Implicit Reference to Sovereign Equality

The application of the principle of SE was originally undertaken in the first political organization of the twentieth century, the **League of Nations** [hereinafter the 'League'].[295] Created in 1919, in the aftermath of World War I, the League was a universal

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[293] ARBOUR, *supra* note 12, p. 252; SEIDL-HOHENVELDERN, *supra* note 252, p. 22. *See* BROWNLIE—PRINCIPLES, *supra* note 30, p. 287; QUOC DINH ET AL., *supra* note 2, p. 413.

[294] *See* QUOC DINH ET AL., *supra* note 2, pp. 414-415.

IGO established with a mandate to ensure and secure international peace and security.[296] Although there was no specific reference to SE in the League's constituent act, the principle was influential both in this organization's composition and in its voting structure.

The League was structured into two organs, the *Assembly* and the *Council*, the first being the plenary organ with universal membership, and the latter being the confined organ with restrictive membership. It is thought that the principle of SE was responsible for the structure of the League's plenary organ where all states had an equal say—i.e. one vote. SE's influence on the League's composition was, however, limited because the principle was discarded in its Council which had a restricted membership.

Interestingly, the League's dual institutional structure has been replicated in most other IGOs of the twentieth century, which claim adherence to the principle of SE in their plenary organs while non-adherence in their limited membership organs. The inconsistent application of SE is usually rationalized on a functional basis. In the League's case it would not have been practical to have an organ representative of all member states partake in decisions regarding world peace and security for it would have unnecessary burdened the decision-making process by slowing it down, with potentially adverse consequences—i.e. threatening world peace and security.

The League required ***unanimity*** for its decisions.[297] This requirement assured the member states of this organization that their respective views carried the same weight as all other voting states. Unanimity was thus rooted in the principle of SE, and was believed to be a requisite for securing members' adherence to the organization's decisions.[298] However, it ultimately proved to be too stringent a requirement.[299] Indeed, it has been argued that the League's failure to prevent World War II was due to the fact that the requirement for unanimity in its decision-making processes made it extremely difficult for it to reach decisions, a fact which ultimately paralyzed it and inevitably led to its demise.[300]

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[295] L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, 277 (H. Lauterpacht ed., 8th ed. 1961).

[296] SHAW, *supra* note 5, p. 747; BOWETT, *supra* note 13, p. 17; OPPENHEIM, *supra* note 295, pp. 392.

[297] BOWETT, *supra* note 13, p. 19. *See* QUOC DINH ET AL., *supra* note 2, p. 601. There were two important exceptions to the League's unanimity voting requirement: 1) abstentions were not counted and; 2) states could not vote if they were party to the dispute under consideration.

[298] SCHERMERS & BLOKKER, *supra* note 1, p. 812. *See* BENNETT, *supra* note 41, p. 82; Boutros-Ghali, *supra* note 254, pp. 27, 55.

[299] QUOC DINH ET AL., *supra* note 2, p. 601.

[300] *See* SHAW, *supra* note 5, p. 748; QUOC DINH ET AL., *supra* note 2, p. 601; CHARLES ZORGIBE, LES ORGANISATIONS INTERNATIONALES 23 (1986). *See also* Plofchan, *supra* note 282, p. 225. The author blames "[t]he requirement of unanimity [for having] made the League's collective security system ineffective". *See also* MITRANY—WORKING PEACE, *supra* note 87, p. 5 discussing the common belief which attributed "the League's failure ... directly to weaknesses in its own constitution and machinery". *Cf.*

The principle of SE also found *de facto* application in other organizations of the same period. The **International Labour Organization** (ILO), founded at the same time as the League (1919), had a mandate to increase the world community's working and living standards. In the post World War I era the ILO, like the League, did not expressly foresee for SE in its constituent act. However, it had established a unique voting scheme which took into consideration the principle of SE by giving equal voting representation to all of its member states' governmental and non-governmental delegates. As the ILO will be discussed in the next part of this study, I will not delve into the particular details of its VMs and VPs at this point in time. Suffice it to say that this novel ILO voting scheme has endured throughout this organization's existence, although it has not been reproduced in any other IGO.

(ii) International Governmental Organizations' Explicit Reference to Sovereign Equality

From its genesis until the mid twentieth century, SE was a general principle of international law commonly entertained in political and legal discourse.[301] During that period the international legal system underwent substantial transformation, evolving from a state-based system into a sophisticated structure composed *inter alia* of an increasing number of IGOs. Despite the burgeoning presence and role of international institutions,

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Leland M. Goodrich, *The UN Security Council*, *in* INTERNATIONAL ORGANIZATION: POLITICS & PROCESS 193 (Leland M. Goodrich & David A. Kay eds, 1973) [hereinafter 'Goodrich—U.N. S.C.'] attributing the League's failure to an ineffective "use of military force and the unwillingness of states" to take active measures to defeat aggression.

Cf. also The National CBC News (CBC television broadcast, July 8, 1997). Even in recent times, other IGOs have been known to struggle with the voting requirement of unanimity. For instance, in the 1996 Madrid Summit of the North Atlantic Treaty Organization (NATO) discussions were under way for the expanded membership of this organization. During those meetings, the sixteen member states unanimously agreed to the historic expansion of the organization by inviting three former Communist Warsaw Pact countries—Hungary, Poland and the Czech Republic—to join. However, there was disagreement with respect to the admission of two other Eastern Bloc countries, Romania and Slovenia. The Canadian Prime Minister and French President supported membership of Romania and Slovenia into the organization while the British Prime Minister and American President opposed the entry of these two states. The summit concluded with the American and British position dominating. In a news conference following the Madrid summit, the Canadian Prime Minister faulted the stringent voting requirement of unanimity for the outcome of the organization's decision to exclude membership for Romania and Slovenia contending that "[i]t's difficult to operate in an organization that requires unanimity". The French President, Jacques Chirac, expressed his disappointment in the intransigent American and British position suggesting that the Americans dictated NATO decision-making for far too long and arguing that "[t]here must be a new balance of responsibility between Europe and the United States established at the centre of the [NATO] alliance". Aileen McCabe, *NATO's doors open to the east: 3 former 'enemies' get OK to join*, THE GAZETTE, July 9, 1997, at A1.

[301] *See generally* KLEIN, *supra* note 12.

however, the principle of SE remained conspicuously absent from the founding texts of IGOs.

The first time the principle of SE was mentioned explicitly in an IGO was in the UN's constituent act of 1945. Curiously, and perhaps ironically, the UN, which was the continuation of the failed League, decided to expressly base its existence on a principle which was said to have contributed to the League's paralysis.[302] As such, the UN Charter specifies that "[t]he Organization is *based* on the principle of the *sovereign equality* of all its Members".[303] At the time the UN Charter was enacted, and during the critical first years of its existence, the meaning of SE was indeterminate. In fact, its significance was initially left to the divergent views and interpretations of international scholars, until the first official definition of SE was laid down in the 1970 *Declaration on Friendly Relations.*

Remarkably, despite the great proliferation of IGOs in the twentieth century, and particularly in the post World War II era, the kudos of the ideal of SE has never truly diminished in the arena of the international community. Albeit the UN *remains* the only IGO which *explicitly* incorporates the principle of SE in its constituent act[304] this principle is *implicitly* incorporated in many other prominent IGOs' constituent instruments. However, as will be shown in the next parts of this study, the principle of SE has not conformed to the spirit nor the letter of its sole authoritative definition in the context of any organizational structure.

d) The Role of the Principle of Sovereign Equality in the Decision-Making Organs of International Governmental Organizations

Irrespective of its explicit or implicit mention in IGOs, international legal scholars of the twentieth century have attempted to transpose the concept of SE on the international institutional scale. This is most evident in the context of decision-making organs of political and financial IGOs where, although the principle of SE has never been functionally nor

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[302] *See supra* note 300. The League's unanimity rule, based on the principle of SE, has been blamed for bringing about this IGO's dissolution.

[303] UN CHARTER art. 2, para. 1 (emphasis added).

[304] *See* Annex I: Charting Decision-Making in International Governmental Organizations for a list of IGOs, examined in this study, which either directly or indirectly incorporate the principle of SE in their constituent acts. For instance, while the UN is the only IGO to directly incorporate the principle of SE other IGOs—i.e. ILO, IMF, MIGA—indirectly incorporate this principle in their constituent acts through their status as UN Specialized Agencies.

legitimately applied, it has, almost without exception, been paid lip service by the international legal community.

For example, political IGOs claim to subscribe to the principle of SE in their VMs and VPs and, therefore, are said to adhere to the idea of uniformity via the ***one state, one vote*** rule. This rule represents *formal equality* as it grants uniform voting rights to all, without regard to disparities in geography, populations, natural resources, economic, political and military power,[305] nor differences in financial contributions to the given organization.

Financial IGOs, on the other hand, while claiming *de facto* adherence to the principle of the equality of states, have abandoned formal equality and opted for ***weighted voting***, granting voting rights proportionally to a member-state's financial contribution. This represents *formal inequality* because, the higher the membership dues paid to a financial IGO by a given member state, the more votes the said state holds and, as a result, the more clout it has in influencing the outcome of the organization's decision-making processes. The concept of unequal voting rights is based on the idea that uniformity does not necessarily translate into perfect similarity in the rights and duties of states.[306]

While equality of states has been used as a maxim of the law of nations for centuries, so have inequalities in representation and voting been the norm within most IGOs in the twentieth century. Although both political and financial IGOs claim adherence to the doctrine of SE, the fact remains that, in practice, this doctrine provides anything but equal voting rights to member-states. Indeed, as I explore the basic differences between the decision-making processes of political and financial IGOs, I will show that it is not merely questionable whether or not they can be functionally and legitimately reconciled under the aegis of this elementary international legal principle of SE, but that it is an impossibility.

The inconsistent application of SE in IGOs has led certain international legal scholars to believe that it is not a true principle.[307] Moreover, since there is no legal entitlement for equal voting *rights* under international law, it can be argued that the principle of SE in the context of decision-making in IOs is an empty concept that we can do without.[308] In fact,

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[305] SEIDL-HOHENVELDERN, *supra* note 252, p. 23. *See* Boutros-Ghali, *supra* note 254, p. 10.

[306] ARBOUR, *supra* note 12, p. 252.

[307] Mbaye, *supra* note 5, pp. 87-96.

[308] *Cf.* Westen, *supra* note 165, p. 596. Assessing the general concept of *equality*, Westen characterizes equality as a comparative principle, rooted in the treatment of others, and rejects the concept in the belief that it has no substance of its own but rather derives its content exclusively from rights.

due to the trend towards relative normativity in international law, Weil (1983) claims that this principle is indeed "in danger of becoming an empty catch phrase: for now some states are more equal than others".[309] Interestingly, some scholars advocate that the concept of equality, in general, should be excluded from legal discourse.[310] The viability of this proposition is uncertain and, I contend, undesirable in any legal context, particularly in the current international legal system where SE's remains a functional and legitimate principle in the general realm of inter-state relations. At the same time, however, it would appear that the banishment of this principle is the only functionally legitimate route in the specific context of international institutional law.

As I study a wide range of IGOs in Parts III, IV and V, I will demonstrate that the international system is not evolving into greater egalitarianism, and rightly so. After all, as Tucker (1977) correctly contends, a more egalitarian international system also promises to lead to a more disorderly one.[311] We must recognize that as international institutions increasingly regulate our daily existence their importance proportionally intensifies. When their decision-making processes, and particularly their VMs and VPs, are not functional and are not perceived to be legitimate they risk the failure to solicit society's necessary support and compliance. As several IGOs consider voting-related reforms they must eliminate non-functional and non-legitimate principles like SE.

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[309] Weil, *supra* note 8, p. 441.

[310] Westen, *supra* note 165, p. 543. Westen believes that:

> "(1) statements of equality logically entail (and necessarily collapse into) simpler statements of rights and (2) that the additional step of transforming simple statements into statements of equality not only involves unnecessary work but also engenders profound conceptual confusion. Equality, therefore, is an idea that should be banished from moral and legal discourse as an explanatory norm".

[311] *See* TUCKER, *supra* note 47, p. 175.

4. *Sovereign Equality Vis-à-Vis Key International Norms*

As this study proposes the *de jure* abolition of the principle of SE from international institutional law, it is important to consider this principle's position and impact in relation to other well established and emerging international norms—i.e. voluntarism and democracy. It is also necessary to examine SE's ranking among the hierarchy of international norms so as to determine how it may be banished. I discuss these issues in the following subsections.

a) The Inextricable Link Between Sovereign Equality and Voluntarism in International Law

The principle of SE is now widely understood to mean, *inter alia*, that each state possesses *supreme legal authority* over its territory and affairs.[312] This lack of hierarchy in the world community results in all states co-existing as sovereign and equal, and this, as previously indicated, is the essence of the fundamental international law principle of SE.[313] Accordingly, no other entity (i.e. sovereign state, organization of states, multinationals, etc.) can exercise legal authority over a state without its consent. Since any exceptions or deviations from the principle of SE must come via a state's express will,[314] the concept of *voluntarism* (or *consensualism)* has been intimately linked to this principle and has also been the traditional justification for most of international law.[315] Indeed, like the principle

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[312] QUOC DINH ET AL., *supra* note 2, p. 413. The authors define SE as the doctrine where "*les États ne sont subordonnés à aucune autre autorité nationale ou internationale, ils sont égaux juridiquement entre eux*"; SEIDL-HOHENVELDERN, *supra* note 252 p. 22. A similar definition is provided from an international economic law perspective. Seidl-Hohenveldern defines SE as the principle whereby no sovereign state "can recognize another state as having legal authority over it". *See* ARBOUR, *supra* note 12, p. 252; BROWNLIE—PRINCIPLES, *supra* note 30, p. 287; *See also supra* Part. II.B.3.a & b.

[313] *See* SHAW, *supra* note 5, p. 6. International law is based on the so-called horizontal authority, as opposed to domestic law which is characterized by hierarchical powers and is, therefore, based on vertical authority.

[314] *See* Stephen C. McCaffrey, *The Thirty-Fourth Session of the International Law Commission*, 77 AM. J. INT'L L. 323, 330 (1983).

[315] *See* OSCAR SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 10 (1991). Schacter defines "voluntarism" and "consensualism" as "[t]he idea that the will of States is the basis of international law and hence that the law is dependent on the consent of States"; I.M. Lobo De Souza, *The Role of State Consent in the Customary Process*, 44 INT'L & COMP. L.Q. 521, 531 (1995). Referring to the creation and application of customary rules, De Souza stresses that consensualist theories postulate a state's consent is *necessary* for an international rule to be created and to have universal application; Weil, *supra* note 8, p. 420. Weil contends that in the absence of "voluntarism, international law would no longer be performing its functions". *See also* WALLACE, *supra* note 2, p. 3 noting that "[t]he international legal system is decentralized and founded essentially on consensus."

of SE, voluntarism has been one of the fundamental features of international law.[316] However, unlike SE, which has largely escaped critical scrutiny, voluntarism has been the source for serious affronts on the international legal system. The most common consent-based criticism has been leveled by *Positivist* theory.[317]

English legal philosopher, John Austin (1790-1859) was among the first to challenge the status of international law for its voluntary and consensual aspects.[318] A Positivist, Austin argued that international law is not truly law for, as it has no higher authority, it lacks the basic coercive elements of a domestic legal system.[319] Since international rules are binding upon states only when they emanate from their own will, Austin and his followers regarded the international legal system as merely a system of Positive morality[320] and considered its "soft law" or non-binding rules worthless.[321] Moreover, critics charged that since international law is a consensualist based system, it is also subordinate to states' power and, therefore, it is but rhetoric. The argument holds that, if states in the international community do not comply with a given international rule they could not be forced to change their stance since international law lacks higher authority (i.e. there is no world government or world authority) and the mechanisms necessary to force the said state to comply (i.e.

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[316] *See S.S. Lotus Case* (Fr. v. Turk), 1927 P.C.I.J. (ser. A) No. 10, p. 18. The importance of consent in international law is underlined in one of the earlier judgments of the *Permanent Court of International Justice* (later renamed ICJ) which stated:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed".

See also Vienna Convention on the Law of Treaties arts 11-23, which provide various means and expressions of partial or full consent in international law. Specifically, Article 11 provides that full consent to be bound by the obligations of a treaty may be given by "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

Cf. Pierre Elliott Trudeau, *Approaches to Politics*, *in* AGAINST THE CURRENT: SELECTED WRITINGS 1939-1996 67-78, 71 (Gérald Pelletier ed., 1996) arguing that "*any* given political authority exists because men *consent* to obey it." (emphasis added); Charlesworth et al., *supra* note 24, p. 645 indicating that: "[l]ike all legal systems, international law plays an important part in constructing reality. ... International law defines the boundaries of agreement by the international community on the matters that states are *prepared* to yield to supranational regulation and scrutiny. Its authority is derived from the claim of international acceptance." (emphasis added).

[317] *See* WALKER, *supra* note 163, pp. 423, 969-970. In this century, and particularly in North America, most social sciences, including juridical sciences, have been dominated by Positivist thinking. According to Walker, from a Positivist's perspective, international law puts its emphasis on the concept of sovereign equality and on the rules which states commit themselves to.

[318] *See generally* AUSTIN, *supra* note 126.

[319] *See* SHAW, *supra* note 5, p. 4. *See generally* AUSTIN, *supra* note 126; *See also* Lea Brilmayer, *Groups, Histories and International Law*, 90 CORNELL INT'L L.J. 555, 557 (1990) maintaining that the "underdeveloped nature of the international sanctioning process is part of the reason that international law is ill-equipped to dispense corrective justice".

[320] SHAW, *supra* note 5, p. 4; WALKER, *supra* note 3, p. 638.

[321] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 44.

there is no international police).

These affronts on international law fail to distinguish the unique attributes of this system which do no lend well to comparisons with domestic legal systems.[322] After all, regardless of the absence of global govern*ment* in the international arena, there is nonetheless global govern*ance*[323] composed, *inter alia*, of an extensive number of IGOs which produce a proliferating number of rules which regulate our daily lives.[324] Indeed, these IGOs have also been known to take enforcement measures against states violating international law in the form of economic or military sanctions.[325]

Positivists' emphasis on the will of states has not endeared overwhelming support by the international legal community for the Positivist theory. The consent-based viewpoint, rooted in SE, has been criticized as logically inconsistent and seriously flawed[326] and Positivism itself has been denounced as an incomplete and unrealistically idealistic theory for postulating that the plight of world order rests on little more than consent.[327] After all, states can, and indeed, are regularly bound by international rules even if they did not explicitly consent to them. Despite the principle of SE, the international community, by and large, recognizes most international norms not merely consensually but as part of their status as integral members in the community of nations.[328] This occurs, in part, through

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[322] Over the years, a number of prominent international scholars have eloquently expounded the differences between the domestic and international legal systems thus, rebutting the skeptics and providing the exegeses of why international law is truly law. Indeed, most major international law publications address the issue, at least in passing. There have also been a number of learned articles which have specifically addressed the query of whether international law is truly law by answering in the affirmative. *See generally e.g.* Janis, *supra* note 2; Plofchan, *supra* note 282; WALLACE, *supra* note 2, pp. 2-3.

[323] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, pp. 2-12.

[324] *See generally* Lachs *supra* note 18; RÉPERTOIRE DES ACCORDS ÉCONOMIQUES, *supra* note 67, listing but a sample of the plethora of international rules and agreements which regulate our lives in, *inter alia*, the areas of trade and finance, telecommunications, environment, health and medicine, transportation, etc.

[325] KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 620-715. Some examples of the most well publicized UN enforcement measures include: the 1965 UN trade embargo against Rhodesia after its unilateral declaration of independence; the 1977 UN arms embargo against South Africa for its apartheid and violence prone government; the 1991 UN military intervention against Iraq for its 1990 invasion of Kuwait; the 1991 and 1992 arms and trade embargo against the former Yugoslavia resulting following the secessionist wars of Croatia and Bosnia-Herzegovina; the 1992 arms embargo against Somalia for its devastating civil war and; the 1992 sanctions against Libya for its un-cooperative stance in the case of the bombing of an American Airliner over Scotland.

[326] Setear, *supra* note 30, pp. 156 & 160-161; FRANCK—POWER OF LEGITIMACY, *supra* note 123 p. 187.

[327] *See* Philip R. Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811, 813 (1990) (reviewing LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE (1989); RICHARD A. FALK, REVITALIZING INTERNATIONAL LAW (1989); DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987)) criticizing the Positivist theory as "incomplete, and against the background of a war-torn, disorderly world ... veer[ing] off into an unrealistic idealism".

[328] FRANCK—FAIRNESS, *supra* note 10, p. 42; FRANCK—POWER OF LEGITIMACY, *supra* note 123 pp. 190, 192, 203. *See also* p. 189, maintaining that "the sovereign will of states is subordinate to obligations that derive from their status as members of a community."

their membership in IGOs.[329]

Of course, membership to IGOs is optional. Although a state may transfer or share part of its sovereignty it does not abrogate all of its sovereign rights by joining an IGO.[330] Its consent is however initially provided via adherence to the organization's constituent act. Since the state accepts the relevant Charter, Convention, Articles of Agreement, etc., it agrees to be bound by the rules contained therein—i.e. VMs and VPs—and by the decisions rendered, and to be rendered, by these institutions.[331] Thus, upon its admission, a state gives its pre-authorized consent to abide by the IGO's decisions. Therefore, it need *not necessarily* give its consent when the decisions are actually being considered or voted upon. Voluntarism terminates at this stage. From this point on—i.e. once a state has voluntarily adhered to and has been admitted to the IGO—the state's individual will is forfeited for the benefit of the collective will of the organization.[332] Indeed, in the context of VMs and VPs, because most IGOs do not require unanimity for their decision-making processes, both voluntarism and SE are *de facto* mute, or non-functional, principles in international institutional law.

Finally, along with their membership in the community of nations and their voluntary allegiance,[333] states usually observe international rules because they perceive them as legitimate[334] and as having originated from a legitimate decision-making process—i.e. voting procedures provided in the given IGO's constituent act. Since the legitimacy of these IGOs' VMs and VPs impacts on the legitimacy of their decisions, members of the international community generally comply with IGOs' legitimate decisions even against

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[329] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, pp. 95, 190-191, 203. *See also* Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNEL. INT'L L.J. 29, 31 (1995) declaring that "[m]embership in the United Nations by new States is equivalent to affirmation of their full personality as international entities and is essential to the complete enjoyment of their newly acquired status in an increasingly interdependent world."

[330] BROWNLIE—PRINCIPLES, *supra* note 30, p. 288; QUOC DINH ET AL., *supra* note 2, p. 566.

[331] BROWNLIE—PRINCIPLES, *supra* note 30, p. 290.

[332] *See* Gordon, *supra* note 223, p. 533 n.79, noting that: "[b]y joining an international organization, which is a voluntary act of sovereignty, a State assumes various obligations which are derived from the scope and character of the organization. In assuming these obligations, the State transfers certain elements of its jurisdiction and certain prerogatives of its sovereignty to the organization."

[333] *See* Charney, *supra* note 5, p. 757, emphasizing the importance of "voluntary allegiance" to international norms and arguing that "international law is law only because there are known norms of behaviour that its subjects *choose* to follow in most circumstances." (emphasis in original). *See also* WALLACE, *supra* note 2, pp. 2-3 who rightly adds that, although the international legal system is largely based on consent, states regularly and voluntarily formulate their internal or external policies in accordance with internationally established rules because they *want* to act and they *want* to be perceived as acting within the rules of international law.

[334] *See* Charney, *supra* note 5, p. 787; FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 25. Inquiring into the reason nations obey rules Franck maintains it is "[b]ecause they perceive the rule[s] and [their] institutional penumbra to have a high degree of legitimacy".

their will, which is *de facto* a breach of the principle of SE.

Recognizing: (1) that the globalization of world exchanges have produced global governance by the burgeoning number of IGOs (*supra* Part I.A.1); (2) the importance of legitimacy in the new world order (*supra* Part II.A.2); (3) the decreasing of sovereignty in international law (*supra* Part II.B.2); (4) the inter-connected paradigm of SE and voluntarism in international law and (*supra* Part II.B.4.a); (5) the non-functional principle of SE in IGOs' decision-making processes (*infra* Parts II, IV & V), it is now time to abrogate SE from international institutional law so as to refashion the system according to functional and legitimate decision-making processes.

b) Sovereign Equality as *Jus Cogens*

Given that part of my thesis' proposition involves the elimination of the principle of SE from IGOs, it is imperative to establish what type of norm it is so as to determine whether and how this norm can in fact be functionally and legitimately banished from international institutional law. Of course, there is more than one category of basic international norms and—unlike international sources of law which lack hierarchy—they all have hierarchical standing as some norms are obviously more fundamental to the international legal system than others.[335] In this respect, it is important to determine in what category of basic international law the principle of SE is classified so as to evaluate the terms by which it can be abolished from international institutional law.

As depicted in Diagram III, there are principally four categories of basic international norms,[336] which fall within the two and three tier classification originated by Hart and elaborated by Franck respectively.[337] In hierarchical order these are: 1) *Jus cogens* or ultimate rules; 2) Norms of constitutional significance or secondary rules of recognition; 3) Norms of legislative significance and 4) Norms of institutional significance. Norms of legislative and institutional significance are primary rules of substance.

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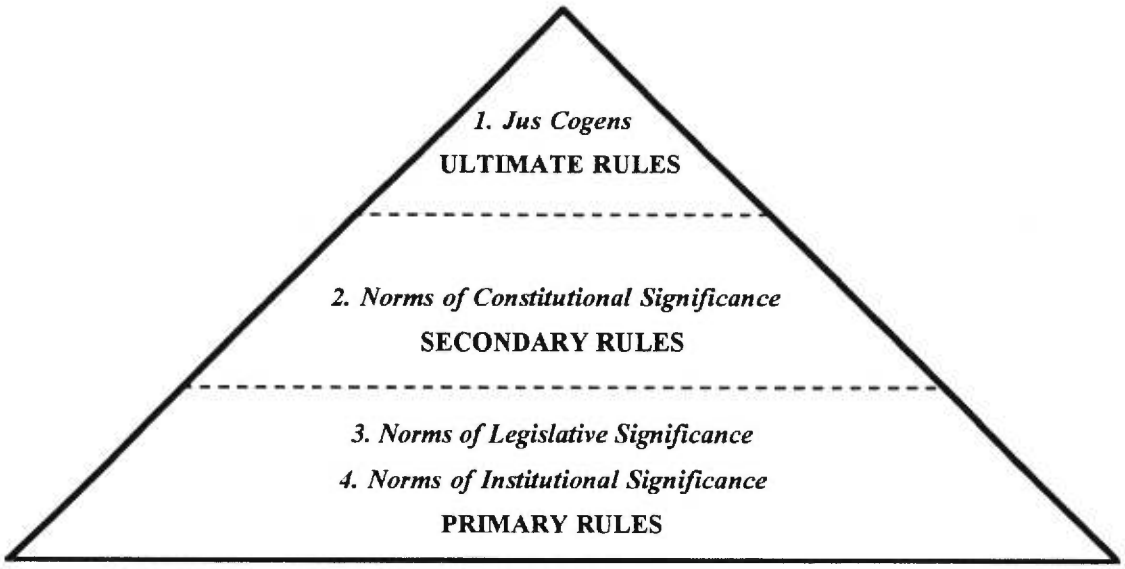
[335] QUOC DINH ET AL., *supra* note 2, p. 115.

[336] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 41.

[337] *See* HART, *supra* note 151, pp. 81, 94; FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 184. *See also* Part. II.A.3.b.

See also Johnston—Functionalism in International Law, *supra* note 77, p. 41, explaining that in addition to the two or three tier classification of international norms "[i]t is compatible with functionalist logic to postulate a third ... and a fourth level" of principles.

DIAGRAM III HIERARCHY OF BASIC INTERNATIONAL NORMS



Jus cogens are universally recognized principles or norms for international conduct established by either custom or treaty.[338] They are held to be peremptory norms of systemic significance because they are "rules by which other rules are validated or invalidated".[339] In other words, *jus cogens* are in international law what public policy or public order rules are in domestic law.[340] The importance of *jus cogens* norms in the international legal system is evidenced by the formal definition provided in the *Vienna Convention on the Law of Treaties* which specifies that:

> "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general

[338] SHAW, *supra* note 5, p. 99; Plofchan, *supra* note 282, p. 234; *Vienna Convention on the Law of Treaties* art. 53. *Cf. also* G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 147-160 (1974). Examining international legal literature concerning *jus cogens*, Tunkin presents the dichotomy between proponents and opponents of the existence of general international law imperative norms which states cannot suspend by their own wills.

[339] FRANCK—FAIRNESS, *supra* note 10, p. 43. Franck also refers to peremptory norms as a kind of unwritten "customary constitution of the international community". *See* BROWNLIE—PRINCIPLES, *supra* note 30, p. 513 qualifying *jus cogens* as "overriding principles of international law". *See also* SHAW, *supra* note 5, p. 99 drawing a parallel between rules of public order / policy in domestic law and *jus cogens* rules in international law.

[340] TUNKIN, *supra* note 338, p. 150.

international law having the same character."[341]

Accordingly, peremptory norms are indispensable to the structure of the international community and therefore—until and unless such norms are replaced by another norm of equivalent effect—they are not susceptible to derogation, even by mutual agreement of the world's most powerful states.[342] Moreover, if a norm classified as *jus cogens* was to be removed from the international legal system, it would render the system dysfunctional.[343]

Norms of constitutional significance, otherwise known as secondary rules of recognition, are fundamental principles and processes which govern the creation and application of substantive rules—i.e. the UN Charter. As they are essentially rules about rules, they provide the infrastructure of the international legal system. Because the international legal system is dependent on rule-making institutions, these secondary rules are so significant to international law that non-compliance would render the IGOs' constituent acts meaningless.[344] Of course, problems of non-compliance can be overcome by amendments as these norms are susceptible to derogation by ultimate rules.

The third category of basic international law norms, **norms of legislative significance,** are the so-called primary rules of obligation contained in universal law-making conventions, treaties, etc.[345] These norms attribute specific rights and duties to states which are intended to bind them. Indeed member states of the international community are expected to implement these norms within their own borders.[346] Non-compliance of such rules is said to impair international legal development.[347] However, their amendment is possible by the mutual consent of the states party to the original convention or treaty.

Finally, **norms of institutional significance** attribute substantive rights and duties within specific institutions. As with their legislative counterparts, these primary rules are at

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[341] *Vienna Convention on the Law of Treaties* art. 53.

[342] Johnston—Functionalism in International Law, *supra* note 77, p. 41; *Vienna Convention on the Law of Treaties* art. 53; BROWNLIE—PRINCIPLES, *supra* note 30, p. 513.

[343] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 41.

[344] *See id.;* QUOC DINH ET AL., *supra* note 2, pp. 272-273.

[345] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 41; QUOC DINH ET AL., *supra* note 2, pp. 273-274.

[346] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 41. *Cf.* Plofchan, *supra* note 282, p. 231. Plofchan discusses how international treaties and instruments—regarded as primary international rules—have a symbiotic relationship with customary international rules—which are regarded as secondary international rules.

[347] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 41, footnote 127.

the bottom of the hierarchical order of international basic norms because non-compliance would still enable the operation of the given organization, albeit it would not operate "at the intended level of institutional sophistication".[348] In other words, derogation of these norms is possible because the organization would not be dysfunctional but simply less functional and less legitimate.

According to these categories of norms, SE is found in all levels of the international normative hierarchy. The principle of SE is a substantive primary rule recognized, either *de facto* or *de jure*, as a legislative or an institutionally significant norm for it is embedded in numerous international instruments—e.g. *Declaration on Friendly Relations* etc. It is also a norm of constitutional significance—i.e. a secondary rule—because it has been enshrined in the constituent act of the world's foremost political IGO, the UN Charter.[349] Most importantly however, SE is an ultimate rule of the international legal system.[350] It is *jus cogens* because, presumably, the international legal system would not function if states do not perceive one another as being sovereign and equal and, as a consequence, interfere in each others' sovereign territories—e.g. applying extraterritorial laws, encroaching on another state's sovereignty over its natural resources, etc.[351]

Because SE is widely recognized as *jus cogens*,[352] it is deemed to be a principle *so* fundamental to the international legal system that it cannot be derogated. However, despite its status in the *general* international legal system, and particularly in the relations between states, SE is not *a sine qua non* in the *specific* field international institutional law. If it were, its derogation would render the international legal system dysfunctional. As this study will

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[348] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 41; QUOC DINH ET AL., *supra* note 2, p. 273.

[349] *See* U.N. CHARTER, art. 2 (1).

[350] *See* BROWNLIE—PRINCIPLES, *supra* note 30, p. 19; QUOC DINH ET AL., *supra* note 2, p 50; Weil, *supra* note 8, p. 419. Damrosch, *supra* note 241, p. 34.

[351] *See* Damrosch, *supra* note 241, p. 34. *See also Charter of Economic Rights and Duties of States* G.A. Res. 3281, U.N. GAOR 29th Sess., U.N. Doc. (1974), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW 240-254 (Ian Brownlie ed., 1995) affirming states' rights to permanent sovereignty over their natural resources.

In 1996, Canada accused the US government of encroaching on its sovereignty with the Helms-Burton Act, and, in 1997, with over-fishing in the Canadian Pacific coast. Of course these disputes are exceptional since, as a rule, most states respect each others' sovereign rights.

[352] *See* Franck—Legitimacy in the International System, *supra* note 127, p. 758. *See also* BROWNLIE—PRINCIPLES, *supra* note 30, p. 19; QUOC DINH ET AL., *supra* note 2, p 50; Weil, *supra* note 8, p. 419; Damrosch, *supra* note 241, p. 34.

But see Bleckmann, *supra* note 9, p. 88. Questioning the status of SE, Bleckmann claims that if we are to consider the principle of SE as *jus cogens* it would mean that all the rules derived from the UN Charter's decision-making processes which are based on SE would not be susceptible to change. However, this is an erroneous deduction because Bleckmann fails to consider the hierarchy of basic international norms. In fact, the rules emanating from the UN Charter would be norms of institutional or legislative significance which may be altered by other such primary rules through secondary and ultimate rules.

show, IGOs have been functional for many decades despite the fact that the concept of SE has almost never been respected in their decision-making organs. The driving theory of the cooperative functionalist ethic has not only been responsible for the growing number of IGOs but has also usurped the principle of SE from its traditional and broad application in the international legal system. Accordingly, the once peremptory norm of SE is now by customary practice excluded from international institutional law.

The UN is the only IGO which explicitly incorporates the peremptory norm of SE in its constituent act. Yet even within the UN, the norm has only been partially applied. The decisions of the General Assembly—in which all UN member states have equal voting rights (i.e. 'one state, one vote')—are not binding.[353] Decisions taken in the Security Council on the other hand—in which only fifteen member states are represented, five of whom (i.e. the permanent members) have veto power—can be binding.[354] Despite these blatant violations of SE within the VMs and VPs of the Security Council however, the UN has enjoyed functional legitimacy for well over have a century.[355] The ideal of SE as enshrined in the UN Charter, therefore, has been *functionally qualified* and rendered inoperative within the Security Council.

The structure of all IGOs, including the UN, has been shaped by the given institution's needs—i.e. structured on the basis of the Functionalist ethic in which form follows function. As Functionalism eroded the principle of sovereignty and, consequently, the principle of SE,[356] SE has been *de facto* displaced as a *jus cogens* norm from international institutional law. It follows therefore, that SE's *de jure* abolition is but a logical consequence in order to reform old norms so as to better reflect the new interdependent structure of contemporary society.

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[353] *See infra* Part III.A.2 for a further discussion of the principle of SE and voting with the UN General Assembly and, specifically, section a(ii) for an exegesis of this principle's role in the context of non-binding decision-making.

[354] *See infra* Part III.A.3 for a further discussion of SE and voting with the UN Security Council.

[355] The UN has often been the subject of vocal criticisms and has, at times, been accused of not preventing regional conflicts and therefore failing to meet its mandate. Although most people would readily admit that the UN could function more efficiently, one would be hard pressed to call it a 'dysfunctional' organization for, after all, it has been responsible for several successful interventions in various regional conflicts and has been instrumental in averting broader aggression. *Cf.* FRANCK—FAIRNESS, *supra* note 10, pp. 298-315 discussing the multiple peace and security missions undertaken by the UN.

[356] *See* Franck—Clan and Superclan, *supra* note 205, pp. 368-369 for a discussion on the Functional needs for the erosion of sovereignty in contemporary regional and global systems of governance; MITRANY—FUNCTIONAL THEORY, *supra* note 73, pp. 118-122, 186, Mitrany addresses the "futility of insisting on sovereign equality" in a Functional organization; MITRANY—WORKING PEACE, *supra* note 87, p. 31, Mitrany discusses how sovereignty is effectively forsaken through Function. *See also* Stern, *supra* note 18, p. 592 and Franck—Democratic Governance, *infra* note 365, p. 78 noting the declining concept of sovereignty in international society.

c) Sovereign Equality *vis-à-vis* Democracy in International Governmental Organizations

Democracy originates from the Greek word *Δημοκρατια* which is a composite of two words *Δημος* (i.e. people) and *Κρατια* (i.e. power), meaning 'people power' or, as commonly expressed by the popular maxim, *Government by the people for the people.*[357] Democracy is usually classified into direct or representative democracy. ***Direct democracy*** refers to a system of governance in which the decision-making process takes place directly by the ***majority*** of citizens (e.g. referendum, plebiscite, etc.). Majority may be expressed in various ways including: 1) ***simple majority*** or *majoritarianism* (i.e. representing 50% +1 resulting in 100% of the power); 2) ***qualified majority*** (i.e. representing either 2/3 or 4/5 majority, or double majority or any other type of special majority) and; 3) ***absolute majority*** (i.e. corresponding to a number of votes or representative seats greater than all others remaining votes or representative seats combined). ***Representative democracy*** refers to a system where the decision-making process is conducted by the majority of the people chosen to represent citizens (e.g. members or representatives in legislative assemblies). [358]

In domestic law, democratic form of governance takes place by an electoral process, through universal suffrage, whereby the elected majority rules.[359] In other words, the government is elected by the majority of votes or representative seats (i.e. direct democracy) and legislates by the majority votes of its elected officials (i.e. representative democracy). The most common type of majority rule in domestic law is simple majority.

In international law, and particularly in international institutional law, there is usually no electoral process. In fact, the officials of most IGOs are not elected by universal suffrage—

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[357] *See* WALKER, *supra* note 3, p. 350; *See also* JAMES CRAWFORD, DEMOCRACY IN INTERNATIONAL LAW (Inaugural Lecture, Whewell Professorship) 7 (March 5, 1993) [hereinafter 'CRAWFORD—DEMOCRACY IN INTERNATIONAL LAW'], arguing that the principle of democracy includes many rights, namely the right "to participate in public life, effective freedom of speech, the opportunity to organise political parties and other groups".

[358] WALKER, *supra* note 3, p. 350.

[359] *See* Sharpe, *supra* note 75, p. 108, providing the most elementary definition of democracy as government by the majority will of its subjects. *But see* Susan Rose-Ackerman, *Corruption and Democracy*, 90 PROC. AM. SOC. INT'L. L. 83, 85 (1996). Professor Rose-Ackerman contends that "[m]ost democracies are not pure majoritarian systems, but have some separation of powers." In this respect, she argues that "[d]emocracy is not simply an instrument for imposing the will of the majority. Multiple sources of authority [...i.e. legislative, executive and judiciary] imply that no one group has absolute power."

as is the case in domestic law. They are usually appointed by a given state government to represent the interests of, and be accountable to, that particular state. Thus, unlike domestic democratic governance, there is no *direct* democratic process in most IGOs.

The question remains as to whether there is a *representative* democratic process in IGOs. One could argue that there is indeed such a process because those appointed—i.e. as delegates, representatives, ambassadors, etc.—to a given IGO, represent and act for the interests of their respective states. However, the decision-making organs of IGOs usually have restrictive membership. As a result, in most IGOs, a *minority* of states speak on behalf of others and impose their views on the majority of states not represented in the IGO's key decision-making organs. For instance, the UN's, key decision-making organ, the Security Council, has a restricted membership of 15 states, yet it imposes its decisions on the remaining 170 states which are members of this organization.[360] This *de facto* oligarchy[361] is not only found within the UN, but also in virtually all other IGOs. Accordingly, there is no *representative* democracy within most IGOs.

The democratic principle—whether it be direct or representative—does not appear to be transplanted in the governance of international institutional law. In fact, the voting process in most IGOs appears to be anti-democratic or at the very least democratically deficient.[362] Remarkably, however, IGOs have been known to hold the community of nations, and particularly newly independent states, to so-called democratic norms.[363]

Although the democratization of international society is not a concept championed by all,[364] it is increasingly noted that there is a trend towards "international democracy" in the world community because there is an "emerging right to democratic governance" throughout the world.[365] Indeed, the doctrine of democracy is not only one of the

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[360] For further discussion on the UN's VMs and VPs within its Security Council *see* Part III.A.2.

[361] *See* Weil, *supra* note 8, p. 441, claiming that the international community of nations is *de facto* an oligarchy where norms are promulgated by the most powerful or numerous and imposed on the others, and which, therefore, poses a danger in the international community.

[362] *See* Thomas M. Franck, *The Success and Failure of International Organizations*, 90 PROC. AM. SOC. INT'L. L. 596, 598 (1996) [hereinafter 'Franck—International Organizations'], warning that the democratic deficiency of IGOs will bring about their future failure.

[363] *See* Gregory H. Fox and Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 5 (1995).

[364] *See* Weil, *supra* note 8, p. 420, arguing that since states are both the architects and the recipients of international law norms, "there can be no question today, any more than yesterday, of some 'international democracy' in which a majority or representative proportion of states is considered to speak in the name of all and thus be entitled to impose its will on other states."

[365] *See generally* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) [hereinafter 'Franck—Democratic Governance']. *See* CRAWFORD—DEMOCRACY IN INTERNATIONAL LAW, *supra* note 357, pp. 14-15. As Crawford rightly states, "[r]eferences to democracy, which a generation or even a decade ago would have been regarded as political and extra-legal, are entering into the justification of legal decision-making in a new way."

fundamental questions of political theory in domestic law but is now increasingly linked to international legal entitlement.[366] There have been three principle stages which have led the direction towards democratic entitlement in international law: 1) "the normative entitlement to self-determination"; 2) the "normative entitlement to free expression as a human right"[367] and; 3) the "normative entitlement to a participatory electoral process".[368]

Despite this tendency towards international democracy, most IGOs continue to be based on an inter-state hierarchy and remain undemocratic in their decision making processes. Some scholars claim that there is something inherently hypocritical for IGOs to espouse to the democratic governance of domestic political institutions in the absence of international democracy within their own governance.[369] Arguably, this "do as I say, not as I do" attitude is deceiving, lacks consistency and, therefore, (according to the coherence criterion of Franck's theory of legitimacy, if the inconsistency is not justified) hinders the legitimacy of IGOs. While some international jurists may justify this paradox by pretending that representative democracy is *explicit* in regional systems but more *implicit* in IGOs,[370] others hold that this democratic deficiency within IGOs must be rectified.[371]

However, I argue that reforming the lax democratic standards within IGOs is not a functionally legitimate proposition. Given the structure and large number of IGOs, it is inconceivable to make their decision-making either directly or representatively democratic (i.e. to the have the world's population decide on a given international law issue or to have the world's population vote for and elect representatives to act on their behalf in the

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[366] *See generally* Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N.Y.U.J. INT'L L. & POLITICS 289 (1995), marveling that democracy is now a universally recognized human right. *See generally* Franck—Democratic Governance, *supra* note 365, arguing that a government's legitimacy is directly related to the global legal entitlement of democracy.

[367] *See Universal Declaration of Human Rights*, G.A. Res. 217 (Dec. 10, 1948), article 29, [hereinafter '*Universal Declaration*'], enshrining the principle of a 'democratic society' as an international human right.

[368] Franck—Democratic Governance, *supra* note 365, pp. 52, 90.

[369] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, referring to "the double standards that demand democracy at the national level but uphold its curtailment at the international level." *Cf.* Coll—Global Consciousness and Legal Absolutism, *infra* note 534, p. 617, discussing the inadequacy of the theories of global consciousness and legal absolutism in international law and organizations, the author is critical of the reluctance of states to adhere to UN Charter principles—such as the prohibition of use of force (article 2(4))—and argues that "there is much hypocrisy in the official rhetoric of states."

[370] Cerna, *supra* note 366, p. 295.

[371] *See* Cerna, *supra* note 366, p. 293. *See also* Boutros-Ghali, *supra* note 254, pp. 39-40. Regarding the restrictive membership of the League of Nations Council as anti-democratic, Argentina unsuccessfully sought to have all the member states represented in the League's Council. *Cf.* TUCKER, *supra* note 47, p. 72. Holding that the "democratization of existing international institutions is a formula the developing states have employed to demand a greater voting strength for the Third World as a bloc", Tucker argues that this formula signals not merely an appeal to "a principle of political equality [... but also] the recognition of a collective power to disrupt if a greater measure of equality is not granted".

extremely large number of IGOs). Such hypotheses are simply not functional propositions if not for any other reasons than for the logistics and the costs which would be involved.

We must be careful not to idealistically attempt to impose yet another unattainable principle in the law of international institutions. Recognizing that certain principles—such as SE—have not been successfully transplanted in IGOs, we must be vigilant and learn from experience so that we may not unnecessarily repeat historic failures. Our quest for democratic ideals must not be misdirected. We should first consider the cost-benefit analysis of uniformly applying legal principles—e.g. SE, democracy, etc.—rather than idealistically advocate yet another unrealistic and unrealizable ideal.[372]

Furthermore, even within the most democratic societies there are countless of national government bodies, organizations, tribunals, agencies, etc., which are not directly or representatively elected. Does that mean that our national legal systems are democratically deficient? And, if so, does it mean that they are not functional or legitimate? It is unreasonable to expect all legal principles, no matter how fundamental, to be applicable at all times and in all systems. For instance, freedom of speech is one of the basic rights afforded in democratic societies. Yet even this principle is unacceptable when the form of speech expressed is considered to incite hatred.

More importantly, SE and democracy are, at times, competing principles—i.e. unanimity reflects SE values while majority reflects democratic values. Thus, it is important to consider whether the democratic principle's application would be *in lieu* of the principle of SE in international law. After all, notwithstanding the non-pragmatic electoral process in international institutional law, even if the democratization of IGOs' decision-making processes were a functional hypothesis, it would require some sort of majority voting scheme. However, a majoritarian voting mechanism—while it would conform to democratic principles—would be inconsistent with the principle of SE which requires the consent of all and would, therefore, undermine consensualism.[373] For SE to apply, as the world community is currently set up, every sovereign member state of an IGO would need to have an equal say in the voting process and this would be an unrealizable scenario. For instance, the UN would be expected to have *all* of its member states agree unanimously at

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[372] Paradoxically, Thomas Franck presents diametrically opposed viewpoints with regard to the application of certain principles. While advocating democratic decision-making in IGOs, similar to that found within nation states, (*see generally* Franck—Democratic Governance, *supra* note 365), he also admits "[t]hat likes be treated alike does not mean that legal principles must strive for uniformity at all costs." (FRANCK—FAIRNESS, *supra* note 10, p. 39). This would appear to contradict his stance on the application of the democratic ideal.

[373] *See* De Souza *supra*, note 315, p. 533.

world community is currently set up, every sovereign member state of an IGO would need to have an equal say in the voting process and this would be an unrealizable scenario. For instance, the UN would be expected to have *all* of its member states agree unanimously at *all* times. Requiring unanimity or a veto would inevitably lead to an impasse and would thus undermine the ability of the UN, and particularly the Security Council, of preserving international peace and security. Perhaps, establishing democracy within the IGO decision-making processes would give international institutional law-making a little more legitimacy. However, this new found legitimacy would come at the expense of a less functional, if not a dysfunctional, organization.[374]

Despite the merits of democracy and its unequivocal importance as an internationally held principle, it cannot be fully reconciled with the function in the context of international institutional law. A functional international legal order must take precedence over a democratic one. Like the centuries-old principle of SE, democratic entitlement is not functionally realizable in the specific context of international institutional law. Accordingly, although both SE and democracy can still be broadly and legitimately applied principles in the general field of international law, both must be sacrificed within IGOs.[375]

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[374] *See infra* Part V.A.5.

[375] *But cf.* Franck—Democratic Governance, *supra* note 365, p. 87. Franck argues that democracy is a subsidiary right to peace. While this may be so, I contend that democracy must also be subordinate to a functional and a legitimate decision-making order in global governance.

III. DECISION-MAKING IN INTERNATIONAL POLITICAL ORGANIZATIONS

In the next part of this study I analyze the role which the principle of SE has played in the two most influential political IGOs of the twentieth century, namely the **United Nations** (UN) and the **International Labour Organization** (ILO). After outlining their genesis and purpose, I discuss the composition of their key decision-making organs, examine their powers and establish how both the UN and the ILO *attempt* to accommodate the doctrine of SE in their decision-making processes via formal equality.

In Part III.A, I discuss how the UN misinterprets and *de jure* embraces the doctrine of SE while it *de facto* rejects it within its VMs and VPs. Specifically, I establish that despite its founders' intention to preserve the concept of SE in the UN General Assembly and to ignore it in the UN Security Council, SE has proven to be neither a functional nor a legitimate principle in this Organization. It should, accordingly, be abolished from the UN.

Specifically, after a brief introduction into the origins and structure of the UN, I discuss the restatement of the principle of SE in the UN Charter (III.A.1.a) and the exegesis of this principle in the *Declaration on Friendly Relations* (III.A.1.b). I then explore how SE seeks credence in the UN General Assembly (III.A.2) and how it is breached in the UN Security Council (III.A.3). Finally, I examine the current level of functional legitimacy of the principle of SE in the UN (III.A.4.a) and look at past and current proposals for reforming the UN's VMs and VPs (III.A.4.b).

In Part III.B, I explore the unique attributes of the ILO and discuss the role which the principle of SE has played in the establishment of its VMs and VPs. After introducing the ILO's genesis and structure (III.B.1), I examine its constitutional foundations relating to the principle of SE (III.B.1.a). I then explore its legal status as a UN Specialized Agency and its indirect legal adherence to the principle of SE (III.B.1.b). In the following section, I study the dual, tripartite and quadruple representation found in the General Conference (III.B.2.a(i)) and in the Governing Body (III.B.2.a(ii)). I evaluate the effect of SE on the ILO's binding and non-binding decision-making (III.B.2.b) and the role of SE in the manifestation of the 'one state, four votes' rule (III.B.2.c). In the third section, I evaluate the impact of majoritarianism in conjunction with the inability to make reservations in the

ILO's treaty-making (III.B.3). Finally, I assess the role that the principle of SE plays in the decision-making processes of the ILO and conclude that it is neither a functional nor a legitimate principle in this IGO (III.B.4).

A. THE UNITED NATIONS (UN)

> "[A] vital and central role in global governance falls to people coming together in the United Nations, aspiring to fulfil some of their highest goals through its potential for common action."
>
> The Commission on Global Governance[376]

The UN was established in the aftermath of W.W.II, in 1945.[377] Today it is the world's foremost international political organization. Having been founded at a time when Functionalism—postulating a co-operative ethic—reigned supreme in the sphere of international relations, the UN's *raison d'être* was to provide international peace and security, to foster friendly relations between nations, and to realize international co-operation.[378]

For the purpose of accomplishing its intended mission, the architects of the UN set-up six principal organs: 1) the **General Assembly** (GA); 2) the **Security Council** (SC); 3) the **Economic and Social Council** (ECOSOC); 4) the **International Court of Justice** (ICJ); (5) the **Trusteeship Council**; and 6) the **Secretariat**.[379] While all of these organs are decision/rule-making bodies,[380] the GA and the SC, being the UN's most significant decision-making organs, are the focus of the present chapter.

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[376] COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 225.

[377] *See* Wilhelm G. Grewe, *The History of the United Nations, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1, 2 (Bruno Simma et al. eds, 1994).

[378] U.N. CHARTER art. 1. "The Purposes of the United Nations are:

1. To maintain international peace and security...
2. To develop friendly relations among nations based on respect for the principle of equal rights...
3. To achieve international co-operation in solving international problems...
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends."

[379] U.N. CHARTER art. 7; Jacqueline Dutheil de la Rochere, *Organes: Article 7, in* LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 212 (Jean-Pierre Cot and Alain Pellet eds, 1985).

[380] *Cf.* FRANCK—FAIRNESS, *supra* note 10, pp. 173-217. Even the Secretariat can be considered as a UN decision-making body. Discussing the "good offices" functions of the UN Secretary General, Franck shows how a number of new initiatives and decisions—at times, independent from the General Assembly and the Security Council—have emerged directly by the Secretary-General during the past decades, particularly in UN efforts to mediate conflicts between and within states. One recent example has been the UN Secretary Mission to Iraq. Mr. Kofi Annan reached an agreement with Saddam Hussein (regarding the inspection of his presidential palaces by UN officials searching for biological weapons) which averted US

Considered to be the extension of the failed League, the UN was conceived, in part, to remedy the structural birth defects (i.e. unanimity voting) which plagued its predecessor and which are believed to have contributed to the League's failure to prevent the Second World War.[381] However, as will be examined herein, it is likely that the UN has similar and perhaps more pronounced inherent flaws in its framework (i.e. SE).

In the following sections, I examine what I believe to be erroneous claims made by members of the diplomatic and juridical communities regarding the application of the principle of SE in the UN. I argue and establish that this principle has never found application within the UN, either in the GA or in the SC. I explore the impact which the "restatement" of the principle of SE in the UN Charter, and its subsequent elaboration in the UN resolution *Declaration on Friendly Relations*, had on international law and argue that these two events heightened the confusion in legal scholarship regarding the principle of SE in international institutional law. This confusion, in turn, resulted in the compromise of the legitimacy and functional existence of the principle of SE in the wider spectrum of international law. Lastly, I attempt to establish how the calls for reform based on claims of SE are infructuous and undesirable in the UN.

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military action. *See* Turner, *supra* note 237, p. A7; Lafleur, *supra* note 237, p. B12; Coulon, *supra* note 237, p. A7, reporting on the UN Secretary General's political accord with Saddam Hussein.

[381] *See supra* Part II.B.3.c(i).

1. THE PRINCIPLE OF SOVEREIGN EQUALITY IN THE UNITED NATIONS

As noted earlier, the first time the principle of SE was expressly foreseen in an IGO's constituent act was in the UN Charter[382]—although it had implicitly been applied in earlier IGOs (i.e. the League and the ILO). Its inclusion in the UN Charter has had tremendous impact with regard to its place in the international legal system.

Despite the egalitarian provision of SE in the UN Charter, reality reflects the primacy of existing inequalities.[383] In the twentieth century these inequalities between large and small nation-states have been further accentuated by the great disparity between poor and rich nation-states.[384] Of course, inequalities between nation-states exist whether they are members of IGOs or not. However, I maintain that there is an important distinction to be made between the tenet that, (1) all states are sovereign and enjoy equal protection as a *general* principle of *international law* and (2) all states have sovereign and equal rights—i.e. voting rights—within the *specific* context of *international institutional law,* especially within the world's most important political organization. This proposition assumes that, because the international community's interdependent needs and interests result in global governance, the individual will of states is subordinate to their collective will as expressed via international institutions.[385]

In the first scenario, when states stand on their own, acting outside the sphere of an organized structure, their inequality in relation to other states makes them more vulnerable and thus in need of greater protection.[386] Therefore, the principle of SE serves as a functional reference point by which states, while preserving all their sovereign rights, interact with one another on an equal basis, each taking their decisions free from the

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[382] *See* U.N. CHARTER art. 2, para. 1.

[383] TUCKER, *supra* note 47, p. 33; JESSUP—MODERN LAW OF NATIONS, *supra* note 51, p. 30.

[384] Boutros-Ghali, *supra* note 254, pp. 9, 11. Boutros-Ghali holds that "*au XIX^e siècle se ramenait à l'inégalité des ordres; grandes et petites nations*" while "*[l]'inégalité du XX^ème siècle est une inégalité totale; c'est une inégalité de condition de vie, de civilisation, de puissance, une inégalité quasi fatale.*"

[385] *Cf.* JESSUP—MODERN LAW OF NATIONS, *supra* note 51, p. 2, noting in 1959 that "[u]ntil the world achieves some form of international government in which a collective will takes precedence over the individual will of the sovereign state, the ultimate function of law, which is the elimination of force for the solution of human conflicts, will not be fulfilled." *Cf. also generally* THE COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, noting that at the end of the twentieth century we do have a system of global governance.

[386] *Cf.* D. LASOK AND J.W. BRIDGE, LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES 4 (4th ed. 1987). The authors discuss how "[t]he Second World War demonstrated ... the vulnerability of the sovereign state concept. The sovereign state could no longer guarantee the protection of the citizen ...".

auspices of any international institution.[387] This corresponds to Grotius' concept of SE where states interact on equal footing without any preferential or discriminatory treatment being afforded to them.[388] In other words, the only reference point for the principle of SE is sovereignty. If a state is recognized as being sovereign within the international community, then it is treated equally in its exchanges with fellow sovereign states.

Furthermore, the concept of equality between nation-states is necessary in order to counter hegemony. Because "[s]overeignty, in its meaning of an absolute, uncontrolled state will, ... is the quicksand upon which the foundations of traditional international law are built",[389] the juxtaposition of the concept of equality tempers the potentially devastating effects of absolute sovereignty. By affording equality to all sovereign states in general, the principle of SE plays an important functional and legitimate purpose in protecting the rights of one state from being undermined by another. Hence, in relations between states, the principle of SE remains a general notion upon which they recognize and transact with one another, preventing any theoretical superiority which would impede friendly relations and encourage conflict.

In the second case, i.e. when acting *within* an organized structure, the same protection is not required because all states have joined an IGO and have thus compromised their sovereignty in the pursuit of common goals.[390] They, therefore, act in union and speak in one voice—i.e. the organization's—and their rights are safeguarded via their membership in the IGO. Indeed, the phenomenon of the twentieth century society being organized through multilateral institutions has considerably changed the perspectives of international law-making and implementation.[391] As such, the equality of sovereign states has a different purpose and function in the UN as opposed to when it is applied outside the sphere of this IGO. In other words, because the UN is a separate entity endowed with the right of decision-making *from* and *for* all its members, UN member states *share* their sovereignty in the areas of international peace and security. Under the umbrella of the UN, and on issues under its mandate, sovereign states are not subject to the same vulnerabilities in their interactions. Consequently they do not require the same protection as when acting outside the IGO's auspices.

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[387] *See* JESSUP—MODERN LAW OF NATIONS, *supra* note 51, pp. 35, 40-41, arguing that "[l]ike the legal attribute of equality, the function of sovereignty as a legal concept was to protect the state in a world devoid of any alternative to self-protection."

[388] *See* DICKINSON, *supra* note 239, p. 67, discussing that "[e]qual protection of the law was a necessary corollary of sovereignty and independence in the Grotian system." *See also* pp. 35, 58.

[389] JESSUP—MODERN LAW OF NATIONS, *supra* note 51, pp. 2, 40.

[390] *See id.* at 41.

[391] Emmanuel Roucounas, *Engagements parallèles et contradictoires*, 206 R.C.A.D.I 13, 25 (1987).

Furthermore, as hegemony within IGOs is theoretically impossible because all states have the same common purpose, the principle of SE has neither a functional nor a legitimate role in international institutional law. International cooperation is, in large part, necessitated by the ever increasing interdependency in such fields as science, technology, economics, environment and defense, to name but a few.[392] It follows, then, at least theoretically, that it is IGOs, and not individual member states, who have the higher authority with regard to the organization's primary functions. For example, it is the UN, as a separate and independent entity, which has exclusive power over collective peace and security issues, and not the individual member states.

The deficiency of scholarly analysis in distinguishing between "equal protection of the law" and "equal capacity for rights"[393] has been further compounded by the unsatisfactory distinctions made by publicists concerning the application of SE within international institutional law as opposed to its function within international law in general. Moreover, as will be examined in the following subsection, by attempting to apply the principle of SE outside its intended context, the UN Charter has confused the issue even more.

a) The Restatement of Sovereign Equality in the United Nations Charter: A Misstatement

The equality of sovereign states is one of the basic founding principles of the UN. Article 2(1) of the UN Charter states that:

> "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles:
> 1. *The Organization* is *based* on the principle of the *sovereign equality* of all its members" (emphasis added).

I postulate that one of the most significant defects of the UN is its misinterpretation of SE and its alleged application as one its founding principles. Albeit well intentioned, the UN founders erred by including the principle of SE as one of the UN's constitutive principles. They erred again when they attempted to apply SE in a different context than that for which it was intended; and they erred once more when they did not recognize that

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[392] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 42.

[393] DICKINSON, *supra* note 239, p. 148.

SE is not a functional principle within international institutions.

The problem here is that—contrary to the views held by many international legal scholars who claim that this article "restates" the customary international law principle of SE[394]—Article 2(1) of the UN Charter is *not a restatement* of the principle as expressed in international law but rather a *misstatement* of it. It misstates international law because the centuries-old principle of SE emerged with the genesis of modern international law and was intended to be employed within the then current structure of the world community. In the sixteenth, seventeenth and eighteen centuries IOs did not exist. In fact, NGOs and IGOs did not emerge in the international legal system until the nineteenth century, and only proliferated in the twentieth century. Therefore, they were never engaged *vis-à-vis* the doctrine of SE.

If the UN founders wished to restate the principle of SE they would, or should, have incorporated it in a form which was *exclusive* of any international institutional structure. For instance, Article 2(1) of the UN Charter could have read as follows: "1. The Organization *recognizes* the principle of the sovereign equality *in the international community of nations*" (emphasis and changes added). Stated this way the UN member states would have affirmed their adherence to the principle of SE by restating its true and originally intended meaning that there is no hierarchy between nation-states in the structure of the international community.[395] At the same time, however, this proposal would exclude the principle of SE from the scope of application of the UN's operational structure.

In the past, other eminent international scholars have also recognized the misstatement of the principle of SE as enshrined in the UN Charter and offered more radical solutions. In particular, Clark and Sohn (1962) proposed a revision of Article 2(1) by seeking to eliminate the term "sovereign equality" altogether.[396] However, it is unlikely that this proposition is a viable alternative. Eliminating reference to the principle of SE from the

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[394] *See* René-Jean Dupuy, *Article 2: Commentaire général, in* LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 71, 72 (Jean-Pierre Cot and Alain Pellet eds, 1985) [hereinafter: Dupuy-Charte]. *See also* QUOC DINH ET AL., *supra* note 2, pp. 413-414.

[395] *Cf.* SHAW, *supra*, note 5, p. 6, discussing the recognized basis of the international legal system to be the so-called horizontal authority which is characterized by non-hierarchical powers.

[396] *See* GRENVILLE CLARK AND LOUIS B. SOHN, WORLD PEACE THROUGH WORLD LAW 6 (2nd rev. ed. 1962) [hereinafter CLARK & SOHN]. They proposed the revised article to read as follows:

> "All nations shall be equally entitled to the protection guaranteed by this revised Charter, irrespective of size, population or any other factor; and there are reserved to all nations of their peoples all powers inherent in their sovereignty, except such as are delegated to the United Nations by this revised Charter, either by express language or clear implication, and are not prohibited by this revised Charter to the nations."[396]

entire international legal forum would signal a hierarchical community structured around the *de jure* recognition of certain states' superiority to others. Hegemony, however, has never been an acceptable alternative to SE in the international community.

By choosing to *base* their institution on the principle of SE, the UN founders not only changed the purpose and destination of this principle from its intended use—only between states and not within IGOs—but, more importantly, they disregarded the obvious and fundamental contradiction between the principle of SE and the theory of international cooperation—i.e. Functionalism. Indeed, by definition, functional criteria are also non-egalitarian.[397] Since the very essence of cooperation requires compromise, Functionalist ethic is inherently inconsistent and incompatible with individual will or unilateral action. Thus, the only way a state can avoid giving up its sovereign individual will, and thus its right to SE, is by remaining outside the international institutional framework. The mere fact of belonging to an international institution necessarily means that a state, in pursuit of the common benefit of all member states and of the function of the IGO, and in the areas which fall under the IGO's mandate, relinquishes or shares its sovereignty and, therefore, cannot claim the right to SE within this organized structure.

b) Explaining the Principle of Sovereign Equality in the Declaration on Friendly Relations

In 1970, a quarter of a century after the UN Charter came into force, the UN GA attempted to rectify the misapplication of the principle of SE with the *Declaration on Friendly Relations*.[398] This resolution defined seven key international law principles, one of which is SE. Ironically, however, the meaning of SE provided by the resolution deviates from the meaning of SE provided in the UN Charter. Returning to its roots, the definition of SE foreseen in the *Declaration on Friendly Relations* conforms to the original meaning of SE, provided by the early international law publicists who envisioned application of this principle for *inter-state relations* and *not* for *intra-institutional operations*.[399] After all, when modern international law was being developed in the sixteenth and seventeenth centuries the world was just in the process of being transformed into a community of nation-states. As noted earlier, IOs did not emerge until the end of the nineteenth century. It is therefore this UN resolution, and not the UN Charter, which provides the true restatement of the

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[397] Boutros-Ghali, *supra* note 254, p. 53.

[398] *See supra* Part II.3.b.

customary principle of SE in international law.

Unlike the UN Charter which specifically refers to the principle of SE in the context of its organization, the *Declaration on Friendly Relations* makes no mention of the principle of SE finding application within *international institutions*. Instead, it provides that "[a]ll states enjoy sovereign equality. They have equal rights and duties and are equal members of the *international community*" (emphasis added).[400] Accordingly, the resolution represents a significant exclusion of the principle of SE from IGOs and is, therefore, an important deviation from the UN Charter. Remarkably, this distinction is often overlooked.

On the other hand, since the *Declaration on Friendly Relations* does not explicitly exclude SE's application from IGOs, and since IGOs are part of the international community, one could argue that the term 'international community' includes international institutions and, therefore, this GA resolution does indeed implicitly apply within IGOs, as well as within IGOs' VMs and VPs. However, this would be too liberal of an interpretation, particularly in the context of the *Declaration on Friendly Relations* where four of its seven stated principles—i.e. respect of territorial integrity, duty of non-intervention, duty to co-operate *vis-à-vis* the UN Charter, and duty to fulfill UN obligations in good faith—make specific reference to the UN. The remaining three principles—i.e. SE, self determination, and dispute resolution—make no reference to either the UN or any other organization.[401]

With this liberal rationale, the principle of self-determination of peoples should also be applicable within IGOs. Of course, this principle's application is fundamental in the general context of international law but its application would be nonsensical within IGOs and, thus, no one has dared to claim such a misapplication. The same logic, however, has not always prevailed with regard to the principle of SE, and the international diplomatic and legal communities persist in their erroneous interpretation and application of this principle within IGOs.

For instance, referring to all the current players of the international legal system—i.e. states, IGOs, NGOs, individuals and multinationals, (*see* Diagram I)—the liberal interpretation, which has misplaced SE within IGOs, could also misplace SE within the context of multinational corporations, individuals and NGOs. Of course, application of SE

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[399] *See* DICKINSON, *supra* note 239, pp. 68-162.

[400] *See Declaration on Friendly Relations, supra* note 290.

[401] *See id.*

within these contexts would be non-sensical and such misapplications have, therefore, never been an issue. Yet, because of the presence of state actors within IGOs, SE has been generally and erroneously held to be a principle within IGOs.

The difficulty with the definition of SE provided in the *Declaration on Friendly Relations* is its legal standing as a GA resolution. As will be further discussed in the next section, a GA resolution is technically not a legally binding instrument. When adopted by consensus,[402] however, it is *de facto* widely considered to be "soft law", carrying high moral authority, as it reflects the will expressed by a large number of the world's nation-states.[403] Regardless of their moral value, however, GA resolutions are subordinate norms to the UN Charter because as *primary rules* they are hierarchically inferior to *secondary rules.*[404] As such, this resolution cannot result in a *de facto* amendment of the UN Charter, which has been *de jure* adhered to by all UN member states.[405] Thus, the ambiguity concerning the principle of SE within the international legal system persists.

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[402] FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 113.

[403] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 31, n.95. Referring to "soft law", the author considers that the world community opinion expressed through UN GA resolutions—although not accorded legally binding force—is nonetheless important because it serves a declaratory function. *See also* Lauterpacht, *supra* note 28, p. 595 for a discussion on the emergence of "soft law"; Kay Hailbronner and Eckart Klein, *Functions and Powers, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 226, 238 (Bruno Simma et al. eds, 1994) hold that GA resolutions are not legally binding and "can at most be used as evidence of customary international law or a general principle of law." *See generally* Weil, *supra* note 8, discussing the relative normativity of resolutions in international law.

Cf. Charlesworth et al., *supra* note 24, p. 616, discussing and drawing a parallel between the Feminist and the Third World challenges to international law Charlesworth holds that "[d]eveloping states have also emphasized decision making through negotiation and consensus, and through the use of nontraditional methods of lawmaking such as the "soft law" of General Assembly resolutions."

[404] *See supra* Diagram III Hierarchy of Basic International Norms.

[405] *See* U.N. CHARTER arts 108 and 109 providing the procedure to be followed for its amendment.

2. *SEEKING CREDENCE IN SOVEREIGN EQUALITY IN THE GENERAL ASSEMBLY*

> "International law reflects first and foremost the basic state-oriented character of world politics. Units of formal independence benefiting from *equal sovereignty* in law and equal possession of the basic attributes of statehood have succeeded in creating a system enshrining such values. Examples that could be noted here include non-intervention in internal affairs, territorial integrity, non-use of force and *equality of voting* in the United Nations General Assembly".
>
> M.N. Shaw[406]

a) Structuring the United Nations' Plenary Organ on the basis of the Principle of Sovereign Equality

All UN member states are members of the GA.[407] It is, therefore, the UN's—indeed, the world's—most universal organ[408] and is currently comprised of 185 members—a significant increase since the time of its inception in 1945 when it was composed of only 50 states.[409] It is thought that the principle of SE—as the founding principle of international law and the UN—is the reason all UN member states enjoy the symbolic universal membership in the GA.[410]

A seat in the GA entitles UN members equal time to voice their concerns on a wide range of issues in an international forum. Indeed, it is a unique world forum where virtually all states—independent of their political or economic ideologies, of their geographic or population size, and of their military power—participate on equal footing, nation-state to

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[406] SHAW, *supra* note 5, pp. 41-42 (emphasis added).

[407] As of December 15 1994, there were 185 member states of the UN. The GA was set up as the non-permanent organ of the UN, as opposed to the SC which was conceived to be its permanent organ. *See* Annex II.

[408] *See* Mohamed Bennani, *Fonctions et Pouvoirs: Article 10, in* LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 249 (Jean-Pierre Cot and Alain Pellet eds, 1985).

[409] Grewe, *supra* note 377, p. 2.

[410] U.N. CHARTER art. 2, para. 1; *Declaration on Friendly Relations, supra* note 290; QUOC DINH ET AL., *supra* note 2, pp. 594-595; FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 101.

nation-state, and discuss international peace and security issues.[411] Contrary to the Aristotelian notion of equality, unequals are treated equally within the GA.[412]

(i) The Classic Voting Rule of 'One state, One Vote'

As the principle of SE presumably provides for equal representation of all member states in the UN's GA, it is also reportedly responsible for each state's entitlement to one vote within this plenary body.[413] This is known as the ***one state, one vote***[414] rule where, irrespective of its actual size, population, financial or military power, each member state is juridically equal to its fellow member states and each has equal voting power to influence the outcome of a GA resolution. In other words, in theory, the People's Republic of China, with 1.4 billion inhabitants, is no more influential within the GA than the Principality of Monaco, which has a population of 30,000. Similarly, the US, which is the biggest financial contributor to the UN,[415] is entitled to one vote within the GA as is the Republic of Haiti, which contributes little to the UN yet benefits greatly from a multitude of UN assistance programs.

In practice, however, the 'one state, one vote' rule has created disproportionate influence in the GA as the smaller states, numerically superior to the 'great powers', *de facto* monopolize the outcome of UN resolutions, even though they represent but a small fraction of the world's population and resources.[416] Political networking often enables a certain number of states to align themselves with others and vote in concert.[417] This solidarity in

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[411] *But see* Eban, *supra* note 138, p. 48. With his decade-long experience as the Israeli ambassador to the UN, the author believes that "[o]ne of the main weaknesses of the United Nations is its predilection for public debate in vast audiences with massive participation."

[412] *See* ARISTOTLE—POLITICS, *supra* note 162, pp. 195, 206-209 for a discussion on the Aristotelian concept of equality requiring that equality exist for equals and inequality for unequals.

[413] U.N. CHARTER art. 18, para. 1, "[e]ach member of the General Assembly shall have one vote"; SHAW, *supra* note 5, pp. 41-42. *See* BOWETT, *supra* note 13, p. 44; Mbaye, *supra* note 5, pp. 79-96; Tavernier, *supra* note 38, p. 501 QUOC DINH ET AL., *supra* note 2, pp. 594-595.

[414] Mbaye, *supra* note 5, pp. 79-96; Tavernier, *supra* note 38, p. 501.

[415] The US has also been the biggest delinquent in its payments to the UN. During the mid nineteen nineties, the American government has withheld payments to the tune of over one billion dollars in order to force UN-related reforms.

[416] *See* Robert F. Meagher, *Introduction, in Symposium: The United Nations: Challenges of Law and Development*, 36 HARV. INT'L L.J. 273, 275 (1995). Discussing the imbalance created in the GA, originally, by a group of 77 developing countries (which became known as the "Group of 77" or "G-77") and which later grew to as many as 125 countries.

[417] *See* Boutros-Ghali, *supra* note 254, p. 58.

voting, otherwise known as ***bloc voting***,[418] negates the purpose of the 'one state, one vote' voting rule in the GA because the pooling of votes—i.e. these so-called "caucusing groups" are a coalition of states based on geographic, regional, ideological, political, economic or other common interests[419]—imbalances the individual vote cast by each state. Thus, according to given loyalties between states—e.g. between Arab states—a variety of collations are formed to endorse a given proposition—e.g. on the Middle East.[420]

Through the years, the balance of power in the GA has increasingly shifted towards the smaller states. This imbalance became more evident as the decolonization movement of the nineteen sixties gave rise to the birth of many new nation-states which gained membership to the UN and obtained the right to vote within the GA.[421]

In the nineteen seventies, the US expressed concerns with what it perceived to be the irresponsibility of the numerical majority in the GA[422] whose participation in the decision-making processes was completely insensitive to economic, military and other sources of power. In the following decades, these concerns developed into serious criticisms of what was widely regarded as the absurd balance of power held by Third World states which were considered to be abusing their numerical voting power within the GA.[423]

By the nineteen nineties, the disproportionate balance of power in the GA had intensified even more. As the former Eastern Bloc countries gained entry into the UN, the GA has

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[418] *See* BENNETT, *supra* note 41, p. 87; M. Margaret Ball, *Bloc Voting In The General Assembly*, *in* INTERNATIONAL ORGANIZATION: POLITICS & PROCESS 77 (Leland M. Goodrich & David A. Kay eds, 1973), defining bloc voting as "any group which consistently votes as a unit on all or particular kinds of issues" because of regional, geographic, ideological, or common interests. *But see* pp. 81-99, Ball provides the voting results of various issues where, quite often, there was no evident alignment amongst the great powers nor amongst the members of the Commonwealth. *See also* Sabine Von Schorlemer, *Blocs and Groups of States*, *in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 1, 69-77 (Rüdiger Wolfrum, Christiane Philipp eds, 1995) for a discussion on blocs and regional groups of states and their formation of voting alignments—based on strategic, ideological and/or economic considerations—within the UN GA.

[419] *See* Soo Yeon Kim and Bruce Russett, *The New Politics of Voting Alignments in the United Nations General Assembly*, 50 INT'L ORG. 629, 644-645 (1996).

[420] *See generally* UNITED STATES DEPARTMENT OF STATE, VOTING PRACTICES IN THE UNITED NATIONS 1996 (Report to Congress Submitted Pursuant to Public Law, 101-167) (March 31, 1997) [hereinafter 'US DEPT. STATE—UN VOTING PRACTICES']; Hanna Newcombe, Michael Ross and Alan G. Newcombe, *United Nations Voting Patterns*, 24 INT'L ORG. 100 (1970).

[421] *See* TUCKER, *supra* note 47, pp. 34-35. *See also* Philip Kunig, *Decolonization*, *in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 1, 390-396 (Rüdiger Wolfrum and Christiane Philipp eds, 1995) [hereinafter 'Kunig—Decolonization'] discussing the historical development, legal basis and substantive movement of decolonization.

[422] Inis L. Claude Jr., *The Political Framework of the United Nations' Financial Problems*, *in* INTERNATIONAL ORGANIZATION: POLITICS & PROCESS 107, 125 (Leland M. Goodrich & David A. Kay eds, 1973) [hereinafter 'Claude—The Political Framework of the UN's Financial Problems']. In the early seventies there was "a keen awareness in the United States of the shift in the balance of voting power which [was] taking place in the Assembly. Correctly or not, the United States fear[ed] increasing 'irresponsibility' on the part of the Assembly."

[423] Crawford—Islands as Sovereign Nations, *supra* note 273, p. 285.

been overwhelmed by smaller states which now, more than ever, numerically dominate and influence this plenary's body decision-making power. This has intensified the long-standing calls for reforms.[424] While the numerical majority—developing states—wish to obtain more and binding decision-making powers in the GA, the numerical minority—industrialized states—vigorously contest these aspirations claiming that, because of SE, their consent is a condition *sine qua non* to the establishment of international norms.[425] They, therefore, would like to see the imbalance of power in the GA balanced by a voting rule more representative of the real power of each member state.

Clearly, one vote per state does not equitably represent the various identity variables—i.e. a state's geography, population, wealth, military strength, etc.—which differentiate the states with a seat in the GA. Moreover, it is against the nature of things, and it is the ultimate unjustified inequality, to give the small states the same voting power as the big states—i.e. to treat unequal states equally.[426] Therefore, the 'one state, one vote' rule, although certainly facilitative, is also seriously flawed for it does not reflect the actual situation of its members' states. In fact, one can go so far as to argue that it is not merely a simplistic voting rule, but also utterly hypocritical, for—by ignoring actual inequalities between sovereign states and allotting them identical voting rights—it purports to reflect equality while, in reality, it reflects little more than numerical equality. In this sense, it is widely acknowledged that this GA voting rule does not reflect *real equality* but rather *formal equality.*[427]

(ii) Sovereign Equality in the Context of Non-Binding Decision-Making

Being a universal body—both within the UN and the international community in general—the GA has the potential of being the locus of the most representative decision-making in the UN and, indeed, in the world. Yet, according to the UN Charter, this plenary organ is only a deliberative body, authorized to make recommendations or

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[424] *See* Von Schorlemer, *supra* note 418, p. 76. *See generally* Klaus Dicke, *Reform of the United Nations, in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 2, 1012-1023 (Rüdiger Wolfrum, Christiane Philipp eds, 1995).

[425] *See* Danilenko, *supra* note 53, pp. 360-361.

[426] *See* Boutros-Ghali, *supra* note 254, p. 55.

[427] *See* Claude—The Political Framework of the UN's Financial Problems, *supra* note 422, pp. 121-122; Boutros-Ghali, *supra* note 254, p. 10 discussing "*l'égalité formelle*" afforded to states when joining IGOs.

resolutions.[428] Hence, the principle of SE finds application in a seemingly powerless body which lacks legislative and binding powers.[429]

Given the GA's universal composition, the developing states (being in the majority) would like to see this organ's resolutions have legislative power with binding authority in international law, rather than simply be recommendations devoid of legal and binding power.[430] Not surprisingly, the industrialized states (being in the minority, and some which are also members of the SC) prefer to hold on to the decision-making power in the SC where they dominate and, therefore, oppose conferring legally binding effect on GA resolutions.[431]

Although the UN Charter empowers the GA to discuss issues and recommend solutions,[432] the legal value of its resolutions has been questioned because it has not been clearly understood whether GA resolutions were merely a political exercise or whether they created international law. As I note below, the answer to this lies somewhere in the middle.

In 1955, an International Court of Justice advisory opinion addressed the issue regarding the value of GA resolutions and ruled that, because the GA does not have the mandate to create international law, its resolutions have no legal binding power.[433] This ruling has since been confirmed by other authoritative international jurists.[434] In fact, the only binding resolutions that can legally emanate from the GA are in three internal areas: 1) election of the Secretary-General; 2) election of a member state to the SC (Article 18 UN Charter) and; 3) apportionment of the expenses of the Organization (Article 17 UN Charter). No other GA resolution has the legal power to bind its members since the UN Charter does not empower it to enact or alter international law.[435]

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[428] U.N. CHARTER art. 10.

[429] *See* Stephen Schwebel, *The Legal Effect of Resolutions and Codes of Conduct of the United Nations, reprinted in* STEPHEN SCHWEBEL, JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS 499 (1994).

[430] Danilenko, *supra* note 53, p. 359. *See also* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 226, explaining that the new member states of the UN tried to make the GA the centre-stage for decision-making, "but the majorities they mustered in the General Assembly could only recommend, not determine. Too often the 'new majority' mistook voting power for decision-making power, with inevitable frustration."

[431] *See* Danilenko, *supra* note 53, pp. 360-361.

[432] *See* U.N. CHARTER art. 10, referring to the GA's powers of discussion and recommendation; Schwebel, *supra* note 429, p. 499.

[433] *See South-West Africa—Voting Procedure, Advisory Opinion of June 7th 1955, ICJ Reports 1955*; Schwebel, *supra* note 429, p. 499.

[434] *See* SHAW, *supra* note 5, p. 3, qualifying the UN GA resolutions as not legally binding. *See also* Schwebel, *supra* note 429, p. 499 (1994) eloquently addressing the limitations of the GA's powers.

[435] *See* Schwebel, *supra* note 429, p. 499.

Since the GA's resolutions are generally not legally binding, one would think that the world's industrialized countries, despite being in the numerical minority, would not be concerned with Third World dominance with regard to this plenary organ's decision-making. However, it has been correctly argued that, from a "functionalist perspective, a resolution of the UN GA is not necessarily devoid of juridical significance simply because it is not formally binding."[436] Indeed, because GA resolutions symbolize the only broad expression of world opinion on a given peace or security issue, and as they are not subject to confirmation or review by another body, their declaratory function and moral authority is considered to carry a high degree of legitimacy.[437] Therefore, despite the UN Charter, the GA has the political leverage to develop customary international law or general principles of international law.[438] As such, because they are not completely devoid of legal effect, GA resolutions have come to be known as "soft law".[439]

b) From Unanimity to Majoritarianism

Historically, and with regard to the decision making processes within the League, *unanimity* was the primary voting rule, while *majoritarianism* was the exception to this rule.[440] The concept of unanimity stemmed from the principle of SE which held that no sovereign state could be bound by a decision without its own consent.[441] Because of the perception of the principle of SE in international law, the voting rule of unanimity was institutionalized in most international decision-making arenas of the nineteenth and early twentieth century—e.g. in the Hague Conferences of 1899 and 1907 in the League, between 1919 and 1945.[442]

In 1969, the *Vienna Convention on the Law of Treaties* enshrined unanimity as its

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[436] Johnston—Functionalism in International Law, *supra* note 77, p. 31, n.95.

[437] Schwebel, *supra* note 429, p. 511; Johnston—Functionalism in International Law, *supra* note 77, p. 31, n.95. *See* Hailbronner and Klein, *supra* note 403, p. 238; BROWNLIE—PRINCIPLES, *supra* note 30, p. 699. *See generally* FRANCK—POWER OF LEGITIMACY, *supra* note 123; Weil, *supra* note 8.

[438] *See* Hailbronner and Klein, *supra* note 403, p. 238.

[439] *See* Charlesworth et al., *supra* note 24, p. 616; Johnston—Functionalism in International Law, *supra* note 77, p. 31, n.95; Lauterpacht, *supra* note 28 p. 595. *See also* Weil, *supra* note 8, p. 416, discussing the varying legal value of recommendations, resolutions and decisions, Weil suggests that the demarcation line for creating or not creating legal rights is hazy. In this respect, he concludes that "we are faced with a pathological phenomenon of international normativity".

[440] With the exception of procedural questions and admission of new members where majority voting sufficed, the League applied the covenant of 'unanimity' as a rule on all of its decisions.

[441] *See* BENNETT, *supra* note 41, p. 82; Boutros-Ghali, *supra* note 254, pp. 27, 55; SCHERMERS & BLOKKER, *supra* note 1, p. 812.

[442] Zemanek, *supra* note 64, pp. 860-861.

primary voting rule for international law-making. Article 9(1) foresees that "[t]he adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2". As such, states' SE is presumably preserved because decision-making, and thus law-making, cannot take place without their consent.[443] Of course, unanimity, like SE, is easier preached than practiced. Recognizing the impracticality of reaching unanimous decisions, the Convention provided an exception to the unanimity rule. Thus, Article 9(2) stating that "[t]he adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule" provides for majoritarianism as a residual voting rule.

Since the UN enshrined the principle of SE in its Charter, one would presume that it would also provide for unanimity as its voting rule. Ironically, however, majority is the rule in most of the Organization's decision-making processes. Indeed, times and voting trends have changed. In the past fifty years, unanimity has given way to majority rule[444] in the decision-making processes of virtually all UN organs and UN Specialized Agencies.[445] In fact, from the hundreds of IGOs which exist today, unanimity finds *de jure* application only in three *global* organizations—i.e. as a general rule, in the North Atlantic Treaty Organization (NATO) and, as an exceptional rule, in the OECD and in the ILO—and in six *regional* organizations—i.e. the EU, the European Space Agency (ESA), the European Free Trade Association (EFTA), the Council of Europe, Benelux and the Organization of Petroleum Exporting Countries (OPEC).[446]

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[443] *See* BENNETT, *supra* note 41, p. 82.

[444] *See* FELD & JORDAN, *supra* note 67 p. 121; PLANO & OLTON, *supra* note 29, p. 339; Boutros-Ghali, *supra* note 254, p. 55; QUOC DINH ET AL., *supra* note 2, p. 602.

[445] The UN's founders foresaw the possibility of fostering ongoing ties with other IGOs. Specifically, Articles 55-60 of the U.N. Charter, enable the UN to cooperate with other IGOs which become the former's "specialized agencies". Embodying functionalist purposes of socio-economic development, these Specialized Agencies operate under the aegis of the UN's *Economic and Social Council* (ECOSOC) which has the right to act as their activity coordinator (Article 63).

Although they foster links with the UN, these Specialized Agencies are IGOs created independently from the UN and are to be distinguished from UN created special agencies such as UNHCR (United Nations High Commissioner for Refugees), UNCTAD (United Nations Conference on Trade and Development) et al. There are currently seventeen UN specialized agencies. They include: (1) ILO—International Labour Organization; (2) ICAO—International Civil Aviation Organization and; the World Bank which includes (3) IBRD—International Bank for Reconstruction and Development, (4) IFC—International Finance Corporation; (5) IDA—International Development Association; (6) MIGA—Multilateral Investment Guarantee Agency (7) IMF—International Monetary Fund; (8) FAO—Food and Agriculture Organization; (9) UNESCO—United Nations Educational, Scientific and Cultural Organization; (10) WHO—World Health Organization; (11) UPU—Universal Postal Union; (12) ITU—International Telecommunications Union; (13) WMO—World Meteorological Organization; (14) IMO—International Maritime Organization; (15) WIPO—World Intellectual Property Organization; (16) IFAD—International Fund for Agricultural Development; (17) UNIDO—United Nations Industrial Development Organization.

[446] Zemanek, *supra* note 64, p. 860; SCHERMERS & BLOKKER, *supra* note 1, p. 516; QUOC DINH ET AL., *supra* note 2, pp. 602, 971.

(i) Majoritarianism in the General Assembly

Consistent with the twentieth century *de jure* trend towards majoritarianism in IGOs, the UN Charter provides for ***majority*** rule for *all* decisions taken by the members of the GA. This majority rule is further qualified by ***two-thirds majority*** and ***simple majority***. Specifically, Article 18(2) and (3) of the UN Charter provides that:

> "2. Decisions of the General Assembly on *important questions* shall be made by a *two-thirds majority* of the members present and voting. [...]
> 3. Decisions on *other questions*, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a *majority* of the members present and voting." (emphasis added).[447]

Although the replacement of unanimity with majority rule constitutes a breach of the principle of SE within the GA's voting processes, the majority rule ensures a more democratic process.[448] Indeed, the *higher* majority rule, as opposed to the *simple* majority, is thought to better protect minority interests by securing greater legitimacy for the decisions adopted.[449] Because compliance with a decision is a measuring stick of the degree of a rule's legitimacy, and since the so-called 'important questions' concern substantive issues and 'other questions' relate to procedural matters, the former necessitate a greater pull toward compliance than the latter. This is precisely the reason behind the two tier majority rule within the GA and it is the reason why higher majorities—i.e. 2/3 majorities—are increasingly becoming the norm in universal organizations.[450]

As a rule, a quorum of majority is required for decision-making in the GA.[451] The GA's majority voting rule applies to all members which are *present* and *voting* when a question is being put to a vote, and not to all states which are members of this organ. In theory,

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[447] Article 18(2) of the UN Charter also enumerates the issues which it qualifies as being 'important':

> "... These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of the trusteeship system, and budgetary questions."

Of course, this is not an exhaustive list of all issues upon which the GA may be called upon to vote. As such, Article 18(3) provides for voting by 'simple majority' as the procedure to follow in the selection of new categories of 'important questions'.

[448] *See* PLANO & OLTON, *supra* note 29, p. 338; QUOC DINH ET AL., *supra* note 2, p. 602.

[449] *See* QUOC DINH ET AL., *supra* note 2, p. 603.

[450] *See Id.*

[451] *Rules of Procedure of the General Assembly*, UN Doc. A/520/Rev.15, Rule 67 [108].

therefore, both a procedural and a substantive resolution could be passed by a very small number of UN members. For example, if only 93 states out of the current 185 member states are present during a GA session, 48 votes are sufficient to pass a resolution on a procedural question and 62 votes would see through a resolution on a substantive issue.[452] Of course, the level of participation in GA decision-making is a symbolic reflection of the moral authority and the legitimacy which a given resolution carries.[453] Thus, technically, the legitimacy of a GA resolution which represents the views of a small number of states may be called into question. In practice, however, this theoretical problem does not materialize often. The GA's resolutions are decided upon by a large number of states because each member state representative is entitled to have five delegates and five alternates, as well as supporting personnel, in each session.[454]

(ii) The Interplay Between Majoritarianism and Sovereign Equality in the General Assembly

Given the negative experience of the voting procedures of its predecessor, the League,[455] the application of majoritarianism in the UN GA was intended to facilitate its decision-making processes. Majority rule is unquestionably a less stringent voting standard for it facilitates the GA's decision-making processes and provides it with greater latitude when adopting its resolutions. Furthermore, it is also widely recognized as a democratically sound rule. Despite its attributes, however, majoritarianism is not revered by all as the decisive voting procedure for the GA.[456]

Since the GA's decision-making is limited to discussions and recommendations[457]—its resolutions carry merely moral value but are theoretically unenforceable on individual states[458]—states are free to disregard its decisions. In this respect, the majority rule is arguably not deemed a threat to its members' sovereignty. It could thus be said that there is

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[452] There is one exception to this quorum rule. When voting on Charter amendments a favorable vote of 2/3 of the UN members is required. U.N. CHARTER art. 108.

[453] *Cf.* FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 101.

[454] *See* U.N. CHARTER art. 9.

[455] *See* SHAW, *supra* note 5, p. 748; Plofchan, *supra* note 282 p. 225; MITRANY—WORKING PEACE, *supra* note 87 p. 5, attributing the League's failure largely to the voting requirement of unanimity.

[456] *See* Robert W. Cox, *The Executive Head: An Essay on Leadership in International Organization*, in INTERNATIONAL ORGANIZATION: POLITICS & PROCESS 155, 178 (Leland M. Goodrich & David A. Kay eds, 1973), discussing the prevailing disenchantment with majoritarianism in IOs in the 1970s.

[457] U.N. CHARTER arts. 10-14.

[458] *See* SHAW, *supra* note 5, p. 3; Schwebel, *supra* note 429, p. 499.

no *de jure* violation of the principle of SE.

When the majority rule, however, is applied in an organ issuing *binding* decisions, which may be *against* the will of some member states, this rule contravenes the principle of SE. Currently, GA resolutions are widely regarded as declaratory of international law.[459] However, with the rationale that the GA's decisions reflect the will of a large number of the world community, the developing states (i.e. the numerical majority) want to see its recommendations and resolutions become binding.[460] On the other hand, due to the numerical minority status of the industrialized states within the GA their influence is negligible and these states are disadvantaged by the majoritarian process.[461] This occurs despite the fact that the industrialized states have the power and, indeed, the responsibility of financing this plenary organ's decisions.[462] Hence, all the GA's decisions adopted short of a unanimous vote *de jure* violate the principle of SE.

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[459] *See* Schwebel, *supra* note 429, p. 511. Judge Schwebel elaborates on the "declaratory" significance of GA resolutions and asserts that "[t]o be declaratory is to be reflective of the perceptions and practice of the international community as a whole"; BROWNLIE—PRINCIPLES, *supra* note 30, p. 699.

[460] *See* Charlesworth et al., *supra* note 24, p. 616.

[461] Danilenko, *supra* note 53, p. 360.

[462] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 176.

DIAGRAM IV CHARTING DECISION-MAKING IN THE UNITED NATIONS

	GENERAL ASSEMBLY	SECURITY COUNCIL
MEMBERSHIP	Universal & Plenary: 185 States	Restricted: 15 States Including 5 Permanent and 10 Rotating Members
DECISIONS	Non-Binding	Binding
VOTING RULE	One state, one vote	One state, one vote
VOTING MECHANISMS & PRACTICES		
—IMPORTANT QUESTIONS	2/3 majority	Qualified Majority = 9/15 members present and voting, including permanent members. *De facto* veto by any one of 5 permanent members
—PROCEDURAL / OTHER QUESTIONS	Simple majority	Qualified Majority = 9/15
—CLASSIFICATION OF QUESTIONS	Simple majority	Possibility of a *de facto* double veto

3. *When They Don't Practice What They Preach: Breaching Sovereign Equality in the Security Council*

> "Its rhetoric of *state equality* notwithstanding, the United Nations Charter confirms and endorses a highly differentiated international society. Critical political powers are reserved to five of the strongest states by giving them a dominant role in the Security Council".
>
> "Security, in the final analysis, is not a verbal exercise but the exercise of power in defense of public order. Without power, security is a word. The design of a realistic international security system cannot ignore how power is actually distributed."
>
> W. Michael Reisman[463]

The Security Council (SC), like the GA, adheres to the voting rule of 'one state, one vote'.[464] As previously noted, one vote per state is intended to be consistent with the principle of SE, as this is enshrined in the UN Charter and elaborated in the *Declaration on Friendly Relations*. Thus, in acknowledgment of its sovereignty, each state is afforded juridical equality and, as such, equal voting rights. However, this voting rule exhausts the extent of the similarities between the GA and the SC. All other characteristics of these UN decision-making bodies vary substantially. As will be discussed in the following subsections, the significance of the 'one state, one vote' rule takes on a completely different dimension the SC.[465]

a) Reflecting on the Inequality of States: the Restrictive Two Tier Composition of the Security Council

Negotiations for the creation of the UN took place in the last two years of W.W.II, while

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[463] W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 97 (1993) (emphasis added).

[464] U.N. CHARTER art. 27, para 1. foresees that "[e]ach member of the Security Council shall have *one vote*." *See* also Diagram IV: Charting Decision-Making in the United Nations.

[465] Because of the SC's composition and the legal effect of its decisions, the one vote per state rule loses its meaning. *See* the key differences between the GA and SC in Diagram IV: Charting Decision-Making in the United Nations, *supra* page 106.

the war was still being waged.[466] During that time, there was not only intense military and political activity by the Allied forces, but also intense diplomatic activity between the "Big Three": the United Kingdom, the United States and the Soviet Union.[467] Consistent with the Functionalist ethic of the period, these three Allied powers were interested in carrying their wartime co-operation into peace time.[468] They recognized that the UN's function of maintaining international peace and security could not be effectively performed by a large plenary organ (at that time composed of 50 member states) and, they were also determined to play a predominant role in performing this function.[469] As such, the Allied powers envisioned the creation of a smaller executive organ within the UN where they would share—as they had during the Second World War—the *primary* responsibility of securing world peace.[470] Hence, the genesis of the SC.

During the discussions for the creation of the SC, plans for membership and voting privileges broke with the precedence set in the GA for conventional majoritarianism and equal voting power.[471] In support of this divergence some participants argued that the SC should be an organ of relative equality where "nations possessing the necessary power to keep the peace [...would have] the chief responsibility [...of] preserv[ing] it" and that the role that each state would play in the organization should be proportionate to its power.[472] However, this proposal provided no criteria for determining the proportional measuring stick of power and responsibility. Nonetheless, the power and influence of states, as well as their geographic distribution, have been the two criteria which have been almost naturally imposed to form the two tier composition of this body.[473]

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[466] The Dumbarton Oaks meeting took place in 1944. It was followed by the Yalta Summit in 1945.

[467] *See* ARCHER, *supra* note 13, pp. 24-25.

[468] *See* ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD OF POLITICAL ECONOMY 5 (1984) [hereinafter KEOHANE—AFTER HEGEMONY]. Keohane holds that "[i]nternational cooperation among the advanced industrialized countries since the end of World War II has probably been more extensive than international cooperation among major states during any period of comparable length in history."

[469] *See* Jost Delbrück, *Functions and Powers, Article 24, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 397, 398 (Bruno Simma et al. eds, 1994) [hereinafter 'Delbrück—Article 24'].

[470] SCHERMERS & BLOKKER, *supra* note 1, p. 752. *See also* U.N. CHARTER arts 39-51 empower the UN SC with the *exclusive* responsibility to enforce "action with respect to threats to the peace, breaches of the peace, and acts of aggression".

[471] *See* Leland M. Goodrich & David A. Kay, *Introduction, in* INTERNATIONAL ORGANIZATION: POLITICS & PROCESS ix-xxii, xi (L. M. Goodrich & David A. Kay eds, 1973).

[472] KLEIN, *supra* note 12, p. 115. *Cf. also* Boutros-Ghali, *supra* note 254, pp. 30-31. The same type of discussions regarding equality, proportionality and privileged representation were taking place following the First World War.

[473] *See* Boutros-Ghali, *supra* note 254, p. 41; FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 176.

The SC was initially composed of eleven members, five of whom were *permanent* and the remainder *non-permanent*. The key political brokers in the Second World War, the United States, Britain, and Russia, as well as China and France became the five permanent members. The non-permanent seats were allotted by "equitable geographical distribution"[474] to regions of the world whereby one country in a given region would be chosen by the GA to represent that region by occupying a rotational seat for a two year term.[475] This geographic criterion, considered to be a neutral measure, is said to rectify the breach of SE.[476] In other words, although most UN member states are denied seats in the SC, their regions are nonetheless assured representation. The implicit postulate is that there is some sort of geographic identity or allegiance between states. Thus, with respect to the non-permanent member seats, the principle of SE is applied between groups of states and not between states.[477]

Besides this geographic criterion, the SC's non-permanent members were required to be states which contributed significantly to the achievement of the UN's primary function of maintaining international peace and security.[478] Thus, technically, no important region of the world could be deprived from participating in the SC but, states which regularly contribute to the UN—i.e. Canada with its multiple UN peacekeeping missions—would be more likely to be often rewarded with a non-permanent seat.[479]

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[474] U.N. CHARTER art. 23, para. 1. *See also* Boutros-Ghali, *supra* note 254, pp. 45-47. At the post W.W.II San Francisco Conference it was initially suggested that the principle of SE be taken into account when selecting non-permanent SC member states. Ultimately, however, this principle gave way to other considerations. Other suggestions for selecting the SC's non-permanent membership included (a) a random draw where all the non-permanent seats would be drawn from a list of the world's states which do not have a permanent SC seat (Venezuelan proposal), (b) a Latin American non-permanent seat where, alphabetically, each Latin American country would have an opportunity to be represented in the SC by alternating its non-permanent seat (Guatemalan proposal), (c) six geographic regions, each representing one non-permanent seat in 1) North and Central America; 2) South America; 3) Europe; 4) Africa; 5) Western Asia and; 6) Western Pacific states (Filipino proposal), (d) the world divided into nine zones, each representing one non-permanent seat (Indian proposal) or, (e) the non-permanent seats being awarded to geographically strategic regions of the world (Australian proposal).

[475] U.N. CHARTER art. 23, para. 2. *See* BENNETT, *supra* note 41, p. 83. *But see* Boutros-Ghali, *supra* note 254, p. 34, suggesting that this type of representation in a restrictive organ is faulty because, in reality, member states act as sovereigns and not as agents of non-member states.

[476] QUOC DINH ET AL., *supra* note 2, pp. 595-597.

[477] *Id.*

[478] U.N. CHARTER art. 23, para. 1; Rudolph Geiger, *The Security Council, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 393, 395 (Bruno Simma et al. eds, 1994);

[479] *See Canada and the UN: What the UN Means to Canada—A Historical Perspective*, (Dec. 1996) (on file with the Canadian Department of Foreign Affairs); *The United Nations: Fact Sheet*, (Dec. 1996) (on file with the Canadian Department of Foreign Affairs). Due to its involvement in multiple UN peacekeeping missions, the contribution criterion has enabled Canada to hold a non-permanent seat within the SC for a total of five terms during: 1948-49, 1958-59, 1967-68, 1977-78, and 1989-90. Canada is currently seeking a sixth term for the 1999-2000 period. *See also* Geiger, *supra* note 478, p. 395, suggesting that the contribution criterion plays a bigger role than that which is currently played by the criterion of equitable geographic distribution.

As the GA grew as a result of the decolonization movement of the nineteen sixties, the SC followed suit increasing the number of non-permanent seats from six to ten.[480] The increase was sought by states of medium and small power which hoped for an opportunity to participate in this restrictive organ through a larger geographic distribution of its non-permanent seats.[481] And indeed, this increase reflected a better representation of the world's regions. However, its permanent membership, the most important constituency of the SC, remained unchanged. Today, more than fifty years after the UN's founding, the SC is comprised of fifteen member states—five permanent and ten alternate members.[482]

Although today's world does not reflect the same political realities as the post-second world war era, the five permanent member states retain their privileged position in the SC. Evidently, privileged membership representation is easier achieved on a functional than on a political basis.[483] However, with the latest influx of members following the democratization of former Eastern Bloc countries, a wide range of calls for reforms of the SC's membership have been voiced.[484] For the most part, these reforms envision further enlargement of the SC's non-permanent membership, with some states also proposing the enlargement of the permanent membership to include contemporary key world economic powers like Germany and Japan.[485] Interestingly, several of these proposals have invoked adherence to the principle of SE in order to justify their various positions. These proposed reforms are addressed in the last section of this chapter.

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[480] GA Res. 1991 A (XVIII), UN GAOR, 18th Sess., Supp. No. 15, at 21, UN Doc. A/5515 (1963). The 1963 amendment to the U.N. CHARTER art. 23 came into force on August 31, 1965. *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 236.

[481] QUOC DINH ET AL., *supra* note 2, p. 598.

[482] U.N. CHARTER art. 23; *See* Annex II for the current list of the UN's SC member states.

According a GA resolution, the SC's non-permanent seats are to be filled by: (1) three African states; (2) two Asian states; (3) two Latin American states; (4) two Western European or "other states" and; (5) one Eastern European state. *See* GA Res. 1991 A (XVIII), UN GAOR, 18th Sess., Supp. No. 15, at 21, UN Doc. A/5515 (1963); Geiger, *supra* note 478, p. 396.

Cf. Reisman—Constitutional Crisis in the UN, *supra* note 463, pp. 83-84, 95, suggesting—I believe erroneously—that the power to veto is the functional equivalent of the constitutional theory of checks and balances. Reisman argues that, although the UN Charter does not incorporate a mechanism for checks and balances—typically found in domestic institutions—it does provide real control by, "[t]he Amendment of 1963 that expanded the Council's membership [which] had the potential for creating an effective 'nonaligned' veto, which would have countered and repaired this apparent oligarchical and arguably atavistic feature."

[483] *See* Boutros-Ghali, *supra* note 254, p. 54.

[484] *See* QUOC DINH ET AL., *supra* note 2, p. 67.

[485] *See* MONIQUE CHEMILLIER-GENDREAU, HUMANITÉ ET SOUVERAINETÉS: ESSAI SUR LA FONCTION DU DROIT INTERNATIONAL 170 (1995).

(i) The Effects of the Security Council's Binding Decision-Making on the Principle of Sovereign Equality

As noted earlier, one important difference between the GA and the SC lies in the fact that the decisions taken by the plenary body of the UN, the GA, are non-binding while those made by the UN's executive organ, the SC, have the power to be legally enforceable on issues related to international peace and security.[486] Indeed, as the only UN body empowered with rendering binding decisions, the SC is the organ upon which world peace and security rests and its members possess the political leverage to bring about important developments in international law.

More importantly, however, because some SC resolutions do have a *de jure* binding value, the 'one state, one vote' rule and non-adherence to the principle of SE takes on greater significance. The fact that the SC's resolutions are made by a handful of states and are executory on *all* member states of the organization—i.e. 185 states—limits the effect of the majority's sovereignty because decisions are made on their behalf without their participation and even, at times, against their will. Indeed, the legally binding effect of the SC's resolutions is a fundamental breach of the sovereign rights of all those who have not participated in its decision-making processes—i.e. the remaining 170 member states—as well as all those SC member states who have not voted in favour of the resolution.

(ii) The loss of meaning of Sovereign Equality in the Security Council's Restrictive Membership

The SC's limited membership was intended to render its decision making more functional as discussion and decision-making are obviously more expedient within a smaller group of 15 than within a larger group of 185 participants. This practice effectively limits the principle of equality in the UN to the 15 members of the SC. The will of the remaining 170 UN member states which do not have a vote in the SC remains mute. Therefore, there is a loss of meaning of the principle of SE. The one vote per state rule does not have the same value within the SC, where it is applicable merely to 15 states, as it does within the GA, where it is applicable to 185 states. By not allowing the overwhelming

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[486] *See* U.N. CHARTER arts. 10, 25; Jost Delbrück, *Functions and Powers, Article 25, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 407, 408 (Bruno Simma et al. eds, 1994) [hereinafter 'Delbrück—Article 25']. *See also* Tavernier, *supra* note 38, p. 501, where the authors explain that the term "decisions" found in article 27 of the UN Charter has been widely interpreted in such a way as to include resolutions as well as recommendations.

number of UN member states to participate in the voting process of this all important decision-making organ, the UN Charter recognizes the *inequality of states* and breaches the fundamental principle of SE.

More importantly, however, the UN member states which do not have a seat in the SC are unable to represent their views within this organ unless the decision under consideration involves an issue in which their interests are particularly affected.[487] As such, in violation of the principle of SE, their voice is generally completely silenced within the SC as decisions are made on their behalf, not only without their vote but also, without their participation.

(iii) The Further Compromise of Sovereign Equality in the Security Council's Two Tier Membership

The classification of the SC members into two categories—i.e. permanent and non-permanent members—constitutes yet another breach of the principle of SE. As noted earlier, the world's most powerful nations in the post W.W.II era—i.e. the US, France, UK, Russia and China—comprise the permanent members. The non-permanent members are selected on the basis of geography and they rotate every two years.[488] This two-tier classification assigns unequal value to the votes of its permanent members in relation to those of its non-permanent counterparts.[489] As will be further discussed in the following subsections, the different majoritarian values attributed to the votes of its permanent and non permanent members, as well as the VMs foreseen in the UN Charter and the various VPs which have since developed, create further inequalities within the SC. As such, the *inequality of states* is, once more, expressly recognized as the *non-permanent* member states of the SC are discriminated *vis-à-vis* the permanent states.

As noted earlier, if unjustified, the inconsistent application of a principle—i.e. SE within the SC—compromises its legitimacy.[490] In the context of justifying inconsistencies, there are those who like John Rawls (1971) hold that discrimination for a greater good is justified on condition that the "inequality of opportunity [...] enhance[s] the opportunities

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[487] U.N. CHARTER art. 31.

[488] *See* BENNETT, *supra* note 41, p. 83.

[489] *See* Reisman—The Constitutional Crisis in the UN, *supra* note 463, p. 83; BENNETT, *supra* note 41, p. 83.

[490] *See supra* Part II.A.2.b regarding the criteria the Legitimacy theory.

of those with lesser opportunity".[491] The issue is then to determine the purpose and benefit of the discriminatory two-tier membership and unequal value of votes between permanent and non-permanent members within the SC in order to determine if the breach of SE is justified. However, the unequal status of the SC members is not a *direct* benefit for the least advantaged states—i.e. its non-permanent members and its non-members. Instead, it benefits the *entire* community of nation-states by providing a functional organ which safeguards international peace and security. The inequality in the SC's two tier composition could not, therefore, be justified on these grounds.

On the other hand, and also using Rawls' Liberal theory of justice, the inequality of membership status may be considered acceptable if it is justified on the basis of the higher purpose of the SC—i.e. the maintenance of international peace and security. However, even if this explanation can be deemed acceptable, the degree of inequality that can be justified is subjective and rather unclear. For instance, how many permanent members *vis-à-vis* non-permanent members would constitute a justified inequality? It is uncertain whether the current ratio should stand or whether a different one should be applied. What is however clear is that this inequality breaches the principle of SE which *de facto* has no place, and *de jure* should not have no place, in the VMs and VPs of the UN.

b) Democratic Majoritarianism: How much of a Majority and how much of a Democracy?

As noted earlier, majoritarianism is increasingly prevalent in the decision-making processes of an ever growing number of international institutions. Although the most widespread expression of majoritarianism in law-making arenas is the traditional ***simple majority*** (50% +1) rule for procedural questions and the ***two-thirds majority*** rule for substantive issues[492]—as is the case within the UN GA—increasingly, there are divergent and novel expressions of special majorities.

For instance, there is the ***double majority*** rule where the majority of two or more factors—e.g. the majority of participants holding the majority of contributions—are considered. There are also other ***qualified majority*** rules—e.g. 60% majority in the UN

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[491] RAWLS—A THEORY OF JUSTICE, *supra* note 163, p. 303.

[492] Zemanek, *supra* note 64, p. 861. *See* SCHERMERS & BLOKKER, *supra* note 1, p. 550.

SC (9/15) and in the ILO (3/5), and 70% and 85% majorities in the IMF.[493] As with the traditional versions of majority rule, these alternatives to majoritarianism are intended to render decision-making more representative and, thus, more democratic.

Arguably, majoritarianism is inextricably linked to the fundamentals brought about by democratic values, and decision-making by majority rule is widely considered to conform to the practices of democratic institutions within and between member states.[494] Of course, democracies are not exclusively majoritarian systems and, in fact, have various levels of powers which protect against absolute power.[495] Moreover, although democracy intends to impose the will of the majority, both at the national as well as on the international level, there are divergent views on exactly how much of a majority is necessary so that decision-making processes can be considered democratically legitimate. Accordingly, the level of majoritarianism required to ensure the legitimacy of decision-making processes is not determinate in either the domestic or the international front.

In most domestic legal systems *simple majority* of the legislature's seats is widely recognized as the basic legitimate form of democracy when electing a government. In Canada there are 301 seats in the House of Commons and the political party obtaining 50%+1 seats—i.e. 151 seats—can officially form, what is often referred to as, a majority government by *simple majority*. However, this voting rule does not always suffice to establish the legitimacy of all domestic decision-making processes. For instance, with the *Constitution Act of 1982*, Canada repatriated its Constitution from the United Kingdom.[496] The repatriation was accompanied with a new amendment formula for the Canadian Constitution which made qualified *double majority*—i.e. 7/10 provinces representing more than 50% of Canada's population—the *general* requirement for the amendment formula of the Constitution.[497] Nine out of ten provinces—the exception being Québec—representing well over 50% of Canada's population, signed the *Constitution Act of 1982*.[498] Despite the fact that the Canadian Constitution was legally amended, as per the amendment formula, its

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[493] *See* Annex I: Charting Decision-Making in International Governmental Organizations.

[494] *See* PLANO & OLTON, *supra* note 29, p. 338. *See also* Part II.B.4.c regarding democracy's relation with majoritarianism.

[495] Rose-Ackerman, *supra* note 359 p. 85. Indeed, domestically democracy is not concentrated on one level but is diffused into separate powers. As such, a typical democracy is represented by a three tier system, the executive (e.g. the Cabinet) legislative (e.g. Canadian Parliament, US Congress), the judiciary (e.g. Court system). Thus, no one source of authority can monopolize power, presumably rendering the democratic form of government the "least corrupt[able] form of government".

[496] *See* BENOÎT PELLETIER, LA MODIFICATION CONSTITUTIONNELLE AU CANADA 29-31 (1996).

[497] CAN CONST. (Constitution Act, 1982) arts. 38-40; PELLETIER, *supra* note 496, p. 92. This is dubbed the *general* amendment formula because there are also four other voting amending formulae foreseen for *specific* contexts.

[498] *See* PELLETIER, *supra* note 496, p. 30.

legitimacy has since been called into question. The Secessionist forces of the only non-signatory province claimed that Québec's adherence to the highest law of the land was a *sine qua non* in its legitimate membership in the Canadian Federation. In other words, due to the importance of the decision, Québec's Secessionists rejected majoritarianism and sought nothing short of unanimity (i.e. a veto) for the legitimacy of Constitutional decision-making.[499]

Ironically, the legitimacy of the majoritarianism process has also been the point of contention amongst the Federalist forces in Canada. In the mid nineteen nineties, a Québec referendum on secession resulted in a narrow margin of 49.4% for secession, 50.6% against secession with a 94% voter turnout.[500] Subsequent to this narrow victory by the federalist forces, the Liberal government—via its Intergovernmental Affairs minister, Stéphane Dion—challenged Québec's right to secession based on a vote of *simple majority*, arguing that on such an important question there needs to be a higher majority.[501] Using the example of the former Yugoslavia—where a referendum on Slovenia's secession saw a 90% turnout with 90% of the population favouring secession[502]—Mr. Dion has suggested that in a democratic society *consensus* was necessary for serious and quasi-irreversible changes.[503] Furthermore, he argued that Canada would only recognize a declaration of Québec's sovereignty if the procedure leading to such a declaration, including the voting procedure, was deemed acceptable.[504] As such, Canada's Federalists argue that a vote of

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[499] *See* Pierre April, *Française ou non, la Constitution reste illégitime, dit Landry*, LA PRESSE, May 14, 1997, at B5. Deputy Premier, Bernard Landry, claims that "*... comme les cinq gouvernements précédents, ce gouvernement-ci [du Parti Québécois, sous la direction de M. Lucien Bouchard] n'acceptera pas d'assujettir le Québec à une Constitution illégitime.*"

[500] Denis Lessard, *Le NON de justesse: OUI: 49,4. NON: 50,6*, LA PRESSE, Oct. 31, 1995, at A1; H. Wade MacLauchlan, *Accounting for Democracy and the Rule of Law in Quebec Secession Reference*, 76 CAN. BAR. REV. 155, 160 (1997).

[501] *See* Vincent Marissal, *L'incertitude amène l'intolérance*, LA PRESSE, Aug. 30, 1997, at A19, [hereinafter Marissal—L'incertitude] discussing Minister Stéphane Dion's stance regarding the requisite majority for recognition of Québec's secession by the rest of Canada. *See* Manon Cornellier, *Une nouvelle missive de Dion à Landry*, LE DEVOIR, Aug. 27, 1997, at A4. Discussing Québec's secessionists' stance, Canadian Minister for Intergovernmental Affairs, Stéphane Dion, claims that the voting rule of simple majority suffices for Québec to enter into, or remain within the Canadian Federation but the same voting majority does not suffice for Québec to leave the Canadian Federation because the stakes and the risks for injustice are higher in the event of Québec's separation from the rest of the country. In this respect, Mr. Dion draws a parallel between the rules for marriage and those for divorce, as well as those for the formation and dissolution of a partnership, arguing that the rules for divorce are more stringent than those for marriage as the rules for the dissolution of an association are similarly more rigorous than those for its formation.

[502] *See Dion corrige Landry sur la Slovénie*, LE SOLEIL, Aug. 30, 1997, at A18.

[503] *See* Serge Truffaut, *Bouchard se contredit, estime Dion*, LE DEVOIR, Aug. 12, 1997, at A1, [hereinafter 'Truffaut—Bouchard se contredit'], quoting Minister Stéphane Dion's letter to Québec Premier, Lucien Bouchard which states that: "*Il est d'usage en démocratie de requérir un consensus pour les changements graves, quasi-irréversibles, qui touchent profondément non seulement nos vies mais aussi celles des générations futures.*"

[504] *See* Marissal—L'incertitude, *supra* note 501.

See also Cornellier, *supra* note 501, discussing the Federalists' stance regarding Québec's secession necessitating a "*procédure de décision claire, légale et équitable*", Canadian Minister Stéphane Dion wrote to

50% + 1 in favour of secession would not suffice for Canada to recognize Québec as a sovereign nation[505] while Québec Sovereignists argue that *simple majority* is the purest democratic principle and one which must be adhered to by all democrats.[506]

As is the case at the national level, at the international level it is unclear just how much of a majority is necessary to ensure the legitimacy of international decision-making. Indeed, there is no uniform application of majoritarianism in IGOs' decision-making as there are several different applications of the majority rule. Still, there has been an emerging trend developing in the international arena as—the effort to ensure the legitimacy of conventional democratic—decision-making processes is increasingly lending to majoritarianism being qualified into *higher* and *double* majorities. In the following subsection I explore the novel and controversial ways by which the SC exercises majoritarian rule and establish that it is doubtful that majoritarianism suffices for democratic rule when it is employed in the context of a restrictive, two tier-composition organ.

c) Qualified Majoritarianism in the Security Council

Like the GA, the SC also foresees for majority rule in its decision-making processes. However, the majority rule set out in the SC could not be more different than that provided for in the GA. In fact, the voting rules of *simple majority* and *two-thirds majority* are absent from the voting processes of the SC. Instead, Article 27 of the UN Charter foresees that:

> "2. Decisions of the Security Council on *procedural matters* shall be made by an *affirmative vote of nine* members.

Québec Deputy Premier Bernard Landry that Canada's recognition of Québec's prospective declaration of independence is paramount in order for Québec to be recognized by the international community and be admitted to the UN. Vincent Marissal, *Sans le feu vert d'Ottawa, pas de reconnaissance internationale de l'indépendance, affirme Dion*, LA PRESSE, Aug. 27, 1997, at B1.

[505] *See* Cornellier, *supra* note 501; Marissal, *supra* note 501.

[506] *Cf.* Serge Truffaut, *Partition: le ton monte: Chrétien cautionne les propos de Dion*, LE DEVOIR, Aug. 13, 1997, at A1, [hereinafter Truffaut—Partition], reporting on Québec Deputy Premier's, Bernard Landry, correspondence to Canadian Intergovernmental Minister, Stéphane Dion, Mr. Landry wrote:

> *"Vous réiterez les très graves propos de votre premier ministre qui refuse de reconnaître une décision démocratique à 50% plus un que les Québécoises et les Québécois auraient prise en faveur de la souveraineté. Il est proprement incroyable qu'un démocrate, quel qu'il soit, défende une telle position."*

Mr. Landry further argued that most referendums held by European states over the Maastricht treaty were based on the voting rule of simple majority.

> 3. Decisions of the Security Council on *all other matters* shall be made by an *affirmative vote of nine* members including the *concurring votes of the permanent members*; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."[507] (emphasis added).

Thus, for the SC's procedural decisions, the UN Charter provides for a *qualified majority*—i.e. 60% of all 15 members. Because each member, whether permanent or non-permanent, has one vote, theoretically they have identical influence in the outcome of procedural issues in the SC. As such, there is relative adherence to democratic concept—via majoritarianism—but it comes at the expense of the principle of SE—i.e. no unanimity.

In Article 27(2) of the UN Charter there is no reference to "members present and voting", as is the case with the voting procedure of the GA [Article 18 of the UN Charter]. As such, the qualified majority voting rule foreseen in the UN Charter applies to the entire membership, regardless of whether or not a state is absent from a given SC session. Given that there is a quorum of nine member states, which may include both permanent and non-permanent members, a procedural decision in the SC may technically, therefore, be made strictly by the non-permanent members to the exclusion, and against the will, of the five permanent members.

As for "substantive issues", Article 27(3) of the UN Charter provides that the SC is called upon to decide by a *qualified majority* plus a *unanimity* vote[508]—i.e. with a vote of 60% of all fifteen (permanent and non-permanent) member states plus 100% of the votes of the five permanent member states. The first part of this equation is identical to the voting requirement for procedural questions. But when it is combined with the requirement for unanimity it equates to the ***veto.***

The power to veto means that a negative vote by any one of the five permanent members effectively blocks any important decision under consideration in the SC.[509] This devalues the decision-making role of the non-permanent member states because, regardless of whether there is quasi-unanimity on a given important issue (i.e. 10/10 non-permanent members + 4/5 permanent members vote in favour of a given resolution) their sovereign

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[507] *Cf.* Reisman—The Constitutional Crisis in the UN, *supra* note 463, p. 93. The *nemo judex* prohibition of article 27(3) bars a state from voting on a resolution under Chapter VI of the UN Charter (Pacific Settlement of Disputes) if it is party to the dispute. Of course, since resolutions under Chapter VI are merely recommendations without any binding effect, this has been criticized as simply a cosmetic restriction. In fact, there are several ways of by-passing this restriction—namely, by omitting to indicate under which chapter a given recommendation is made or by rendering the decision under Chapter VII.

[508] *See* QUOC DINH ET AL., *supra* note 2, p. 602.

[509] U.N. CHARTER art. 27 para. 3; BENNETT, *supra* note 41, p. 83.

will is disregarded when a single permanent member opposes the adoption of the resolution.[510]

(i) The Controversial Power to Veto

The word 'veto' does not appear in the UN Charter. In fact, the power to veto was a novelty at the genesis of the SC and it remains unique to this UN executive organ as it has not been reproduced in any other IGO—at least not with such transparency. Several reasons may be responsible for its lack of re-creation, one of the main being the fact that states are generally reluctant to relinquish adherence to the principle of SE. In the latter part of this study I examine the implicit power to veto in several other IGOs and establish how different VMs provide participating parties with a *de facto* power to veto based on qualified majority voting structures[511] or even by the requirement for unanimity.[512]

The interesting part of the veto is that, on its own, the components of this VM are seemingly democratic (qualified majority rule) and in conformity with the principle of SE (unanimity rule). However, the merger of these two component elements of the veto seem to violate both democratic principles and the principle of SE.

The power to veto is undemocratic for it disregards majoritarianism by imposing the will of one or more of the five permanent members—who are, in fact, in the minority not only within the SC but also within the entire UN—on the majority of the non-permanent members of the SC. Of course, as democracy is not a principle enshrined in the UN Charter,[513] this novel VM is technically not in violation of the organization's constituent act.

The veto is also inconsistent with the principle of SE because, when employed, "it may pre-empt powers ordinarily exercised by members of the UN system as incidents of their

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[510] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 238.

[511] *See* Part IV.A on the VMs of the International Monetary Fund (IMF).

[512] *See* Part V.A & B on the VMs of the European Union (EU) and of the Organisation for Economic Co-operation and Development (OECD).

[513] Democracy is, however, a value foreseen in other important UN instruments—i.e. *Universal Declaration of Human Rights*, G.A. Res. 217 U.N. Doc. (Dec. 10, 1948) art. 21, para. 1 & art. 29, para. 2. *reprinted in* INTERNATIONAL LAW—SELECTED DOCUMENTS 352 (Barry E. Carter & Philip R. Trimble eds, 1991). This declaration was adopted unopposed by forty eight states of the UN GA, with eight states abstaining.

sovereignty".[514] Since the power to veto grants exclusive and *unequal* voting rights to the permanent members of the SC, it represents a serious challenge to the traditional theory of national sovereignty[515] and SE[516] for it subordinates the will of each and all ten non-permanent members (i.e. collective) to the will of any one of the five permanent members (i.e. individual). As such, the former are powerless to pass a SC resolution without the latter's approval. Since the principle of SE, contrary to the principle of democracy, is expressly stated in UN Charter the veto is thus in violation of its constituent act.

This Charter violation occurred because the reality of power politics in the post W.W.II era were such that the veto was considered to be *a sine qua non* to the very establishment of the UN.[517] Presumably, the power to veto was instituted in order to preserve the "vital interests" of the big powers.[518] Arguably, these interests could have been preserved by the permanent member states opting out from a collective security decision rather than blocking a resolution from being adopted. Evidently, however, this was not a viable option because it was felt that the veto would preserve their SE only by affording them the "assurance that no action [...can] be taken against a permanent member or [that no action can be taken] without its consent."[519] Of course, this means that the SE of the five permanent member states is preserved at the expense of the non-permanent member states' SE.

Moreover, the requirement of the affirmative vote of its five permanent members constitutes an important limitation to the SC's powers and functions.[520] For instance, given that each of the five permanent members has the power to block a resolution, a veto from any one of the five can paralyze the SC and thus effectively obstruct the collective security system. When such a hindrance to decision-making occurs the SC is *de facto* rendered an

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[514] FRANCK—FAIRNESS, *supra* note 10, p. 285.

[515] *See* BENNETT, *supra* note 41, p. 83.

[516] QUOC DINH ET AL., *supra* note 2, p. 602.

[517] COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 235.

[518] *See* BENNETT, *supra* note 41, p. 85.

[519] Goodrich—U.N. S.C., *supra* note 381, p. 195.

[520] *Cf.* Tavernier, *supra* note 38, p. 500, where Professor Paul Tavernier explains how in the early days of the UN's existence a disagreement arose between the United Kingdom and the USSR on the application of the rule of unanimity of the permanent members when one of the member states is a party to a dispute brought before the Security Council. In February 1945, a compromise solution was proposed at Yalta by the United States. It proposed that a permanent state abstain from voting on a dispute in which it is party to (as the British wanted), while the veto power would be upheld on coercive measures (as the Soviets wanted). This voting formula was ultimately incorporated and, following discussion thereof, was adopted unchanged at the San Francisco Conference on March 5, 1945.

The voting procedure of the Security Council was examined by a Committee known as Committee III/I. Several amendments were suggested only one of which was retained for a vote. This was the Australian amendment which proposed that the Security Council's right to veto be excluded from decisions relating to the peaceful settlement of disputes [Chapter VI of the Charter]. This amendment was rejected and the Yalta formula was reproduced in its entirety.

ineffective agent in the pursuit of international peace and security. Indeed, this had been realized in the early years of the UN when permanent member states frequently resorted to use of their veto power.

Not surprisingly, the ability to veto decisions was initially viewed as the ultimate power both within the SC and the UN as a whole.[521] As such, during the *travaux préparatoires* for the drafting of the UN Charter this privileged veto status granted to the SC was highly controversial for it institutionalized a system of 'great powers'.[522] The controversy remains lively more than half a century later, albeit for somewhat different reasons. Today, the debate is not merely focused on *why* certain states have privileged status in the SC but *who* these privileged states should be, since the 'great powers' in the post W.W.II period no longer reflect the 'great powers' of contemporary society.

Furthermore, while some members of the international community claim that the power to veto was granted exclusively to the five permanent members of the SC in order to avoid abuse,[523] others argue that the veto in itself constitutes abuse of power.[524] Others, still, view the power to veto as elitist and abusive for it recognizes that great-power politics renders some states *de facto* 'more equal' than others.[525] Because it is anti-democratic and violates the principle of SE, several developing member states have periodically called for the abolition of the permanent members' power to veto.[526] At times it has even been suggested that international security is not in the hands of the SC, but rather in the hands of its five permanent members and some have gone so far as to suggest that international security lies in the hands of the two nuclear superpowers.[527] Of course, after the end of the Cold War and at the end of the twentieth century, there is, in essence, only one superpower—i.e. the US—[528] and, so, it appears that 184 nation-states are at the mercy of

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[521] Tavernier, *supra* note 38, p. 499.

[522] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 176; COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, pp. 234-235.

[523] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 235, noting that "neither the Soviet Union nor the United States would have ratified the Charter without the veto provision. And that the veto acts as a sort of *safety fuse* in the UN system by making it impossible for the organization, [to take action only by a ...] majority vote in the Security Council" (emphasis added); Eban, *supra* note 138, p. 43, explaining that the "veto provision was an absolute condition for American participation in the United Nations and the small and medium-sized countries regarded the veto as a crucial defense against *irresponsible majorities*." (emphasis added). Curiously, they didn't fear *irresponsible vetoes!*

[524] *See* Tavernier, *supra* note 38, p. 500.

[525] PLANO & OLTON, *supra* note 29, p. 338. The authors also define as elitist the weighted voting systems found in such international institutions as the World Bank and the International Monetary Fund.

[526] Tavernier, *supra* note 38, p. 517.

[527] *See* QUOC DINH ET AL., *supra* note 2, p. 67.

[528] *See* Richardson—Gulf Crisis, *supra* note 223, p. 42.

its willingness to use or abuse the power to veto.[529]

Coming to the defense of this controversial VM, some legal scholars have reasoned that decision-making via the power to veto is necessary because it seeks to safeguard the sanctity of the SC which ultimately safeguards the collective security system.[530] Therefore, because the SC is burdened with the enormous task of protecting the world community, the breach of the SE principle is considered by some legal experts as a *necessary* breach.[531] Using Rawls' Liberal theory argument of justified inequality for a greater good,[532] it has been reasoned that the power to veto is justified because the SC has the burden of shouldering the responsibility for international peace and security.[533] Indeed, although small and medium-size states are excluded from the decision-making processes of the SC and, thus, barred from decisions concerning military and political security issues, they nonetheless obtain "protection from aggression through collective security in exchange for their own renunciation of force as an instrument of national policy."[534] After all, it is the big five world powers which possess the means of protecting world peace and security through the enforcement of UN resolutions.[535] In return, these five permanent members of the SC are provided with their own protection, namely, privileged voting status within the SC's voting procedures.[536]

(ii) The Power to Double Veto

Unlike Article 18(2) of the UN Charter which provides a list of some of the categories of

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[529] For example, in 1996, against the overwhelming will of the world's nation-states, the US vetoed a resolution to re-appoint the Secretary-General Boutros Boutros-Ghali for a second term.

[530] René Degni-Segui, *Fonctions et Pouvoirs: Article 24 Paragraphes 1 et 2, in* LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 451, 468 (Jean-Pierre Cot and Alain Pellet eds, 1985).

[531] BENNETT, *supra* note 41, pp. 83-84; *See* Christian Tomuschat, *General Assembly, in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 1, 548, 557 (Rüdiger Wolfrum and Christiane Philipp eds, 1995); FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 177.

[532] *See* RAWLS—A THEORY OF JUSTICE, *supra* note 163, p. 303.

[533] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, pp. 177, 211-233.

[534] Alberto Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from some of its Best Friends*, 27 HARV. INT'L L.J. 599, 609 (1986) [hereinafter 'Coll—Global Consciousness and Legal Absolutism'].

[535] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, pp. 176-177.

[536] *See* Claude—The Political Framework of the UN's Financial Problems, *supra* note 422, p. 113. Discussing the power to veto in the SC, Claude reflects that the UN "cannot successfully perform significant political or security functions in the absence of unanimity among the major powers". Claude further cautions that the UN's "existence will be imperiled if it is pushed into such futile ventures, and that constitutional safeguards are needed to prevent its being maneuvered into dangerous and unpromising situations of this sort."

non-procedural questions within the GA, the UN Charter is silent as to what issues qualify as *procedural* or *substantive* in the SC. Moreover, while the GA employs the flexible classification rule of simple majority in order to determine additional categories of procedural and substantive issues not listed in Article 18(3) of UN Charter, the SC employs a rather stringent voting classification rule. Of course, the determination of what constitutes a procedural or a non-procedural issue is critical in order to determine whether the right of veto can rightfully and legitimately be exercised by the SC. Yet, the criteria for determining what constitutes a procedural question, as opposed to a substantive question, in the SC have been, and remain, highly controversial.[537]

Upon the creation of the UN, the sponsoring members issued a statement declaring that determining whether or not a specific issue is procedural or substantive would be considered a substantive decision and would therefore be subject to the veto.[538] In other words, in order to qualify an issue within the SC, there would first be a *preliminary question* which must be voted favourably by at least nine SC member states, together with the unanimous favourable vote of the five permanent members (Article 27(3) of the UN Charter).[539] This process has led to the voting procedure commonly referred to as the ***double-veto***.[540] Given that the double-veto occurs in a two step process, it is twice as responsible as the veto for breaching the principle of SE *vis-à-vis* the SC's non-permanent member states.

To explain in greater precision, in order to classify an issue in the SC, its members first decide by way of a *first veto*—i.e. the affirmative vote of nine of its members, including the concurring votes of its permanent members—to consider a given question as either procedural or substantive. If the veto vote determines that the issue at hand concerns a procedural question, then the *second* vote held by the SC is decided via *qualified majority*—i.e. voting rule of 60% of all 15 members states. On the other hand, if the *first*

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[537] *See* Tavernier, *supra* note 38, p. 501.

[538] *See* BOWETT, *supra* note 13, p. 30.

[539] *See also* Tavernier, *supra* note 38, pp. 502-518. Referring to the Repertory of practices followed by UN organs and the Repertory of practices followed by the Security Council, Professor Paul Tavernier comments that the distinction between a procedural question and other issues is difficult to determine. Discussing the initial *travaux préparatoires* as well as the varying interpretations that these works have been given by legal scholars such as Goodrich and Hambro, Day, Brugière and Virally, he notes that some authors believe that the *travaux préparatoires* do not have authentic interpretative value (Goodrich & Hambro) while others believe that such works, albeit not official, should be treated as having authentic interpretive value (Day and Brugière). Professor Virally acknowledges that the San Francisco Conference constitutes *travaux préparatoires* of the UN Charter, but contests the interpretive value of this work. Furthermore, he believes that, for the most part, the SC has conformed to the spirit of the *travaux préparatoires* even though the experience to date on this issue is far from conclusive.

[540] *See* BENNETT, *supra* note 41, p. 84. *Cf.* BOWETT, *supra* note 13, p. 31, "[o]ne means of avoiding a double-veto is for the President to rule that the matter is procedural".

veto vote determines that the issue under consideration is substantive, and if this issue is to obtain a favourable vote before the SC, then its members must vote via a *second veto*. Hence, the term double-veto.

As the veto infringes the non-permanent members' rights to SE within the SC, the double-veto multiplies the infringement because the non-permanent member states are, once again, placed in a position of inferiority *vis-à-vis* their permanent counterparts as their votes, individually as well as collectively, have less value than the single vote of the 'big five' powers. In other words, not only do the permanent member states dominate in the substantive decision-making processes but they also dominate in the procedural decision-making processes. This breach of the principle of SE leaves the ten non-permanent members *de facto* impotent in the SC's decision-making processes relegating them powerless players in this UN executive organ.

(iii) The Doctrine of Implied Powers in Relation to the Principle of Sovereign Equality

Since Article 27(3) of the UN Charter requires the unanimous favourable vote of all five permanent members on substantive matters, it should logically follow that if one of the five members abstains from voting or is absent from the session there would not be five affirmative votes and, therefore, the SC's decision would be blocked. This *absolute unanimity* by the five permanent members[541] means that if, for some political or other consideration, a permanent member state did not want to vote in favour of a particular resolution—regardless of whether or not it really opposed it—the SC would be *de facto* paralyzed by a veto.

Given that international peace and security rests with the SC, paralysis of this executive organ is, of course, not a viable option. Therefore, irrespective of the logic with regard to the interpretation of the wording of the UN Charter, abstentions or absences by one or all of the five permanent members of the SC have long been considered *not* to constitute a veto.[542] Hence, unanimity of the five permanent member states has come to mean *relative unanimity*—i.e. unanimity of those permanent states present and voting with the decision

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[541] *See* Boutros-Ghali, *supra* note 254, pp. 27-28.

[542] *See* BENNETT, *supra* note 41, p. 85. *See also* Boutros-Ghali, *supra* note 254, p. 27, discussing how in this context the rule of unanimity *de facto* takes on a more realistic role.

being binding on all member states.[543] Of course, this is not merely a liberal interpretation of the UN Charter. It also blatantly contradicts the terms by which the members of the organization have agreed to be bound and, consequently, violates the principle SE.[544] There are two reasons for this anomaly: (i) a Court ruling and (ii) customary practice.[545]

In 1971, an advisory opinion of the International Court of Justice ruled that an abstention of one of the permanent members of the SC is not an obstacle to the validity of a resolution.[546] Using a functional approach, the court found that it was within the UN's *implied rights* to confer to the SC the necessary means to enable it to perform its duties.[547] It was thus decided that, in limited circumstances, an international institution may exercise a different power than that which was explicitly foreseen in its constituent act. This decision has allowed greater latitude of the SC to make decisions on crucial issues with which its permanent members, for a variety of political or economic reasons, did not wish to be associated.[548]

From this emerged the international law ***doctrine of implied powers*** which attributes implicitly the legal basis for IGOs' activities. Through the years, this doctrine became established practice and thus slowly gained greater prominence. In fact, since "it is never possible to lay down an exhaustive list of powers of the organization in a constitution, *inter alia* because any organization needs to respond to developments in practice which cannot be foreseen when it is created,"[549] the doctrine of implied powers is considered to legalize and legitimize IGOs' practices. Moreover, it provides flexibility in an otherwise rigid international institutional structure.

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[543] *Cf.* Boutros-Ghali, *supra* note 254, pp. 27-28. Mr. Boutros-Ghali refers to the rule of relative unanimity in the Arab League Pact where the decision reached by less than a unanimous vote—i.e. by majority—is not binding on the member states who have not voted for it. This, of course, is not the meaning of relative unanimity in the UN's SC as the decisions which are not blocked by a veto vote must nonetheless be adhered to by the abstaining or absentee member states.

[544] *See* QUOC DINH ET AL., *supra* note 2, p. 602.

[545] *Id. See generally* Sydney D. Bailey, *New light on Abstentions in the UN Security Council* 50 INT'L AFF. 554 (1974).

[546] [1971] ICJ 16 par. 22. The Court ruled that:

> "...the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote ...".

[547] BROWNLIE—PRINCIPLES, *supra* note 30, p. 690; BOWETT, *supra* note 13, p. 32.

[548] *Id.*

[549] SCHERMERS & BLOKKER, *supra* note 1, p. 232.

Because the UN Charter makes no provision for not counting abstentions and/or absentees either in the GA or in the SC, by their adherence to the UN, via its Charter, the SC's members, and indeed the entire membership of the GA, have not given their prior consent to this UN VP of not counting abstentions or absentees.[550] As such, this VP theoretically undermines the supreme legal authority of each member state of the UN. After all, the principle of SE means that no sovereign state, or organization of states, can exercise legal authority over another sovereign state without its express or tacit consent.[551] However, once again, this fundamental international law principle is sacrificed, this time for the doctrine of implied powers.[552]

The doctrine of implied powers was dominant amongst the international law community in the nineteen seventies but, as I will show in my examination of financial IGOs in Part IV, this doctrine now assumes a much more restrictive interpretation.[553] This restricted or otherwise tempered use of the doctrine of implied powers is intimately related to the principle of SE.[554] It shows that, albeit SE is not observed in the *specific* context of international institutions' decision-making processes, it still remains sufficiently important in the *general* context of international law so as to require—not simply implied powers but rather—*de jure* amendments to IGOs' constituent acts.

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[550] BENNETT, *supra* note 41, p. 84.

[551] QUOC DINH ET AL., *supra* note 2, p. 602; SEIDL-HOHENVELDERN, *supra* note 252, at 22; KLEIN, *supra* note 12, pp. 1-4; DICKINSON, *supra* note 239, p. 334.

[552] BROWNLIE—PRINCIPLES, *supra* note 30, p. 290.

[553] *Id.* Recently, the International Monetary Fund's (IMF's) constituent act was amended in order to impose voting sanctions on defaulting members. Due to a restrictive interpretation of the IMF's Articles of Agreement (its constituent act), it was deemed that it was not within its implied powers to impose such sanctions. Clearly, this amendment was necessary because the principle of SE dictated that it was not considered possible or acceptable to impose voting sanctions on its members without their explicit consent.

[554] *See generally* Head, *supra* note 42.

4. Functional Legitimacy Within the United Nations

> "If the Security Council is at last going to play the role envisaged for it in the Charter, it must be perceived as fully legitimate in a broad sense by nation-states and people. Its current unrepresentative character is the cause of great disquiet, leading to a crisis of legitimacy. Without reform, it will not overcome that crisis; without legitimacy in the eyes of the world's people, it cannot be truly effective in its necessary role as a custodian of peace and security. Equally, reform must be managed in such a way as not to diminish the effectiveness and political viability of this central institution."
>
> The Commission on Global Governance[555]

a) The Current Level of Functional Legitimacy of the Principle of Sovereign Equality in the Voting Mechanisms and Practices of the United Nations

When states interact on their own outside an organized structure, inequalities may lead to various forms of abuse. For instance, states which are either economically and/or militarily disadvantaged in comparison to others, may not have the necessary means to protect their respective positions and prevent abuses by other more powerful states. In such circumstances, the principle of SE of states is a useful and functionally legitimate point for mutual recognition and respect in their interactions. On the other hand, the principle takes on a completely different meaning when states interact *within* IGOs. In this case, because states are protected from abuses by the very institution in which they are members, SE loses its functional legitimacy and ultimately its *raison d'être*.

As a general principle of international law, SE may be both a functional and a legitimate principle, but within the context of the UN it is only partly functional and not quite legitimate. In the following subsections, I evaluate the current UN voting mechanisms and practices, as well as their prospective changes, and I consider the degree of their functional legitimacy *vis-à-vis* the principle of SE.

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[555] Commission on Global Governance, *supra* note 19, p. 237.

(i) The Non-Functional Myth of Sovereign Equality in the General Assembly and the Security Council

If it is true that the "UN needs to set the highest standards of efficiency at all levels of its operations"[556] then we must question the role of the failed principle of SE enshrined in its Charter. The principle of SE is completely non-functional in the SC and only partly functional in the GA. As noted earlier, in the GA, its application entitles each state to one vote. This enables 185 UN members to cooperate through a fairly simplistic and facilitative process which allows for the voicing of each state's opinion and the issuing of recommendations—what Functionalists consider to be "soft law". In this context then, the functioning of the GA would appear to be in compliance with the principle of SE. However, SE would only be a functional principle in the GA if this plenary organ were the UN's sole binding decision-making body.[557] Since this is not the case, SE is a non-functional principle within the GA. Moreover, the Charter also allows for majoritarian rule in the GA and this is in direct breach of the traditional concept of SE which requires unanimity.

In the functioning of the SC, the principle of SE is altogether absent. It is absent, first, at the level of membership—i.e. only 15 out of 185 UN members hold a seat and, therefore, have a direct voice. This is justified in so far as universal membership in this UN organ would unquestionably undermine the SC's efficiency.[558] Secondly, SE is absent at the level of voting where the two-tier membership system allows for any one of the five permanent members to veto a decision and, therefore, in effect overrule the voice of all others. Accordingly, the principle of SE is completely non-functional in the SC.[559]

As noted earlier, the fact that there are some political and/or other explanation for these inequalities, does not necessarily mean that they can be sufficiently justified nor, does it detract from the violation of the principle of SE in the VMs and VPs of this IGO. Nevertheless, through their voluntary membership in the UN, and by virtue of their adherence to its constituent act—i.e. the UN Charter—185 member states have *de facto* accepted the breach of the principle of SE which evidently means that they have recognized

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[556] *Id.* at 232.

[557] *See also* QUOC DINH ET AL., *supra* note 2, pp. 596-598, discussing the contexts in which SE is a functional concept in IGOs.

[558] *See id. at* 594-596.

[559] *See also* Boutros-Ghali, supra note 254, p. 60, discussing the "inégalité fonctionnelle" within the UN's SC.

that the principle is not functionally transposable in the binding decision-making processes of this universal Organization.[560]

(ii) Measuring the Legitimacy of Sovereign Equality in the General Assembly and in the Security Council

The legitimacy of the UN's, as well as of all other international institutions', decisions is directly related to the perceived legitimacy of its rules.[561] Indeed, an IGO's rules affect the persuasiveness of its professed fairness and, if deemed legitimate, ultimately inspire a sense of obligation in states to whom their decisions are directed.[562] Therefore, determining whether the UN's VMs and VPs are legitimate ensures compliance of the decisions emanating from its decision-making bodies. However, neither the 'one state, one vote' rule nor majoritarianism are legitimate within the UN for these rules remain outside the reach of the four established criteria for legitimacy, namely: *determinacy*, *symbolic validation*, *adherence* and *coherence*.[563]

First, the principle of SE although not expressly defined in the UN Charter (secondary rule) appears to be misstated *vis-à-vis* the classic doctrine of SE. Second, the *Declaration on Friendly Relations* (primary rule) deviates from the misstated principle of SE found in the Charter and returns to the roots of the classic doctrine of SE. This confusion is compounded by the unclear manifestation of this principle in both the UN's plenary and executive decision-making organs. Accordingly, the SE does not meet the ***determinacy*** criterion.

Second, the principle of SE as reflected in the voting rule of one vote per state by allowing the participation of each UN member in decision-making is of symbolic significance. This rule however applies only to the GA in which all UN member states are

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[560] *See* Rüdiger Wolfrum, *Voting and Decision-Making*, *in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 2, 1400, 1403 (Rüdiger Wolfrum and Christiane Philipp eds, 1995) [hereinafter 'Wolfrum—Voting and Decision-Making']. *See also* QUOC DINH ET AL., *supra* note 2, pp. 594-595. Drawing a distinction between universal and regional IGOs the authors argue that the principle of SE is not a functional proposition within the structure of the principle decision-making organs of universal IGOs. They do however suggest that it may be functional within the decision-making bodies of regional IGOs.

[561] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 150.

[562] FRANCK—FAIRNESS, *supra* note 10, p. 30. Franck rightly claims that "[m]easuring the legitimacy of a rule is not a purely theoretical exercise" because "[t]he more plausible a community's perception of a rule' legitimacy, the more persuasive that rule's claim to fairness, the stronger its promotion of compliance, and the firmer its re-enforcement of the sense of community."

[563] *See supra* Part II.A.2.b for the criteria of legitimacy in international law.

party to, and not to the SC. Given its non-applicability in the latter decision-making organ, the rule does not meet the ***symbolic validation*** criterion. Majoritarianism also fails to meet this criterion for, albeit democratic, it does not symbolize the consent of all members, neither in the GA nor in the SC. Such consent is a requisite of the principle of SE—i.e. a decision must express the will of *all* members in order for it to be legitimately binding.

Third, the principle of SE manifested in the voting rule 'one state, one vote', emanates from a higher normative order—i.e. the UN Charter principle and the international law doctrine of SE—meets the criterion of ***adherence*** within the GA. By the same token, however, it fails to meet this criterion within the SC which, as a result of its restrictive two-tier membership system, breaches the principle of SE. As noted, the principle of SE requires unanimity in both the GA and the SC. Majoritarianism, therefore, is also in breach of SE as unanimity is not a factor either in the GA (50% +1 and 2/3 majority) or in the SC (9/15 majority and the veto which calls for 9/15 + 5/5).

Fourth, as Franck rightly argues, "an international community that accepts rule-coherence as an ideal has a better case for legitimacy than one that does not."[564] However, the principle of SE is not consistently applied throughout this organization because the voting rule of 'one state, one vote' finds application within the GA but—because of its restrictive two tier composition—not within the SC. As such, it does not meet the fourth legitimacy criterion of ***coherence*** and, therefore, loses substantial amount of legitimacy. The same holds true for the majoritarianism rule which varies from simple majority to the veto rule thus, finding no consistency within the UN.

Given their different composition (universal and restrictive), their different VMs and VPs (simple majority, two-thirds majority, qualified majority and veto), as well as the different legal effect of their respective resolutions (non-binding and binding), there are important inconsistencies between the principle of SE as applied in the GA and in the SC. Indeed, establishing SE as a founding principle of the UN and concurrently sanctioning the privileged position of the 'great powers'—i.e. US, France, UK, Russia and China—was viewed as a paradox even by the founding members of this organization.[565]

Of course, as Franck's legitimacy theory claims, if the inconsistencies can be rationally explained there is an exception to the coherence criterion and the voting rule can still be

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[564] FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 175.

[565] KLEIN, *supra* note 12, p. 116.

qualified as legitimate.[566] For example, in evaluating the voting rules in the UN's SC, Franck argues that, "while inconsistent with state equality, [the veto] does not undermine the rule's coherence and legitimacy", rationalizing that "the states bearing the greatest institutional responsibility should also have the greatest say in critical disputes".[567] Although I agree with Franck's argument concerning proportional responsibility of power, I beg to differ with his conclusion. Given the numerous important inconsistencies, the principle of SE is, in fact, the exception, and not the rule, within the UN. After all, it is Franck himself who also rightly reminds us that a "'rule' [...which] only applies self-selectively has far less legitimacy than one of general application."[568] Moreover, there are no rational justifications *vis-à-vis* the remaining inconsistencies of SE within the UN.

In fact, although the reasons which rationalized the establishment of the five permanent members in the SC may have been relevant and rationally coherent in the aftermath of the Second World War, they do not reflect the realities of power in contemporary society. The 'big five' are no longer who or what they used to be and their primacy in collective security issues is no longer acceptable.[569] As such, the inconsistencies between the applications of the voting rule of 'one state, one vote' in the GA *vis-à-vis* the SC, as well as the inconsistencies of this rule within the SC, can not be rationally justified. Indeed, because the 'one state, one vote' is inapplicable within the UN's most powerful decision-making organ, the principle of SE is once again *de facto* the exception, and not the rule, within the UN.

b) Challenges to the *Status Quo:* Reforming United Nations' Voting Mechanisms and Practices

The maxim *quot homines, tot sententiae* is appropriate to describe the movement for UN-related reforms as there have been virtually as many proposals to reform this Organization as there have been scholarly publications on it. In particular, numerous proposals to reform the UN's decision-making processes have been *informally* tabled throughout the Organization's existence. As new states emerged and IGOs increasingly played a dominant role in global governance the movement for UN-related reforms

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[566] *See* FRANCK—POWER OF LEGITIMACY, *supra* note 123, pp. 153, 163; FRANCK—FAIRNESS, *supra* note 10, p. 41.

[567] FRANCK—POWER OF LEGITIMACY, *supra* note 123, p. 177.

[568] Franck—Democratic Governance, *supra* note 365, p. 81.

[569] COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 237.

intensified. Upon its fiftieth anniversary, the UN itself *formally* undertook to review its decision-making processes by establishing a committee to study and recommend voting-related reforms.

(i) Informal Proposals for Voting Reforms throughout the United Nations' Existence

During the initial years of the SC, the frequent use and opportunity for use of the veto led to various calls for reforms. Proposals for its amendment have included a range of options. One such option is the abolition of the veto and its replacement by the rule of equal voting rights for all SC members.[570] Abolishing the veto would *de facto* eliminate the difference in power between the two tier membership composition of the SC. All SC members would have equal voting power. This would signal a rapprochement with the principle of SE.

Other proposals for reform have included the substitution of the rule of unanimity of the permanent members of the SC—i.e. the second part of the equation foreseen in Article 27(2) of the UN Charter—by a rule of qualified majority. For instance, instead of all five members being required to vote affirmatively in order for a SC's resolution to be carried, a mere three of five would suffice.[571] While this change may signal a move towards more democratic decision-making within the SC, it would not bring the principle of SE any closer within this organization.

Another suggestion envisioned the restriction of the power to veto so as to limit its use and provide for its complete abolition on issues concerning membership admission and the peaceful settlement of disputes.[572] Restricting the number of issues which are subject to veto would also decrease the number of issues which would be subject to a double veto. This would result in the continued smooth functioning of the UN while endowing greater legitimacy to the SC's voting procedures. However, the breach of the principle of SE would remain so long as there exists any form of veto and any restrictive membership in the SC.[573]

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[570] *See* Goodrich—U.N. S.C. *supra* note 300, p. 205.

[571] *See id.*

[572] *See id.*

[573] *See* Wolfrum—Voting and Decision-Making, *supra* note 560, p. 1403.

Another proposal for reformation of the SC's power to veto involved a call for the exchange of the nature of the decision-making powers between the SC and the GA[574]—e.g. transforming the SC's binding resolutions into mere recommendations and opting for a greater decision-making power and enforcement by the GA.[575] The difficulty with this proposal is that, due to its size, the GA would undoubtedly be less efficient and, more importantly, the SC would lose its *raison d'être*.[576] Moreover, one would be hard-pressed to conceive that the world's most powerful states would support such a proposal. Since power entails responsibility,[577] the world's superpowers argue that if the GA membership has increased powers it must also shoulder the responsibilities of financing and otherwise supporting—i.e. militarily, technologically and otherwise—UN resolutions.[578]

Despite these calls for reforms, a new spirit of cooperation has prevailed in the SC in recent years. The power to veto has been used sparingly and permanent members have often opted to abstain from resolutions, thus enabling them to be carried.[579] In fact, it has now become common practice that, before the SC formally adjourns to vote on a given issue, a small group of its member states—the so-called mini-council, composed of three of the five permanent members, the US, UK and France—hold meetings *in camera* with other SC members, without keeping common minutes.[580] During these closed meetings, the SC members consult privately on a wide range of issues, including on the wording of the resolutions, in order to accommodate the veto power holders.[581] Once the secret

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[574] *See* Goodrich—U.N. S.C., *supra* note 300, p. 196. In the 1970s, Goodrich reports that "[t]he most striking trend in the practice of the UN since its establishment has been the increasing inability of the Security Council to serve the purposes for which it was intended and the growing preference of Members to make use of the General Assembly."

[575] *See Id.*

[576] *See* Boutros-Ghali, *supra* note 254, p. 37. Discussing the basic organizational principles inversely proportionally linking size and efficiency, Boutros-Ghali holds the common belief that the smaller the size of an organ the greater its efficiency.

[577] *See* Lord Owen, *The Limits of Enforcement*, 42 NETH. INT'L L. REV. 249, 251 (1995).

[578] *See* Goodrich—U.N. S.C., *supra* note 300, pp. 205-206, stating that "[i]t is also unlikely that the major powers would agree to the expansion of the powers of the Assembly, unless they have a share in the voting commensurate with the responsibility which they have to assume." Goodrich then suggests that a "prerequisite to such agreement would be solution of the complicated question of weighted voting in the General Assembly." *See also* Boutros-Ghali, *supra* note 254, p. 35, discussing the post Second World War San Francisco Conference for the creation of the UN during which the participants drew clearly an important link between states' power and responsibility thus recognizing the principle of inequality of states.

[579] *See* BENNETT, *supra* note 41, p. 85.

[580] Reisman—The Constitutional Crisis in the UN, *supra* note 463, pp. 85-86. *Cf.* Goodrich—U.N. S.C., *supra*, note 300, pp. 206-207, suggesting—in the 1970s—that important "formal changes for the immediate future of the Security Council would be the improvement of the Council proceedings by the use of informal techniques not requiring revision of voting or composition. Among such techniques, mention might be made of the following: an effective use of private, as against public, meetings of the Council". It appears that Mr. Goodrich had great foresight as his quarter century old suggestion has materialized in the 1990s.

[581] BENNETT, *supra* note 41, p. 85.

consultations and meetings result in a decision, the SC's fifteen members adjourn to their chamber for the formal voting procedure. These private deliberations are said to have ensured a more effective and powerful SC as its decisions "appear to go further than at any other time in the history of the United Nations".[582] Although this informal procedure has come at the cost of a less transparent decision-making process within the SC,[583] it is believed to have contributed to the restrained use of the power to veto in the nineteen eighties and nineties.[584]

(ii) The Role of Sovereign Equality and Democracy in the Newest Proposals for United Nations' Voting-Related Reforms

In recent years, and especially the years leading up to the UN's fiftieth anniversary in 1995, calls for the modernization and revitalization of this organization have become even more prominent. This time, however, these calls have been voiced—not only informally within international legal and academic communities but also—*formally*, within UN, by its member states who established a Working Group to consider voting-related reforms.[585]

With a shift in economic and political powers since the end of the Second World War, and with the UN's substantial increase in membership since the end of the Cold War, the latest calls for reforms in UN voting have been predominantly centered around the issue of (i) the size and (ii) the composition of the SC's permanent and non-permanent membership and (iii) its general voting procedure, including its power to veto[586]—i.e. amendments to Articles 23 and 27 of the UN Charter.

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[582] Reisman—The Constitutional Crisis in the UN, *supra* note 463, p. 86.

[583] *See also* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 238, characterizing these informal SC meetings as having a "closed shop atmosphere" and cautioning that "resorting to these too frequently is clearly unhealthy."

[584] *See generally* US DEPT. STATE—UN VOTING PRACTICES, *supra* note 420. For example, there were 59 resolutions adopted by the SC in 1996 and only 1 was vetoed. The defeated resolution concerned the appointment of the Secretary-General Boutros Boutros-Ghali for a second term. It was vetoed by the US.

[585] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 238.

[586] *See Report of the Progress of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council*, Off. Doc. GA., 49th session, Supp. n° 47, UN Doc. A/49/47 (1995) [hereinafter '*Report on Equitable Representation*']. *See also Council and Related Matters—Compendium of observations and assessment of the two Vice-Chairmen*, their discussion papers, as well as proposals and other documents presented to the Open-ended Working Group on the Question of Equitable Representation on the Increase in the Membership of the Security Council and Other Matters Related to the Security Council UN Doc. A/49/965. (1995), p. 6 [hereinafter '*Compendium of Observations*'].

In general, there has been strong support by the UN member states to increase the number of the non-permanent members in the SC. However, there has been powerful opposition to this proposal.[587] Interestingly, numerous states claim that a further increase in the SC's permanent membership "would run contrary to the principle of *sovereign equality* of all UN members, and would exacerbate the disparity already existing in the Security Council".[588] Not surprisingly, it is the least influential states—e.g. Nicaragua, United Arab Emirates, etc.—which claim adherence to the principle of SE and therefore oppose any expansion-based reform of the SC.[589] It appears that shattering the myth of SE remains a difficult task as certain states continue to be oblivious to over half a century of UN practice which has seen no functionally legitimate application of this principle.

The Working Group established in 1993 by the UN to examine voting-related reforms is *The Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Related Matters to the Security Council* [hereinafter *The Open-ended Working Group*]. The name given to this group suggests that *equity*—and not *equality*—is sought in the SC reforms. However, its first progress report contradicts this perception. In fact, in its first report *The Open-ended Working Group* reaffirmed the misstated principle of SE enshrined in the UN Charter and added other principles in which it sought guidance. Specifically, the report notes that:

> "It was recognized that the principles of *sovereign equality* of all Members of the United Nations, equitable geographic distribution and contribution to the maintenance of international peace and security, as well as to the other purposes of the Organization, should guide the work on reform of the Security Council. The concepts of transparency, *legitimacy*, effectiveness and efficiency should also be taken into account in this context as should, in the view of a large number of delegations the concept of *democracy*"[590](emphasis added).

Reaffirming the misstated principle of SE is clearly without purpose and only serves to perpetuate a myth—a myth which has no place in the world's foremost political organization for peace and security. As my analysis has shown, this principle is incompatible with functional legitimacy within the UN. Moreover, this preliminary report has erroneously added yet another unattainable principle—democracy—in the UN's

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[587] *See generally Compendium of Observations, supra* note 586.

[588] *Id.* at 6 (emphasis added).

[589] *Need for Fair Geographical Representation on Security Council Stressed as Assembly Concluded Phase of Reform Debate*—Press Release GA/9151 (Nov. 1, 1996).

[590] *Report on Equitable Representation, supra* note 586.

decision-making processes.[591] Indeed, as noted earlier, the principles of SE and democracy are mutually exclusive because, amongst other reasons, in decision-making the first necessitates unanimity while the latter requires majoritarianism. It was a mistake to found the UN on the misstated principle of SE. Upon this historic opportunity for UN reforms the same mistake should not be repeated nor should SE be replaced by yet another functionally illegitimate principle—i.e. democracy—in the context of international decision-making.

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[591] *See generally supra* Part II.B.4.c for a discussion on the principle of SE *vis-à-vis* democracy in IGOs. *See also* QUOC DINH ET AL., *supra* note 2, pp. 597-598, discussing the move for the democratization of restricted organs of international institutions.

B. THE INTERNATIONAL LABOUR ORGANIZATION (ILO)

> "To make of the *jus gentium* the *ars boni et aequi* in all that pertains to the freedom and dignity of the common man in industrial society: such is the high mission which the *corpus juris* of social justice seeks to fulfil."
>
> C. Wilfred Jenks[592]

1. GENESIS AND STRUCTURE

The Industrial Revolution (late 18th century and early 19th century) brought about profound economic and social changes.[593] At the end of the nineteenth century, several individuals, private associations and some European states sought to form an international alliance to combat the deplorable state of working conditions resulting from these socio-economic transformations.[594] The turn of the twentieth century witnessed two international conventions regulating labour-related issues being adopted in Berne.[595]

Shortly thereafter, as the First World War was being waged, it was evident that

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[592] C. Wilfred Jenks, *The Corpus Juris of Social Justice, in* C. WILFRED JENKS, LAW, FREEDOM AND WELFARE 101, 136 (1963) [hereinafter 'Jenks—*Corpus Juris* of Social Justice'].

[593] Peter A. Köhler, *ILO—International Labour Organization, in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 1, 714 (Rüdiger Wolfrum and Christiane Philipp eds, 1995) [hereinafter 'Köhler—ILO'].

[594] *See* NICOLAS VALTICOS, INTERNATIONAL LABOUR LAW 17-18 (1979). The individuals regarded as the precursors of international labour law regulation and who are credited with promoting this idea in the nineteenth century include Robert Owen in the United Kingdom, J.A. Blanqui, Villermé and David LeGrand in France and Ducpétiaux in Belgium. A number of proposals had been tabled by the French, German and Swiss Governments and the first labour related Conferences, which were held in Germany at the turn the century, culminated in the adoption of two International Labour Conventions; Peter A. Köhler, *Social Standards, in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 2, 1187 (Rüdiger Wolfrum and Christiane Philipp eds, 1995), [hereinafter 'Köhler—Social Standards'], discussing the first inter-cantonal labour legislative initiatives taken in Switzerland in the late eighteen hundreds; ARCHER, *supra* note 13, p. 14, identifying the private entity known as the 'International Association of the Legal Protection of Labour' (founded in Bassel, in 1919) as a forerunner to the establishment of the ILO.

[595] *See* Köhler—Social Standards, *supra* note 594, p. 1188; Köhler—ILO, *supra* note 593, pp. 714-715. Adopted in 1906, the Conventions came into force in 1912. One convention restricted night work for women in industrial businesses and the other prohibited the use of white phosphorus in the manufacturing of matches.

economic hardship and deprivation produced social unrest and political instability, factors which imperiled universal peace and stability.[596] The international community had an increasingly heightened awareness and recognition of the importance of social justice and the need for international labour regulation.[597] In the War's aftermath, the participants of the Paris Peace Conference sought to create an organization whose function would be to promote human rights by improving working and living standards world-wide. Marking the end of W.W.I, in 1919, the Treaty of Versailles gave birth to two IGOs: the **League of Nations** (League) and the **International Labour Organization** (ILO),[598] the latter being a constituent part of the former.[599]

The only surviving institution of this peace treaty today is the ILO, whose objectives were initially affirmed through the adoption of the 1919 ILO Constitution.[600] According to this constituent act, the ILO seeks to create employment and dignified working conditions world-wide and to promote human rights by eradicating social injustice.[601] In this respect, it has a quasi-legislative role because it seeks to establish, improve and harmonize international labour standards.[602] Indeed, the ILO has been amongst the first organizations to attempt to codify international law.[603]

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[596] *See* Köhler—ILO, *supra* note 593, pp. 714-715; Werner Meng, *Article 57, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 796, 806 (Bruno Simma et al. eds, 1994) [hereinafter 'Meng—Article 57'].

[597] *See* Thomas Weiss and Jean Siotis, *Functionalism and International Secretariats: Ideology and Rhetoric in the UN Family, in* FUNCTIONALISM: THEORY AND PRACTICE IN INTERNATIONAL RELATIONS 173, 178 (A.J.R. Groom and Paul Taylor eds, 1975).

[598] *See* VALTICOS, *supra* note 594, p. 18.

[599] *See* Meng—Article 57, *supra* note 596, p. 802. *See also* p. 803. Initially, these two IGOs were so closely linked that membership to the League meant simultaneous membership to the ILO. In later years, however, the ILO admitted states which had not been members of the League.

[600] The first ILO Constitution was adopted as Part XIII of the Treaty of Versailles.

[601] *See Constitution of the International Labour Organization*, Geneva, ILO (1963) Preamble, [hereinafter ILO CONSTITUTION]. The preamble states:

> "Whereas universal and lasting peace can be established only if it is based upon social justice;
>
> And whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; ...
>
> Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve conditions in their own countries;
>
> The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organization: ..."

[602] *See* QUOC DINH ET AL., *supra* note 2, p. 654; Nicolas Valticos, *Les conventions de l'Organisation Internationale du Travail à la croisée des anniversaires*, R.G.D.I.P. 8 (1996) [hereinafter 'Valticos—Conventions de l'OIT']; Meng—Article 57 *supra* note 596, p. 806. *See also* PLANO & OLTON, *supra* note 29, p. 361.

[603] *See* QUOC DINH ET AL., *supra* note 2, p. 72.

In order to accomplish its mission the ILO utilizes its three constituent organs: 1) the **General Conference** (also known as the International Labour Conference); 2) the **Governing Body** and; 3) the **International Labour Office.**[604] As the General Conference and the Governing Body are its two principal decision-making organs they will be the focus of the present chapter.

a) Constitutional Foundations: Equality and Democracy but *not* Sovereign Equality

During the ILO's first quarter century existence social issues had evolved into complex multi-dimensional problems.[605] In 1944, the ILO's goals were reaffirmed and broadened by the *Declaration of Philadelphia* which became an integral part of its constitution.[606] This constituent instrument provided that:

> "I. The Conference reaffirms the fundamental principles on which the *Organization is based* and, in particular, that—
> [...]
> (d) the war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying *equal status* with those of governments, join with them in free discussion and *democratic decision* with a view to the promotion of the common welfare." (emphasis added).

Henceforth, the ILO's constitutional *foundations* included *equality* and *democracy*. This was a significant addition to its 1919 Constitution which had been mute on the application of these two principles *within* the ILO. In fact, the only reference to equality in the ILO's original Constitution concerned its application *by* the organization—i.e. it recognized "the principle of equal remuneration for work of equal value".[607]

The importance of the values of equality and democracy as the *basis* of the ILO is

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[604] ILO CONSTITUTION art. 2; Köhler—ILO, *supra* note 593, p. 717.

Headquartered in Geneva, and having forty field offices, the International Labour Office is the ILO's permanent secretariat. The Governing Body, appoints a Director-General who has the duty of administering the efficient conduct of the International Labour Office.

[605] *See* VALTICOS, *supra* note 594, pp. 41-42; QUOC DINH ET AL., *supra* note 2, p. 72, discussing the human hardship resulting from the 1929 economic crisis and the Second World War.

[606] *Declaration Concerning the Aims and Purposes of the International Labour Organization*, Philadelphia, ILO, (May 10, 1944) [hereinafter '*Declaration of Philadelphia*']; *See* VALTICOS, *supra* note 594, p. 41.

[607] ILO CONSTITUTION preamble.

reflected in its unique composition and in its distinctive voting processes respectively. I will discuss these ILO attributes in sections two and three, and therefore, I will not delve into them here. Suffice it to say that, the ILO embodies a mixed membership composition—i.e. both private (workers and employers) and public (government) entities. However, despite its NGO components the ILO is nonetheless widely regarded as an IGO.[608]

It is noteworthy to consider that the principle of SE escaped explicit reference in both the original ILO Constitution as well as its supplemental version. SE's absence is less remarkable in the ILO's original—post W.W.I—constituent instrument than it is in its later—W.W.II—constituent act. After all, in 1919, the League, co-created with the ILO, also omitted reference to the principle of SE. On the other hand, the 1944 *Declaration of Philadelphia* was being enacted virtually at the same time as the UN Charter which enshrined SE as one of the UN's founding principles. In this respect, it is remarkable that the ILO's supplemental constituent instrument continued to neglect direct reference to the principle of SE.

b) Legal Status as a United Nations' Specialized Agency

Following its demise at the end of the Second World War (1945), the League was replaced by the UN. Although originally associated with the League,[609] the ILO continued its existence in a new association with the UN. This association was made possible by the newly established UN Charter as well as the renewed ILO Constitution.[610] Recognizing the value of international cooperation in the increasing globalization of exchanges, the UN sought to promote economic and social co-operation between the UN and other organizations. In order to advance international peace and protect human rights,[611] on December 14, 1946, the ILO entered into a co-operative agreement with the *Economic and Social Council* (ECOSOC) and became the UN's first Specialized Agency.[612]

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[608] *See* ARCHER, *supra* note 13, p. 43. *See generally* BOWETT, *supra* note 41; BENNETT, *supra* note 41; QUOC DINH ET AL., *supra* note 2.

[609] *See* OPPENHEIM, *supra* note 295, p. 718; Ignaz Seidl-Hohenveldern, *Specialized Agencies*, *in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 2, 1202 (Rüdiger Wolfrum and Christiane Philipp eds, 1995) [hereinafter 'Seidl-Hohenveldern—Specialized Agencies']; *See also* U.N. CHARTER arts 55-60, 63 setting out the terms and purposes of co-operation as a UN Specialized Agency.

[610] *See* U.N. CHARTER arts 55-60, 63; ILO CONSTITUTION art. 12.

[611] *See* VALTICOS, *supra* note 594, pp. 19-20; U.N. CHARTER art. 63.

[612] *See* U.N. CHARTER art. 57. Meng—Article 57, *supra* note 596, p. 800. For a list and discussion of UN Specialized Agencies *see also supra* note 445; Köhler—ILO, *supra* note 593, p. 714; Witold Zyss, *Article 17 Paragraphe 3*, *in* LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 377, 379 (Jean Pierre Cot and Alain Pellet eds, 1985); BUERGENTHAL & MAIER, *supra* note 5, p. 46.

It is important to note that co-operative arrangements with the UN can also take other forms than that of Specialized Agencies. They may be comprised of organizations created directly by the UN (e.g. *United Nations Development Programme* (UNDP), *United Nations Environment Programme* (UNEP)) or organizations which merely foster links with the UN via a special status (e.g. *World Trade Organization* (WTO), *International Atomic Energy Association* (IAEA)).[613] These forms of UN association are to be distinguished from UN Specialized Agencies given that their different structures and roles endow them distinct legal status, rights, obligations, etc.

In order for co-operation to be established in the form of a UN Specialized Agency it must take place by an "*intergovernmental* agreement".[614] Therefore, it must occur between the UN and IGOs, not a NGOs.[615] Despite this criterion, and notwithstanding its organs' mixed composition (public and private entities), which distinguish it from all other classic intergovernmental institutions,[616] ILO's classification as a global IGO has enabled it to establish a co-operative link as a UN Specialized Agency.[617]

While the ILO remains independent from the UN, with a distinct legal status,[618] it is nonetheless an integral part of the UN system.[619] As its Specialized Agency, the ILO is not only meant to forge close administrative and institutional links with the UN but also to co-ordinate its policies and activities with those of the UN.[620] It is not explicitly provided, however, whether the ILO is meant to observe the terms of the UN Charter.

Although UN-created institutions—i.e. UNDP, UNEP, etc.—necessarily comply and *de jure* adhere to the UN Charter, it is unclear whether this obligation applies to UN

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[613] *See* ALAIN GANDOLFI, INSTITUTIONS INTERNATIONALES 228 (1984); QUOC DINH ET AL., *supra* note 2, pp. 554-555.

[614] U.N. CHARTER art. 57 (emphasis added).

[615] *See* Meng—Article 57, *supra* note 596, p. 798. Professor Meng discusses the inability of the *World Tourism Organization* to be established as a UN Specialized Agency because its membership included NGO entities—i.e. private tourist organizations and enterprises as associate members. *See also*, p. 800, regional IGOs are also excluded from becoming UN Specialized Agencies.

[616] *See* QUOC DINH ET AL., *supra* note 2, pp. 612-613, 654.

[617] Meng—Article 57, *supra* note 596, p. 800.

[618] Werner Meng, *Article 63, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 851, 852 (Bruno Simma et al. eds, 1994) [hereinafter 'Meng—Article 63']; Seidl-Hohenveldern—Specialized Agencies, *supra* note 609, p. 1205.

[619] *See* Klaus Hüfner, *UN-System, in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 2, 1361, 1362 (Rüdiger Wolfrum and Christiane Philipp eds, 1995) [hereinafter 'Hüfner—U.N. System'].

[620] *See* U.N. CHARTER art. 58. *See also* Seidl-Hohenveldern—Specialized Agencies, *supra* note 609, p. 1204. ECOSOC's co-ordination efforts with UN Specialized Agencies have been relatively unsuccessful and have been targeted as part of the latest series of UN reforms.

Specialized Agencies which have their own distinct constituent acts. For instance, does its status as a UN Specialized Agency mean that the ILO adheres either *de jure* or *de facto* to the UN's founding principles? Or, can the ILO intimately co-operate with the UN yet not adhere to the latter's basic principles? The answer to these queries are inferred in the terms of the intergovernmental agreements between the UN and its Specialized Agencies.

As a rule, "[a]lmost all specialized agencies are contractually obliged to consider the recommendations of ECOSOC and the GA and, if possible, to follow them."[621] Accordingly, it is difficult to conceive of a UN Specialized Agency which does not conform to the basic principles of the UN Charter. Indeed, when an autonomous international institution cooperates with the UN it should normally signal that it is compatible with the UN's founding principles, otherwise, close cooperation and coordination of policies and activities as is provided by the UN Charter (Article 58) would not be possible. In this respect, the ILO's status as a Specialized Agency should mean that this organization necessarily accepts the UN's founding principle of SE as a guiding principle within its own operations.

Moreover, the principle of SE is not only enshrined in the UN Charter as part of this IGO's founding principles (Article 2(1) UN Charter) but it is also reiterated—albeit, in different language—with regard to ECOSOC's related stipulations.[622] Indeed, co-operation with the UN as a Specialized Agency is intended to take place with "respect for the principle of equal rights and self-determination of peoples" (Article 55 UN Charter). This provision is identical to the one foreseen as the UN's primary purposes and principles (Article 1(2) UN Charter). Indeed, it is argued that the UN Charter stipulations as to "equal rights of man and women and of nations large and small" (Preamble) are synonymous with the expressions of the "principle of equal rights and self-determination of peoples (Articles 1(2) and 55) as well as those of "sovereign equality" (Articles 2(1) and 78).[623] The question then arises as to whether *peoples'* equal rights are equivalent to *states'* equal rights. *Prima facie*, it would seem not as these concepts appear to have different meanings. Indeed, due to the disparity in the size of states' populations, in practice, equal rights between states necessarily means unequal rights between its people. However, according to Seidl-Hohenveldern (1995), UN Specialized Agencies seek co-operation:

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[621] *See* Meng—Article 63, *supra* note 618, p. 854.

[622] *See* Rüdiger Wolfrum, *Preamble, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 45, 47 (Bruno Simma et al. eds, 1994), [hereinafter 'Wolfrum—Preamble'], noting that "[a]s far as the equality of states is concerned, it must be borne in mind that apart from the Preamble, four other provisions of the Charter refer to this principle, although two different terms are used: 'equal rights of nations or people' (Preamble; Art. 1(2); 55) and 'sovereign equality of all its members' (Art. 2(1); 78)."

[623] *Id.*

> "expressly on the basis of equal rights and the self-determination of peoples. Even if all doubts as to who shall be entitled to the exercise of the right of self-determination are dismissed, the mention of this right in connection with the principle of equality underlines the rights of individual states to sovereignty, and even to 'sovereign equality' within the United Nations."[624]

In this respect, although the principle of SE is absent from the ILO's multiple constituent acts, as a UN Specialized Agency it has *de facto,* if not *de jure,* become one of its founding principles. Despite this UN Charter reference, the role of the principle of SE has remained relatively obscure within the ILO. Indeed, as will be shown in the following sections, this principle's absence is reflected at all levels of ILO's decision-making organs—i.e. from its composition to its voting schemes.

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[624] Seidl-Hohenveldern—Specialized Agencies, *supra* note 609, p. 1203.

2. THE INTERNATIONAL LABOUR ORGANIZATION'S UNIQUE COMPOSITION AND DECISION-MAKING PROCESSES

> "ILO is unique in being a tripartite organization, bringing two important sectors of civil society—trade unions and employers' federations—together with governments to address basic labour market issues. With the increasing openness of global markets and greater mobility, this organization will only grow in relevance."
>
> The Commission on Global Governance[625]

a) Dual, Tripartite and Quadruple Representation

(i) The General Conference

The General Conference is comprised of the ILO's entire membership, which currently stands at 173 states.[626] As the ILO's plenary body, it enacts and monitors international labour standards. More importantly, it serves as an annual forum for exchange and discussion on international labour and social issues between governmental and non-governmental delegates.[627] Within this dual composition, there are three constituencies—i.e. government, labour and business. Also within this tripartite structure, there is a four-member delegation from each member state and constituency—i.e. two government members, one labour member and one business member.[628]

Each government delegation at the General Conference is composed of two persons; the member state's cabinet minister responsible for labour issues and another similar high profiled government representative. As for the non-governmental delegates—labour and

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[625] COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 269.

[626] At its inception, in 1919, there were 42 member states which joined the ILO. Thereafter, ILO membership rose progressively until the Second World War when it began to decline with several member states withdrawals. *See* VALTICOS, *supra* note 594, pp. 27-28. Membership began to increase again following the decolonization of the nineteen sixties and again with the democratization of the former Eastern Bloc in the nineteen nineties.

[627] The General Conference is also responsible for adopting the ILO budget and electing the Governing Body's composition.

[628] ILO CONSTITUTION art. 3(1); QUOC DINH ET AL., *supra* note 2, pp. 612-613.

business—they are both appointed by the governments of their respective states so as to reflect the most representative professional workers' and employers' organizations of their country.[629] However, unlike other IGOs, the General Conference has a say in the admission of its members' delegates.[630] If it is deemed that a member of the delegation is not an adequate representative of its constituent group, the delegate can be refused admission to the General Conference.[631]

With membership in the ILO standing at 173 states, the General Conference has a total 692 delegates—346 government representatives, 173 representatives of labour associations and 173 representatives of business entities. This unique composition of the General Conference is attributed to the ILO's *raison d'être*. Since its inception, the ILO has had the mandate to establish international labour standards and policies and to promote various interests *within* its member states, as opposed to promoting strictly the interests *of* its member states. The hybrid features of the General Conference were considered to be the best way to achieve its goals. Participation by the largest number of players was thought to ensure an even playing field. Affording a voice to the key labour actors was also intended to inspire confidence amongst the participants and to ensure not only enforcement of the ILO decisions by the states' respective governments but also harmonious compliance by union and business associations.[632] The participation of government as well as employers and employees in this innovative structure is considered to have brought dynamism in the ILO.[633] In fact, it has been argued that this tripartite representation prevents ILO "decisions [from] being taken in a purely technocratic spirit and [...ensures] a democratic control of the activity of the Organization".[634] In this respect, this inclusive participatory process is believed to be more advanced at the international level than it is at the national level.[635] After all, for the most part, national labour-related legislation is enacted by the government in power without formal participation of labour unions or business organizations.

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[629] ILO CONSTITUTION art. 3(5); QUOC DINH ET AL., *supra* note 2, p. 612-613. *See* ANTOINE H. ZARB, LES INSTITUTIONS SPÉCIALISÉES DU SYSTÈME DES NATIONS UNIES ET LEURS MEMBRES 372 (1980). The author cites the "L'O.I.T. (1919-1950)" in *La Documentation française* of June 28, 1950, no 1346, p. 10, which noted the criteria for the appointment of non-governmental delegates in the ILO. *See also* VALTICOS, *supra* note 594, p. 30, discussing the problem of trade union pluralism and the government's responsibility in ensuring that its nominations of employers' and employees' delegates to the ILO General Conference be adequately representative of their respective constituencies. Complaints regarding the governments' selection of delegates may be filed with the Credentials Committed of the ILO General Conference.

[630] *See* VALTICOS, *supra* note 594, p. 35.

[631] *See* ILO CONSTITUTION art. 3, para. 9; VALTICOS, *supra* note 594, p. 35.

[632] *See* VALTICOS, *supra* note 594, p. 29.

[633] *See Id.*

[634] *Id.*

[635] *Id.*

ILO's institutional tripartism means that individuals, as opposed to states, have been given an active role in this organization.[636] Indeed for this tripartite structure to retain its intended meaning, each group of delegates, and indeed each delegate, to the General Conference must theoretically be independent from one another.[637] In fact, this individual delegate's freedom is constitutionally guaranteed in the ILO.[638] Thus, in principle, each delegate is autonomous from all other delegates within, as well as outside, its state's delegation.

Historically, the innovative composition of the General Conference formed interesting alliances between labour unions and business associations throughout the ILO's membership and, indeed, throughout the world. For instance, worker delegates from one state would converge with those of another state. Similarly, employer delegates from one state would unite with those of other states. And finally, the same form of alliance would be formed between government delegates. In fact, as will be discussed in section three, the special tripartite composition and their resulting cross-border alliances of the General Conference have had significant impact on its voting structure.

This unique tripartite composition has also been known to have been periodically less effective in states infamous for their lack of union freedoms whose delegates would or could not accurately represent trade union or employers' pluralism.[639] In fact, the independence of workers and business delegates has often been doubted throughout the ILO's existence as several of its member states have been periodically ruled by communist, fascist or otherwise authoritarian regimes.[640] The practice of such states in the appointments of workers' and employers' delegates to the General Conference did not always comply with the intended tripartite representational structure as their appointed delegates were not independent (as required by the ILO Constitution) but were rather an extension of their own government delegates.[641] By representing views identical to those of the government delegates they defeated the *raison d'être* of the tripartite representation.[642] In fact, the erosion of the tripartite representation was considered so problematic in the 1970s that the US officially claimed this as one of the reasons behind its withdrawal from the ILO in

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[636] QUOC DINH ET AL., *supra* note 2, p. 654.

[637] *Id.* at 612-613.

[638] ILO CONSTITUTION art. 4, para. 1.

[639] *See* VALTICOS, *supra* note 594, pp. 30-33.

[640] *See* QUOC DINH ET AL., *supra* note 2, pp. 172, 613.

[641] *See* VALTICOS, *supra* note 594, pp. 31-33; KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, pp. 260-261.

[642] *See* QUOC DINH ET AL., *supra* note 2, pp. 612-613.

1977.[643]

The composition of the ILO's General Conference like that of the UN GA, appears to comply with the principle of SE for it provides for universal membership. Of course, given its hybrid composition, the principle of SE takes on a different dimension in the General Conference. By allotting two seats to governmental delegates and two to non-governmental delegates within the General Conference, emphasis is not only on equality *between* member states but also on equality *within* member states. Although there is usually a difference in powers between governmental and non-governmental groups the influence of their delegates is presumably equal within the General Conference. However, concurrently, this is a somewhat imperfect equality because the government delegation is always numerically greater than the labour or business delegation (—i.e. ratio of 2:1:1).

(ii) The Governing Body

The Governing Body is an important executive player in the ILO.[644] It functions as an administrator of the General Conference by supervising ILO's operations and, specifically, by initiating international labour conventions.[645] Contrary to the General Conference, it is not a universal organ. Rather, it resembles the UN's SC in so far as membership to it is restricted. It is currently composed of 14 member states,[646] with four representatives (i.e. two government delegates, one labour delegate and one employer delegate) per state.

It is the General Conference's task to elect the Governing Body's limited number of member states. Recognizing inequalities in power within its membership,[647] ILO's founders decided to accommodate these inequalities by granting automatic representation in this executive body to the states of chief industrial importance.[648] Thus, the General Conference selects 10 of the 28 government seats on the Governing Body amongst industrial states and the remaining are selected from the balance of the ILO member

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[643] *See* KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, pp. 260-261. The US withdrawal from the ILO took effect in 1979. It was re-admitted in 1982. *See also* QUOC DINH ET AL., *supra* note 2, pp. 567, 613, holding the ILO's excessive politicization responsible for the 1977 American withdrawal from this Organization.

[644] BOWETT, *supra* note 13, p. 123.

[645] *See* VICTOR-YVES GHEBALI, THE INTERNATIONAL LABOUR ORGANIZATION: A CASE STUDY ON THE EVOLUTION OF UN SPECIALIZED AGENCIES 141 (1989); PLANO & OLTON, *supra* note 29, p. 362.

[646] ILO CONSTITUTION art. 7, para. 1.

[647] Zamora, *supra* note 33, p. 576.

[648] ILO CONSTITUTION art. 7.

states.[649] With this procedure the ILO's founders created a two-tier representation which—although similar to that which exists in the UN SC—differs substantially from the General Conference's universal, one tier, membership.

Within its restrictive membership composition, the Governing Body has a representation identical to that of the General Conference—i.e. dual, tripartite and quadruple. In other words, from a total of 56 seats, there are 28 government delegates, 14 labour delegates and 14 employer delegates.[650] In this sense, there is a balance between government and non-government delegates.[651] Of course, this type of equality is not extended *between* states but rather *within* states. Nonetheless, the Governing Body's unique composition has enabled the same remarkable alliances as those experienced within the General Conference—i.e. coalition amongst workers, employers and government delegates of different states respectively.

However, because an overwhelming number of states—i.e. 159 out of 173—are excluded from membership to the Governing Body, this executive organ's restrictive composition constitutes a clear breach of the principle of SE. The 14 states which participate in both the General Conference and the Governing Body evidently benefit from a more significant role than those which are excluded from the latter organ.[652] Moreover, the Governing Body's two-tier composition is a further violation of SE as certain states (i.e. 14/173) are *de jure* recognized to be more equal than others and industrial states are guaranteed 10 out of 28 government seats within this restrictive body.[653] Therefore, SE gives way to efficiency in this restrictive membership organ.[654]

The SE violations within the ILO Governing Body are similar to those found within the UN's SC discussed earlier, and to those which exist in most other IGOs' restrictive membership organs. There is however a significant difference between this breach of SE and that in the UN. The ILO's constituent instruments do not expressly provide for SE as one of this IGO's foundational principles. SE is referenced in the ILO strictly in its

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[649] *Id.;* ARCHER, *supra* note 13, p. 63; Meng—Article 57, *supra* note 596, p. 807.

See Annex IV for the current list of ILO's General Conference members. Between 1996-99 the important industrial countries—which appoint ten of the twenty-eight government delegates to the ILO Governing Body—are: the US, Russia, China, United Kingdom, Germany, France, India, Japan, Italy and Brazil.

[650] ILO CONSTITUTION art. 7, para. 1. *See also* QUOC DINH ET AL., *supra* note 2, pp. 597-598. Originally, the ILO's Governing Body was composed of a total of 24 seats of which 12 were filled by government delegates, 6 by business delegates and 6 by union representatives.

[651] QUOC DINH ET AL., *supra* note 2, pp. 172, 612-613.

[652] *Id.* at 595-596.

[653] ILO CONSTITUTION art. 7, paras 2 & 3.

[654] QUOC DINH ET AL., *supra* note 2, p. 595-596.

association with the UN as its Specialized Agency.[655] In this respect, it could be argued that the *de facto* non adherence to the principle of SE does not violate the ILO's constitutional foundations. But this claim would not change the reality that the ILO's decision-making processes do nonetheless breach the internationally-established *jus cogens* of SE.

b) Binding and Non-Binding Decisions

As the ILO's executive organ, the Governing Body is the locus of the organization's decision-making in administrative matters. The ILO Constitution provides that the Governing Body is responsible for establishing the General Conference's agenda (Article 10, para. (a)), directing the activities of the International Labour Office (Article 10, para. (b)), appointing the Director-General and other staff (Articles 8 and 9), as well as obtaining information and hearing complaints and petitions with regard to the non observance of an ILO convention (Articles 10, para. (c), 19, 24, 25, 26).[656] Its decisions are binding on its member states.[657] In this respect, the Governing Body is similar to the UN SC. There is, however, a significant difference between these two executive organs. In the UN, the SC's decisions are law-making instruments while, in the ILO, the Governing Body's decisions are merely internal procedural decisions of an administrative nature.

Because of their binding nature, and due to its restrictive composition, the Governing Body's decisions are theoretically rendered in violation of the principle of SE. However, due to the administrative nature of the Governing Body's decision-making, it can also be argued that the decisions can not be considered a serious violation of its member states right to SE.

Matters are different in the ILO's principal organ, the General Conference, which is responsible for adopting and revising international standards on labour-related issues such as: freedom of association, the right to organize, collective bargaining, abolition of forced labour, equality of opportunity and treatment, etc. This plenary body's decisions come in two forms: *Recommendations* or *Conventions*.[658] Both of these forms have a

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[655] *See* U.N. CHARTER art. 55.

[656] Köhler—ILO, *supra* note 593, p. 718.

[657] *See* Zamora, *supra* note 33, p. 576.

[658] *See* ILO CONSTITUTION art. 19; VALTICOS, *supra* note 594, p. 35. *See also* Valticos—Conventions de l'OIT, *supra* note 602, pp. 12, 59. Besides its Recommendations and Conventions, since the Second World War, the ILO also provides technical assistance to its member states in order to help them enact legislation and improve social conditions. There are also other informal instruments decided by the ILO

fundamentally different function and legal character and, thus, impact differently on the ILO membership.

Recommendations issued by the General Conference are considered standard-defining instruments,[659] adopted either when the subject matter is not deemed "ripe for the adoption of a Convention" or when there is a need "to supplement a Convention".[660] They hold no legal constraints and accordingly are not binding on the member states.[661] However, given that most of the world's states are members of the General Conference, the recommendations issued by this plenary organ carry moral authority and presumably inspire the ILO's members through "the creation of a common social consciousness extending beyond frontiers."[662] The recommendations do not require ratification by the members of the General Conference but are submitted to the government of each state in order to provide them guidance in the establishment of their respective labour-related national programs.[663] Member states are subsequently obligated to report to a committee on the action they have taken *vis-à-vis* a given recommendation.[664] The committee in turn reports its findings to the General Conference.[665]

The procedures are similar for ILO ***Conventions*** which play an important role in law-making.[666] However, even when adopted by the General Conference, conventions are not self-executing instruments. By definition, self-executing acts, once adopted, need no further internal measures by member states.[667] However, ILO conventions require ratification through the member states' domestic legislation in order to be considered legally binding instruments.[668] Otherwise, they merely carry a declaratory function which its member states, nonetheless, often try—but are not obligated—to comply with when

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which take the form of Resolutions. Resolutions are "used by the various supervisory bodies of the ILO as guidelines and terms of reference for the appraisal of national situations and the recommendations addressed to governments." The value of these Resolutions varies according to its conclusions.

[659] *See* Jenks—*Corpus Juris* of Social Justice, *supra* note 592, p. 102.

[660] VALTICOS, *supra* note 594, pp. 55-56. *See also* Köhler—Social Standards, *supra* note 594, p. 1188, referring to ILO Recommendations as the preparatory socio-political groundwork for the subsequent adoption of ILO Conventions.

[661] Meng—Article 57, *supra* note 596, p. 807. *See* QUOC DINH ET AL., *supra* note 2, pp. 681-682.

[662] Jenks—*Corpus Juris* of Social Justice, *supra* note 592, p. 109, quoting the 1946 Conference Delegation on Constitutional Questions findings on the value of ILO Recommendations. *See* VALTICOS, *supra* note 594, p. 26.

[663] *See* Jenks—*Corpus Juris* of Social Justice, *supra* note 592, p. 102. VALTICOS, *supra* note 594, p. 26.

[664] ILO CONSTITUTION art. 19, para. 6; Meng—Article 57, *supra* note 596, p. 807.

[665] Meng—Article 57, *supra* note 596, p. 807.

[666] COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 306.

[667] QUOC DINH ET AL., *supra* note 2, pp. 230-231.

[668] ILO CONSTITUTION art. 19, para. 5; QUOC DINH ET AL., *supra* note 2, pp. 230-231.

enacting their respective national legislation.[669]

Because national authorities retain the freedom to transform ILO conventions into domestic legislative measures, these decisions are obviously selectively binding and enforceable on states which have ratified them. This is unlike UN SC resolutions which, once adopted, may bind the UN's entire membership. Of course, this has a direct impact on the principle of SE. While in the UN the principle of SE is sacrificed—because the SC's decisions are imposed on all—in the ILO—because each state voluntarily exercises its free will to ratify or not a given convention—the principle of SE is technically preserved.

Interestingly, at the ILO's inception, a bold proposal was made which sought to render ILO conventions automatically legally binding unless otherwise stipulated. However, this proposal was deemed a threat to the SE of its members and was ultimately rejected.[670] After all, the competence to ratify treaties—which involves the enactment and supervision of national legislation—falls within the exclusive jurisdiction of states' national authorities. It was, therefore, agreed that ILO conventions would necessitate explicit ratification and subsequent national legislative implementation measures by their member states.[671] Accordingly, ratification of ILO conventions would be a voluntary process.

Naturally, this voluntary process—while in the spirit of the principle of SE—would have consequences on the ILO law-making authority. Specifically, the non-ratification and obviously non-implementation of ILO conventions would have curtailed the ILO's effectiveness and would have imperiled its functions. Therefore, a compromise was reached by which states undertook to submit ILO conventions to their national authorities for consideration within eighteen months of their adoption by the General Conference.[672] This obligation applies to all member states, regardless of whether they voted for or against a given convention.[673] Failing to ratify, the member state is obligated to issue a report to the General Conference detailing the state of its national legislation on the given labour-related

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[669] *See* Jenks—*Corpus Juris* of Social Justice, *supra* note 592, p. 102.

[670] Valticos—Conventions de l'OIT, *supra* note 602, p. 9.

[671] ILO CONSTITUTION art. 19, para. 5; QUOC DINH ET AL., *supra* note 2, p. 227.

Since its genesis there have been over 6,200 ratifications of ILO Conventions. Conventions related to fundamental human rights and equal pay were subject to the largest number of ratifications. Ratification requires that member states usually have or enact national legislation in their respective countries that is in conformity with the labour standards foreseen in the ILO Conventions. After ratification, a one year grace period is usually allowed for implementation. *See* Valticos—Conventions de l'OIT, *supra* note 602, pp. 14, 16.

[672] *See* ILO CONSTITUTION art. 19.5 b; Francis Maupain, *La Protection Internationale des Travailleurs et la Libéralisation du Commerce Mondial: Un lien ou un Frein?*, R.G.D.I.P. 45, 52 (1996).

[673] QUOC DINH ET AL., *supra* note 2, pp. 140, 173.

issue addressed in the ILO convention.[674]

Although ratification is voluntary, once ratified, ILO conventions are legally binding instruments on all states which have ratified them and these states must enact or revise their national laws so as to conform to the said conventions.[675] Of course, given that the representation at the General Conference is by senior government representatives, the conventions, if signed by the said officials, are also likely to be ratified by the government in office. The power of the states' national authorities is not threatened as it has the final say in ratifying ILO conventions. Indeed, it is only upon ratification that the states are responsible for taking measures in order to implement the ILO conventions. Theoretically, there is no violation to the principle of SE of the member states because consent is given via their respective ratification processes.

National implementation of ratified ILO conventions is pivotal to the success of this Organization. In fact, once a state ratifies an ILO convention the procedure becomes one of supervised execution whereby there is a system *de facto* challenging each member's sovereign status.[676] For instance, each member state is required to periodically report to the International Labour Office with regard to its implementation of ILO conventions and compliance with ILO standards. Failure to comply can result in official complaints being lodged against a member state. This, is turn, may result in the establishment of a *Commission of Inquiry* which would recommend measures to be taken by the member state and to be implemented within a three month period.[677] Failure to comply with the Commission's recommendations may subject the member state to the jurisdiction of the ICJ whose ruling is final, executory and must therefore be respected.[678]

Other than the ILO's internal procedural decisions rendered by the Governing Body which are binding on its members,[679] the binding and non-binding nature of the General Conference's decisions are an important reflection of the principle of SE. Because the General Conference's binding decisions—whatever the VMs and VPs employed to adopt them—require each member's express consent, the principle of SE is technically preserved.

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[674] Valticos—Conventions de l'OIT, *supra* note 602, p. 11; QUOC DINH ET AL., *supra* note 2, p. 376.

[675] Meng—Article 57, *supra* note 596, p. 807.

[676] *See* QUOC DINH ET AL., *supra* note 2, p. 224.

[677] ILO CONSTITUTION arts. 26-29.

[678] Meng—Article 57, *supra* note 596, p. 807; ILO CONSTITUTION arts. 31-34.

[679] *See* Zamora, *supra* note 33, p. 576.

c) Variation to the Equal Voting Rule: One State, Four Votes

Due to the unique representational structure of the General Conference and the Governing Body, both ILO organs provide a variation to the voting rule of 'one state, one vote' by entitling each member to 'one state, four votes'. Since each member state is granted an equal number of votes—irrespective of its size, population, contribution, military or economic strength, etc.—and each state is granted equal voting power, all delegates as well as all states are presumably on a level playing field. Thus, from this perspective, the principle of SE is theoretically preserved.

In principle, every one of those votes is exercised independently from one another since each delegate may vote freely from the other members of its national delegation.[680] Article 4 (1) of the ILO Constitution grants each General Conference delegate one vote to be exercised freely and individually on all issues under consideration.[681] For each member state at the General Conference there are two governmental representatives who can each can cast one vote, for a total of two votes for the governmental delegation. The third delegate to the General Conference is a trade union representative, acting on behalf of the employees of the member state. This is a non-governmental delegate, who also can cast—individually—one vote in the General Conference. Finally, the fourth delegate is a management representative, chosen to act on behalf of the employers of the member state who has one vote in the General Conference. The same voting structure applies within the restrictive composition of the Governing Body.

During the cold war, tripartism was non-effective in certain states' delegations. For instance in the former Soviet Union, employers, employees and government delegates voted as a bloc. However, since the end of the cold war the ILO has evolved and its tripartite delegations now have the freedom to exercise their vote according to their will and thus the true and intended function of tripartism has been restored in this Organization.[682] Yet the changes in contemporary society make it uncertain that the traditional players in labour-related issues are entirely representative of today's complex reality as they are no longer the only decision-makers in this field, nor are they entirely adequate representatives

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[680] ILO CONSTITUTION art. 4; VALTICOS, *supra* note 594, p. 35; Meng—Article 57, *supra* note 596, p. 807; Köhler—ILO, *supra* note 593, p. 717.

[681] Meng—Article 57, *supra* note 596, p. 807.

[682] *See* Valticos—Conventions de l'OIT, *supra* note 602, p. 29.

of their respective constituent groups.[683] Next to this tripartite representation there are other regional and international institutions, a network of businesses as well as an unstructured sector which play a role in labour-related decision-making.[684] Despite this, tripartism is still regarded as an effective and balanced method of decision-making within the ILO.[685]

The rationale for the ILO's VM was to enable the non-governmental delegates to cast a truly independent vote, irrespective of their government's position on a given issue. In this respect, V-Y. Ghebali (1989) believes that the "the principal yardstick for assessing the independence of the non-governmental groups is their voting record in the ILO bodies and in particular in the [General] Conference".[686] It is noteworthy to consider however that, in order for this unique tripartite VM to be given full meaning and effect, the employee and employer delegations *must truly* be independent from their government's delegations.

As noted earlier, the independence of the three distinct groups has reputed alignments between employers of several member states as they have between employees of other member states. Crossing national boundaries in order to ally oneself with another member state's labour or business representative is a phenomenon unique to the ILO. Indeed, the VM of this tripartite structure is said to influence the characteristics and the content of the conventions and recommendations adopted by the General Conference.[687] However, there are two difficulties with this VM. The first stems from the hybrid and tripartite voting formula foreseen in the ILO Constitution. The second involves unique problems arising from the application of the VM in this General Conference.

First, although the novelty added by the representation of employers and employees directly affects the voting mechanism of this ILO organ, since there are two government representatives, thus two government votes within the General Conference, predominance of the member state's interest is numerically guaranteed. Both government delegates vote together while the same does not obviously hold true for the non-governmental delegates—labour and business. Hence, although there is numerical equality between member states there is also numerical *in*equality within states.

Second, historically, socialist member states posed a problem to this tripartite representation. For instance, when the socialist countries were sending two governmental

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[683] *See Id.* at 35.
[684] *See Id.*
[685] *See Id.* at 36.
[686] GHEBALI, *supra* note 645, p. 139.

delegates and two non-governmental delegates to the General Conference, the other member countries considered all four socialist delegates as government representatives.[688] Thus, the non-governmental vote, presumably independent, could not be freely expressed by non-government delegates since all delegates were employees of the socialist state. Of course, the end of the cold war undoubtedly brought about changes in the voting behaviour of the ILO's governmental and non-governmental delegations. National partisanship is no longer the norm for former socialist states. Although change in the voting behaviour does not necessarily come quickly, tripartism will inevitably take on its intended meaning within the ILO, and will no longer be applicable only for democratic member states but, rather, for all member states.

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[687] *See* VALTICOS, *supra* note 594, p. 29.

[688] *See* LOUIS FRANÇOIS, LES INSTITUTIONS INTERNATIONALES: LA COOPÉRATION INTERNATIONALE ET SON ORGANISATION 133 (1975).

3. *Majoritarianism Without Reservations in the International Labour Organization's Treaty-Making*

a) Voting by Majority

As noted earlier, majoritarianism was an innovation at the turn of the twentieth century and the ILO was part of this innovative change. Indeed, although the ILO was born during the same period as the League—which established unanimity as the voting rule—the ILO Constitution requires majority for virtually all of its decision-making, both in the General Conference and in the Governing Body.[689]

(i) The General Conference

The ILO Constitution stipulates that "[e]xcept as otherwise expressly provided ... *all* matters shall be decided by a ***simple majority*** of the votes cast by the delegates present."[690] Therefore, for decisions to be adopted by the General Conference, the *general* voting rule is 50% + 1 of all the votes cast by the delegates *attending and voting*.[691] This voting rule applies to the total number of governmental and non-governmental representatives—i.e. 692 delegates—and not to the total number of states—i.e. 173 delegations. Moreover, there is no quorum for attendance during the General Conference's decision-making process. Instead, this simple majority rule is required to be exercised by at least half of the delegates present at this plenary body.[692] For instance, if only 600 delegates are present at the General Conference, from a total of 692, at least 300 would have to cast their ballot and 151 would have to vote favourably in order for the decision to be carried.

As for other decisions, the ILO Constitution provides for voting by ***two-thirds majority***. Once again, this voting rule does not apply to the total number of *delegations*

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[689] *See* VALTICOS, *supra* note 594, p. 44; Zamora, *supra* note 33, pp. 575-576.

[690] ILO CONSTITUTION art. 17, para. 2 (emphasis added).

[691] QUOC DINH ET AL., *supra* note 2, p. 172.

[692] ILO CONSTITUTION art. 17, para 3.

but to the total number of *delegates*—i.e. applicable to 692 delegates and not to 173 member states. As with the simple majority voting rule, the two-thirds voting rule refers strictly to the total number of delegates *present and voting* in the General Conference. For example, if 600 out a total of 692 are present at the General Conference, at least 300 would have to vote of which 200 would have to vote favourably for the decision to be adopted.

The voting requirement of two-thirds majority applies in the General Conference on issues relating to delegate admission (Articles 3 (9)), changes in the seat of the International Labour Office (Article 6), budgets (Article 13 (2)), the enablement of member states with arrears to vote (Article 13 (4), determining the exclusion or inclusion of items on the General Conference's agenda (Article 16 (2) and (3)) and making constitutional amendments (Article 36).

A slight variation to the two-thirds majority voting rule is foreseen in cases of membership admission or re-admission to the ILO which may be qualified as a ***double majority***. The ILO Constitution (Article 1 (4) (6)) provides that the requirement of two-thirds majority be applicable not only to the delegates attending the General Conference but must also include the affirmative votes of two-thirds of the government delegates present and voting.[693] For instance, in order to admit a new member state in the ILO, if 600 of 692 are present, a favourable vote by at least 400 out of 600 delegates (2/3 majority) would be required, and at least 267 of the 400 delegates (2/3 majority) voting favourably have to be government delegates.

Moreover—unlike the voting procedure of the UN's GA and SC, where classification of a particular issue determines the voting rule that must be applied—in the ILO the classification of an issue does not effect the voting rule. Therefore, whether the proposal is classified as a convention or a recommendation the voting rule for its adoption will be two-thirds majority in either category.[694]

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[693] ILO CONSTITUTION art. 1, paras. 4, 6; VALTICOS, *supra* note 594, p. 28.

[694] ILO CONSTITUTION art. 19, para 2.

The classification of a proposal adopted as a Convention or a Recommendation is nevertheless significant for a different reason. It is important in so far as the outcome will bind or guide the member states. As previously noted, should the General Conference determine the proposal to be adopted as a Convention, the members ratifying it will be bound to respect it. On the other hand, if the proposal is classified as a Recommendation it will merely serve as a guideline to the ILO's members.

(ii) The Governing Body

The *Standing Orders of the Governing Body* regulate the voting rules and mechanisms for the ILO's executive organ.[695] Unlike the General Conference's VMs, those of the Governing Body do not provide for simple majority or two-thirds majority in its decision-making process. Instead, its rules require that its decisions be adopted by ***special majorities***—i.e. 3/5 majority—[696] or even, at times, by ***unanimity.***[697] A 3/5 majority is required in urgent or special cases and unanimity is sought when there is a motion to place an item on the General Conference's agenda.[698]

Unlike the General Conference—where there is no attendance quorum requirement but merely a 50% +1 required voting in favour of all those attending—the Governing Body has a quorum requirement for attendance. In order for a decision to be adopted, the *Standing Orders of the Governing Body* (Article 19) requires at least 59% of its delegates—i.e. 33/56—to be present during a vote.

As previously noted, because the will of some states may be disregarded in the outcome of the IGO's decision-making process, majoritarianism, albeit democratic, represents a *de facto* violation of the principle of SE. However, in the particular context of the ILO's decision-making, majoritarianism constitutes a further violation of the principle of SE. This further breach results from the fact that the ILO's majoritarianism process applies to the total number of delegates and not merely to the total number of governmental delegates.[699] Indeed, its decision-making rests not only in the hands of national governments, as is usually the case, but resides also with the control of union and business people. Hence, when a given issue presents common socio-professional interests between employers and workers, these delegates can easily defeat the will of the majority government delegates.[700] For example, out of 692 total delegates at the General Conference, if 600 are present and vote, (of which 346 are employee and employer delegates and the remaining 254 are government delegates), a decision requiring simple majority (Article 17 (2) ILO

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[695] *See Standing Orders of the Governing Body*, Geneva, ILO (1920 last amend. Nov. 1993).

[696] *Id.* art. 10, para 5. "In cases of special urgency or where other special circumstances exist, the Governing Body may, by a majority of three-fifths of the votes cast, decide to refer a question to the Conference with a view of a single discussion."

[697] *Id.* art. 10, para 1. "When a proposal to place an item on the agenda of the Conference is discussed for the first time by the Governing Body, the Governing Body cannot, without the unanimous consent of the members present take a decision until the following session." *See* EBERE OSIEKE, CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOUR ORGANISATION 115 (1985).

[698] *Standing Orders of the Governing Body* art. 10, paras 1 and 5.

[699] ILO CONSTITUTION art. 1, paras. 4, 6; VALTICOS, *supra* note 594, p. 28.

[700] QUOC DINH ET AL., *supra* note 2, p. 172.

Constitution) can be adopted solely by the employee and employer delegates and against the will of government delegates.

b) Majoritarianism via Reservations: Voting Discrepancies in Treaty-Making

Whether under the auspices of IGOs or simply in the framework of an *ad hoc* multilateral conference, a proliferating number of international law-making instruments have been adopted by majoritarian voting processes, which have proven more versatile than the older stringent requirement of unanimity voting. More importantly, however, the evolution from unanimity to majoritarianism has given rise to the practice of *reservations*.

Unlike majoritarianism which, as discussed earlier, goes against the principle of SE, the ability to voice reservations has directly the opposite effect. Indeed, as I will discuss hereinafter, the opportunity given to states to formulate reservations is not only in observance of the principle of SE but has also been a determining factor in the burgeoning number of international treaties, conventions, etc.

In international law, reservations are a means for states to opt out of certain decisions which would otherwise be binding. They enable a large number of states to be party to international law instruments without giving up their position on a given issue. In doing so, states are able to adhere only to parts of the decisions to which they consent, while expressly withholding their consent on parts to which they do not wish to be bound. In this sense, they preserve their SE.

(i) The Vienna Convention on the Law of Treaties

The procedure for the formulation, acceptance, objection, legal effect and withdrawal of reservations is foreseen in the *Vienna Convention on the Law of Treaties*.[701] Providing some of the conditions under which reservations may be formulated, article 19 of this Convention foresees that:

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[701] *See Vienna Convention on the Law of Treaties* arts 19-23.

> "A State may, when signing, ratifying, accepting approving or acceding to a treaty, formulate a reservation unless:
> (a) the reservation is prohibited by the treaty;
> (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
> (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Since 1980, when it came into force,[702] the *Vienna Convention on the Law of Treaties* has been instrumental in the adoption of many international agreements. However, the right given to states to opt out of certain treaties has had both positive and negative consequences in international law. The choice for international decision-making via reservations often comes down to weighing the positive against the negative.

On the positive side, the right to claim reservations has ensured a wider application and audience for many decisions under consideration in international fora. In fact, majoritarianism via reservations has enabled states holding minority positions to adhere to numerous conventions, treaties, agreements and other such instruments, without abandoning their stances[703] and, thus, technically, without sacrificing the principle of SE.[704]

On the negative side, however, international instruments are often watered-down through reservations. For instance, when adopting a treaty, this opting out process may result in an important limitation to its effectiveness which could ultimately diminish its

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[702] *Treaties and Customary Law*, *in* INTERNATIONAL LAW: SELECTED DOCUMENTS 51 (Barry E. Carter & Phillip R. Trimble eds, 1991).

[703] Zemanek, *supra* note 64, p. 861.

[704] *Cf. e.g.* Dana Priest and Charles Truehart, *U.S. Makes One Last Pitch On Mine Treaty: Attempt to Alter Terms Likely to Be Rejected*, WASHINGTON POST, Sept. 16, 1997, at A14; David E. Sanger, *U.S., In Shift, Says it May Sign Treaty To Ban Land Mines*, N.Y. TIMES, Sept. 15, 1997, at A1; Charles Krauthammer, *In Defense Of Land Mines*, WASHINGTON POST, Sept. 12, 1997, at A25; Gilles Toupin, *Washington rejette le traité d'Oslo*, LA PRESSE, Sept. 18, 1997, at A1; Mike Trickey, *Mine pact okayed; U.S. opts out*, THE GAZETTE, Sept. 18, 1997, at A1; Paul Knox, *Mine pact Canada's triumph: With 89 nations backing accord, even Axworthy's staff could not predict speed of events*, GLOBE & MAIL, Sept. 18, 1997, at A1; Norma Greenaway, *Land-mine ban signed*, THE GAZETTE, Dec. 4, 1997, at A1. The August 1997 Oslo Conference on the *International Ban on Anti-Personnel Land Mines*, sought to reach agreement on a treaty which would completely ban the production, storage, use or sale of land mines and called for all states party to the treaty to destroy their current stockpiles. However, the US did not support the efforts for a treaty that would include a ban in—what it considered a sensitive area of the world—Korea. It thus sought exclusions from the ban. Given the importance of the US as a military power, it was a widely held view that its absence from this world anti-land mine forum would seriously impair the significance of the prospective ban. In fact, some speculated that without US participation the ban would be more difficult to enforce and, indeed, would render the world-wide ban less effective. Although an exclusion to the land-mine treaty would have limited the scope of the ban, a decision-making process of majoritarianism via reservations would have nonetheless enabled the participation of the US because it would not have compromised its position on Korea and, accordingly, it would not have conceded its SE. Ultimately, because the proposed reservations were deemed unacceptable to the conference participants, the US government did not to sign the Anti Land-Mine Treaty.

value. Moreover, in *ad hoc* international conferences, if reservations are not expressly authorized by the treaty,[705] the consent of all conference participants is required.[706] Thus, because each state has SE, it not only has the freedom to sign on to a treaty on its own terms, or not at all, but it also has the right to prevent the treaty from being watered-down by disallowing reservations.[707] In this sense, the requirement for acceptance of reservations is considered to bestow a power to veto on each state participating in the treaty-making process.[708]

(ii) The Inability to Include Reservations in the International Labour Organization's Conventions

Conventions and treaties are similar, if not identical, international law-making instruments in that they both require domestic legislation in order to be implemented. Many of these multilateral legislative instruments are sponsored by IGOs even though they rarely conform to the given IGO's voting structure. In fact, there are a number of discrepancies between law-making *within* IGOs and law-making *by* IGOs. One of the most notable differences is that majoritarianism via reservations finds application only in multilateral instruments originating from *ad hoc* conferences—usually sponsored by IGOs. They do

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[705] *See Vienna Convention on the Law of Treaties* art. 20, par. 1.

[706] *See Id.* art. 9 providing for the voting rules for the adoption of a treaty it foresees that:

> "1. The adoption of the text of a treaty takes place by the *consent of all* the States participating in its drawing up except as provided in paragraph 2.
> 2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule." (emphasis added).

[707] *Cf. e.g.* Paul Koring, *Behind the scenes of Canada's quiet land-mine diplomacy—In trying to get the United States to accept a ban, Canadian officials spent months nudging it toward a treaty, only to have it pull back*, GLOBE & MAIL, Sept. 19, 1997, at A8. Discussing the last minute negotiations with American officials for reaching agreement on the 1997 Anti Land Mine Treaty, Canadian Foreign Minister, Lloyd Axworthy, was quoted commenting that Canada "was not prepared to pay any price" in order to bring the US on board the international treaty banning anti-personnel mines. In fact, because a world-wide ban on land mines was a popularly held view, the US attempted to adhere to the treaty by proposing certain exclusions. (They included: (1) an exception to anti-personnel mines around anti-tank mines; (2) the ability for a state to withdraw from the treaty if it was engaged in war and; (3) a nine year postponement of the entry into force of the treaty.) Despite the fact that the US had not yet ratified the *Vienna Convention on the Law of Treaties)*, these American reservations intended to water-down the treaty on land-mines and, indeed, were deemed to be contrary to its purpose—i.e. a *total world-wide* ban. Indeed, because (i) these reservations would have resulted in an important limitation to the effectiveness of the treaty and, (ii) reservations were not expressly authorized by the treaty, thus, the consent of all the participants was required. Since the Oslo Conference called for consensus, and there was no express or tacit acceptance to the American proposed exclusions, this particularly treaty was not watered-down. However, although the conference participants exercised their SE and prevented the weakening of the Anti-Land Mine Treaty, the price paid for its integrity is that—one of the largest employers of land-mines—the US is not a party to this treaty.

[708] *See* QUOC DINH ET AL., *supra* note 2, p. 182, discussing the effects of and objections to reservations.

not exist in IGOs' regular decision-making processes.

For instance, if a treaty is being adopted as a decision within the confines of an IGO, and not in an *ad hoc* conference, the tabling of reservations would not be possible. Indeed, a member state of the IGO would not even have the opportunity to propose opt-out clauses because—given that the a *priori* condition of its admission to the given IGO is the obligation to adhere to the IGO's constituent act—it has already committed itself to consent to and abide by the organization's binding decisions. Therefore, once the treaty has been voted on—and either rejected or adopted through the appropriate VMs and VPs in its entirety—member states would generally be obliged to abide by the outcome of the IGO's decision.

As with most IGOs, the ILO does not allow its members to make reservations on particular sections of its conventions. Conventions must be voted on, and ratified, in their entirety.[709] However, ILO member states' *inability* to opt out from ILO convention provisions differs from their *ability* to do so under the *Vienna Convention on the Law of Treaties* which—under certain conditions (articles 19-23)—enables states to formulate reservations. There are several explanations for this discrepancy.

First, unlike other IGOs whose decisions can be executed by the organization without the need for ratification or domestic legislative action by its member states, the ILO decisions are as least fragmented as possible. This means that they must be appropriately reinforced at the member states' domestic legislative level. The reason for this need is the fact that one of the ILO's purposes is to harmonize labour regulations by setting international standards. Enabling reservations and opt-out clauses in ILO conventions would impede harmonization and would expressly enable certain member states' labour standards to be inferior to others.[710] This would in turn bring into question the legitimacy of the entire convention.

Secondly, the very tripartite composition of the ILO is not conducive to the tabling of reservations in conventions[711] for it is unclear as to who would be making the reservation—i.e. would it be all four delegates of a member state or simply the government delegates without the employers or employees participation? Without the participation of government delegates it would, of course, be difficult, if not impossible, to have an ILO

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[709] Valticos—Conventions de l'OIT, *supra* note 602, p. 16. *See* Jenks—*Corpus Juris* of Social Justice, *supra* note 592, pp. 117-118.

[710] QUOC DINH ET AL., *supra* note 2, p. 179.

convention implemented by national legislation. At the same time, however, without the participation of the non-governmental delegates, reservations would not have the same symbolic effect. After all, it would reasonably be argued that since employees and employers delegates have an equal vote in adopting ILO conventions, they should also have an equal vote in proposing reservations.

A further point of difference between ILO conventions and other international-decision-making bodies is that ILO conventions are binding only on those member states which have ratified them. For instance, hypothetically, if a treaty is adopted by the UN SC, it could automatically be binding on all 185 UN member states. On the other hand, if this treaty is adopted as an ILO convention by the ILO's General Conference it would still require ratification by each member state's legislative body and would ultimately be binding only on those state's whose national authorities ratified it. Therefore, if this treaty is adopted as an ILO convention, a member state would nonetheless be entitled to opt out entirely and, thus, preserve its SE. Although opting out would limit the convention's universal application, it would not undermine the convention by fragmentation.

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[711] VALTICOS, *supra* note 594, p. 44.

DIAGRAM V — CHARTING DECISION-MAKING IN THE INTERNATIONAL LABOUR ORGANIZATION

	GENERAL CONFERENCE	GOVERNING BODY
MEMBERSHIP	Universal & Plenary: 173 States Total Delegates = 692 Government Delegates = 346 Labour Delegates = 173 Business Delegates = 173	Restricted: 14 States Total Delegates = 56 Government Delegates = 28 Including 10 States of Industrial Importance Labour Delegates = 14 Business Delegates = 14
DECISIONS	Recommendations: Non Binding Conventions: Binding Upon Ratification	Binding
VOTING RULE	One state, four votes	One state, four votes
VOTING MECHANISMS & PRACTICES		
— IMPORTANT ISSUES	2/3 majority -membership admission -membership re-admission -delegate admission -enable vote despite arrears -determining agenda -constitutional amendments	
— PROCEDURAL / OTHER ISSUES	Simple majority	-3/5 majority -unanimity -simple majority -consensus (VP)
— CLASSIFICATION OF ISSUES	2/3 majority	

4. *Functional Legitimacy of Sovereign Equality within the Decision-Making Processes of the International Labour Organization*

The factors used in this study to determine the level of SE's functionalism in the ILO's decision-making—(i) its voting rule; (ii) its membership composition; (iii) the value of its decisions and; (iv) its VMs—and the four criteria used to measure SE's legitimacy in the ILO's decision-making structure and processes—(i) determinacy; (ii) symbolic validation; (iii) coherence and; (iv) adherence—reveal that this principle is neither a functional nor a legitimate in the ILO. Based on the foregoing examination of the ILO's decision-making structures and processes, as well as on these factors and criteria, in the following sub-sections, I outline how the principle of SE is generally neither functional nor legitimate in this organization.

a) The Non-Functional Role of Sovereign Equality

For the most part, the ILO's decision-making characteristics indicate that SE is not a functional principle within this organization's structure and processes. Indeed, as outlined in Diagram IV, besides the ILO's equal voting rule which can be deemed to comply with the principle of SE (i.e. one state, four votes), SE is not functional in most other component parts of this Organization's decision-making.

The ILO's membership composition while universal in its Governing Conference, is restricted but to 14 states in its Governing Body. This restrictive body which excludes a substantial number of member states is in violation of the principle of SE. And even within this restrictive organ there is a further breach of SE as 10 of the 28 government seats are assigned to states of industrial importance.

Moreover, while the ILO recommendations are not legally binding, and the conventions adopted by the General Conference are binding only after ratification and, thus, respect the principle of SE, there is nonetheless an important restraint on the member states' will—i.e. on their SE—for they have an obligation to report or implement ILO decisions within the

fixed term. In addition, the Governing Body's decisions are of binding value and, therefore, are in breach of the principle of SE because, although they are mostly administrative in nature, they strip states of their choice to comply or not with these decisions.

Finally, the majoritarian voting process is yet another manifestation of the violation of the SE in the ILO's decision-making process. Because majority by definition means that decisions may be adopted (and, if they are of binding value, indeed, implemented) against the will of some states, the majority rule makes the will of some states (i.e. the majority) unequal to the will of other states (i.e. the minority).

b) Sovereign Equality's Lack of Legitimacy

Can it be said that the principle of SE is sufficiently ascertainable rule in the ILO? I have shown that SE is not an expressly defined notion in either of the ILO's constituent instruments. However, as a UN Specialized Agency, the ILO is associated to UN principles. This, however, includes, the principle of SE contained in the UN Charter (articles 1(2); 2(1), 55; 78) which is at the very least obscured, and at the most contradicted, by the definition of SE contained in the UN *Declaration on Friendly Relations* (*see supra* III.A.1). As such, the principle of SE does not meet the ***determinacy*** criterion for the Legitimacy theory.

Similar to the UN, the ILO's equal voting rule (i.e. one state, four votes) conforms to the symbolism of the principle of SE. Moreover, this principle finds some validation in the universal composition of its General Conference. However, no such validation is found in its restrictive membership composition of its Governing Body. As for the symbolism of SE *vis-à-vis* the value of its decisions, it is but partial. While the principle of SE is validated in the General Conference by the fact that the ILO decisions are either non-binding (i.e. recommendations) or they are only binding upon ratification (i.e. conventions), SE finds no symbolism in the Governing Body's decisions which—although of administrative and procedural nature—are binding. Finally, the majoritarian voting established in the ILO, while in conformity to democratic ideals, is in breach of the principle of SE. This breach is tempered only by the fact that, for the most part, its decisions are non-binding. As such, the Legitimacy criterion of ***symbolic validation*** finds little presence in the ILO.

As for the consistency in the use of the principle of SE in the ILO's decision-making processes it is non-existent. For instance, while SE is somewhat respected in the ILO's voting rule (one state, four votes) it is breached in its VMs (majoritarianism) and it is but partially respected in the membership composition of its organs (respected in the Governing Conference's universal composition while breached in the Governing Body's restrictive membership composition) and in the value of its decisions (i.e. respected in the Governing Conference non-binding nature and breached in the Governing Body's binding decisions). Accordingly, there is no ***coherence*** of the principle of SE within the ILO's decision-making processes.

Finally, while the principle of SE is not directly foreseen in the ILO's constituent acts, through its association with the UN, as one of its Specialized Agencies, this principle has an indirect connection to a normative hierarchy in the international community. As such, the principle of SE complies with the fourth criterion of the Legitimacy theory—***adherence***. However, given that only one of the four criteria is present in the ILO's decision-making structure, the principle of SE displays a low degree of legitimacy in this Organization (*see supra* II.A.2.b).

IV. DECISION-MAKING IN INTERNATIONAL FINANCIAL ORGANIZATIONS

> "The [...] centralization of decisionmaking for international economic affairs, [...is] perhaps, the most important indirect index of international interdependence."
>
> Edward L. Morse[712]

> "[I]nternational economic organizations present the most serious test of world government to date. Unlike recommendatory bodies, these organizations make decisions that often have immediate and direct effects in the world economy. And unlike those of the more narrow technical unions, the decisions of economic organizations may affect matters of important national policy. Thus, these organizations test nations' ability to limit their freedom of action in exchange for long-range economic advantages. Enlightened approaches to decisionmaking in these organizations, including safeguards for weaker states, will ensure the ultimate success of this experiment."
>
> Stephen Zamora[713]

In the next part of this study I analyze decision-making in two international financial organizations, namely the **International Monetary Fund** (IMF), and the **Multilateral Investment Guarantee Agency** (MIGA). I focus on the role which the principle of SE plays in their respective decision-making processes and establish how the status of this principle is more deficient in international financial organizations than it is in international political organizations.

Specifically, in Part IV.A I examine the IMF. First, I outline the genesis and structure of this post World War II institution (IV.A.1) and discuss its evolving mission (IV.A.1.a), as well as its membership and its institutional composition (IV.A.1.b). I then explore the IMF's constitutional foundations and framework (IV.A.2) by focusing on the impact of SE in its plenary and restrictive decision-making organs (IV.A.2.a) and discuss the implications of SE on the legal value of the IMF's decisions (IV.A.2.b). In the subsequent

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[712] Morse, *supra* note 230, p. 42.

[713] Zamora, *supra* note 33, p. 608.

section, I address the IMF's decision-making processes (IV.A.3) in relation to the weighted voting rule (IV.A.3.a), as well as the majoritarian VM and consensus VP it employs (IV.A.3.b). In the final section, I assess the level of SE's functional legitimacy in the IMF (IV.A.4) by reflecting on the breach of the doctrine in the IMF's decision-making structure (IV.A.4.a), and conclude by discussing decision-making related reforms (IV.A.4.b).

In Part IV.B I study one of the world's youngest international financial organizations, MIGA. First, I overview its genesis and structure (IV.B.1). Specifically, I examine its membership composition (IV.B.1.a) and the legal value of its decisions (IV.B.1.b). I then discuss its constitutional foundations and decision-making framework (IV.B.2), focusing on its majoritarian decision-making process (IV.B.2.a) and its use of the classic weighted voting rule of financial organizations (IV.B.2.b). In the third section, I discuss MIGA's *sui generis* voting parity (IV.B.3). I examine the roots of this innovation (IV.B.3.a), as well as the challenges it has presented (IV.B.3.b). Finally, I assess the impact of SE's in the Organization's decision-making structure (IV.B.4) and, more particularly, the lack of its functional legitimacy (IV.B.4.a) and the prospects for decision-making reforms (IV.B.4.b).

A. THE INTERNATIONAL MONETARY FUND (IMF)

> "[T]he decisions of the Fund are unlikely to outstrip the common or widespread sentiment among members, at least on issues of importance. The Fund is an entity which in international law is distinct from its members, and members have rights against it and obligations toward it. But this legal analysis does not mean that the Fund is likely to adopt decisions that are out of tune with the general opinion of its membership, or that it would be able to make its decisions effective if there were this disharmony."
>
> Joseph Gold[714]

1. GENESIS AND STRUCTURE

This century's inter-war period gave rise to a phenomenal international economic crisis.[715] In the aftermath of W.W.I, the international community was devastated by the Great Depression of the 1930s.[716] During that time, many states established trade and exchange restrictions and distorted competition in the world markets through currency devaluation.[717] This resulted in a substantial reduction of transnational capital movements and caused serious imbalances in economic development world-wide.[718] World War II compounded the already difficult international economic situation bringing even greater economic hardship and financially devastating many nations.

In the aftermath of these crises, the need to establish an international code of conduct to balance economic development and to have a stable international monetary system was

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[714] JOSEPH GOLD, VOTING AND DECISIONS IN THE INTERNATIONAL MONETARY FUND: AN ESSAY ON THE LAW AND PRACTICE OF THE FUND 213 (1972) [hereinafter 'GOLD—IMF VOTING AND DECISIONS'].

[715] Peter Rawert, *IMF—International Monetary Fund, in* UNITED NATIONS: LAW, POLICIES AND PRACTICE 724 (Rüdiger Wolfrum and Christiane Philipp eds, 1995). *See* PLANO & OLTON, *supra* note 29, p. 143.

[716] *See* DAVID DRISCOLL, WHAT IS THE INTERNATIONAL MONETARY FUND?, 1-3 (1988, revised July 1997) [hereinafter 'DRISCOLL—WHAT IS THE IMF"].

[717] Rawert, *supra* note 715, pp. 724-725; DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 2-3.

[718] *See* DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 3-4.

considered essential in order to avert further financial hardship in the future.[719] In response to this need, in 1944, a conference was held in Bretton Woods, New Hampshire, which resulted in the creation of, *inter alia*, the **International Monetary Fund** (IMF).[720]

a) The International Monetary Fund's Evolving Mission

The IMF was originally conceived as a *financial* IGO with a mandate to oversee the international monetary system.[721] It endeavored to fulfill this purpose principally in two ways. First, it sought to stabilize currencies by creating exchange rate rules to regulate, supervise and, thus, eliminate exchange rate manipulation which states often used to distort

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[719] *See* Herbert Morais, *The Bretton Woods Institutions: Coping with Crises*, 90th Annual Meeting of the American Society of International Law, 29 March, 1996, 90 AM. SOC. INT'L L. PROC. 433, 433-434 (1997); Rawert, *supra* note 715, p. 725.

[720] *See* Rawert, *supra* note 715, p. 725; BENNETT, *supra* note 41, p. 273; INTERNATIONAL MONETARY FUND, IMF CHRONOLOGY, OVER HALF A CENTURY OF CHALLENGE AND CHANGE: HIGHLIGHTS OF THE IMF'S EVOLUTION 1 [IMF Survey Supplement on the Fund] (Sept. 1997) [hereinafter 'HIGHLIGHTS OF THE IMF'S EVOLUTION']; BOWETT, *supra* note 13, p. 60; DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 4-5. The IMF came into existence one year later, (as the IMF Articles of Agreement came into force after ratification on December 27, 1945) and began its operations on March 1, 1947. *See generally* ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND, (as amended Nov. 11, 1992) [hereinafter 'IMF ARTICLES OF AGREEMENT'].

The "United Nations Monetary and Financial Conference", which was called at the initiative of American President Franklin Roosevelt, also gave birth to another financial IGO, the World Bank—otherwise known as the International Bank for Reconstruction and Development (IBRD) whose mandate is economic development. *See* ARTICLES OF AGREEMENT OF THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT (as amended Feb. 16, 1989) [hereinafter 'IBRD ARTICLES OF AGREEMENT']. Commonly referred to as the Bretton Woods institutions, the IMF and the World Bank, although legally independent from one another, have certain common links and characteristics—i.e. their organizational and decision-making organs and structures, as well as their constituent acts, have many similarities. *See* INTERNATIONAL MONETARY FUND, INTERNATIONAL FINANCIAL ORGANIZATION AND OPERATIONS OF THE IMF [Pamphlet series no. 45] (4th ed. 1995) [hereinafter, 'INTERNATIONAL FINANCIAL ORGANIZATION AND OPERATIONS OF THE IMF']; PLANO & OLTON, *supra* note 29, p. 135; BOWETT, *supra* note 13, p. 112. *See also generally* DAVID DRISCOLL, THE IMF AND THE WORLD BANK: HOW DO THEY DIFFER? (1989, revised 1996) [hereinafter 'DRISCOLL—THE IMF AND THE WORLD BANK'], for a comparison of the foundational similarities between the IMF and the IBRD.

[721] *See* Rawert, *supra* note 715, pp. 725, 727-728; COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 187; DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 10; IMF ARTICLES OF AGREEMENT art. I. "The purposes of the International Monetary Fund are:

> (i) To promote international monetary cooperation...
> (ii) To facilitate the expansion and balanced growth of international trade...
> (iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.
> (iv) To assist in the establishment of a multilateral system of payments in respect to current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.
> (v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with the opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.
> (vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

competition in the international markets through the devaluation of currencies.[722] Second, it aimed to help countries overcome balance of payment difficulties by setting up a monetary fund to provide financial assistance through short to medium-term credit facilities.[723]

Through the years, the IMF has both *de facto* and *de jure* revised and expanded its activities and functions. In the post-W.W.II era, the international monetary system was based on gold and US dollar reserves. As trade expanded rapidly in the 1950s and 1960s, many countries were faced with a short supply of gold and US dollar reserves from which they could draw in order to meet their balance of payment obligations.[724] Responding to this problem, in 1968 the IMF amended its constituent act and established an asset known as "Special Drawing Rights" (SDRs) to supplement existing reserve assets.[725] SDRs are artificial assets whose value is based on the average worth of the world's five major currencies which are issued to IMF member states to protect them against a long-range shortage of foreign reserves.[726] These assets are added to the member state's holdings of foreign currencies and gold and are meant to enable its members to meet their balance of

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The Fund shall be guided in all its policies and decisions by the purposes set forth in this Article."

[722] *See* Rawert, *supra* note 715, pp. 725, 727-728; IMF ARTICLES OF AGREEMENT art. I; William E. Holder, *The International Monetary Fund: A Legal Perspective*, (91st Annual Meeting of the American Society of International Law, April 11, 1997) 91 AM. SOC. INT'L L. PROC. 201 (1998); DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 4.

See also KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 296, noting that the premise of exchange rate stability is that "under normal circumstances the values of national currencies in relation to each other should remain constant (plus or minus a very small margin) in order to facilitate certainty in international trade and thereby to enhance international economic welfare."

[723] *See* Rawert, *supra* note 715, pp. 725, 727-728; IMF ARTICLES OF AGREEMENT art. I; DRISCOLL—THE IMF AND THE WORLD BANK, *supra* note 720, pp. 6, 9. *See also* DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 12, explaining that countries experience balance of payments problems when they "do not take in enough foreign currency to pay for what they buy from other countries."

Cf. KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 565, noting that the monetary fund is composed of member states subscriptions to the IMF, of which 75% are paid in countries' real currencies and the remaining 25% are paid in artificial assets, created by the IMF, which are known as the Special Drawing Rights (SDRs). Thus, "[a] member state in balance-of-payment difficulties may request that the Fund allow it to draw stronger currencies than its own, from the Fund's holdings of other members' currencies. When it does draw on the Fund, it actually buys other currencies in exchange for its own, with an obligation to repurchase its own currency in the future."

[724] *See* DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 14.

[725] *See* JOSEPH GOLD, THE RULE OF LAW IN THE INTERNATIONAL MONETARY FUND, [Pamphlet Series No. 32] 18 (1980) [hereinafter 'GOLD—THE RULE OF LAW IN THE IMF']; DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 14. The First Amendment to the IMF'S ARTICLES OF AGREEMENT became effective on July 28, 1969.

[726] *See By-Laws Rules and Regulations of the International Monetary Fund*, (52nd Issue Jan. 1997) Sec. Rule 0-1 [hereinafter '*IMF By-Laws, Rules and Regulations*']. As of January 1997, the valuation of the SDRs is represented by the sum of the values of the (1) U.S. dollar 0.582 (2) Deutsche mark 0.446 (3) Japanese yen 27.2 (4) French franc 0.813 and (5) Pound sterling 0.105. *See also* DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 14. Currently, there exist 21.4 billion SDRs which are valued at approximately US$ 29 billion. Driscoll explains the rationale behind this artificial asset, by noting that "[t]he supply of gold was limited by the difficulty of finding and raising it from the ground. New supplies of gold could not keep pace with the rapid expansion of the world economy. The supply of dollars to be kept by other nations depended on the willingness of the United States to spend and invest abroad more money than they took in."

payment difficulties or to replenish their depleted reserves.[727]

The 1971 US decision to cease buying and selling gold to pay for its international transactions brought about an unprecedented crisis in the IMF.[728] The post-Second World War system of fixed exchange rate currencies known as the par (or equal) value system began to collapse[729] as very few countries continued to fulfill their IMF obligation to maintain a par value for their currencies.[730] In order to restore some order in the international monetary system, in 1978 the Organization finally abrogated the par value system and expanded its activities through the second formal amendment of its constituent act.[731] This amendment gave the IMF the additional responsibility of supervising and advising its members on their respective economic policies with the aim of preventing or warning them of any exchange rate or balance of payment problems.[732] Furthermore, it freed member states' currencies to "float" according to the daily foreign exchange markets.[733]

The IMF continued to provide financial resources to members experiencing balance of payment difficulties by lending convertible currencies,[734] thus enabling member states afflicted with meager foreign exchange reserves to increase their reserves so as to meet their financial obligations.[735] In return for this assistance, the recipients undertook to reform their economic policies so as to redress their balance of payment problems.[736]

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[727] BOWETT, *supra* note 13, p. 112; *See* DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 14.

[728] JOSEPH GOLD, THE SECOND AMENDMENT OF THE FUND'S ARTICLES OF AGREEMENT 1 (1978) [hereinafter 'GOLD—THE SECOND AMENDMENT']; HIGHLIGHTS OF THE IMF'S EVOLUTION, *supra* note 720, p. 2.

[729] KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 297, noting that the "system cracked" when the US "announced that it would suspend the redemption of dollars with gold. This meant that the dollar, the central reserve asset held by most foreign countries, was no longer convertible into the only reserve asset considered more secure." *See also* DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 7-8, explaining that the par or equal value system was a method of calculating the exchange rate of money based on the value of gold as defined in terms of US$ which all IMF member states subscribed to upon joining the Organization.

[730] HIGHLIGHTS OF THE IMF'S EVOLUTION, *supra* note 720, p. 2; KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 297; GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, pp. 26-27.

[731] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 18.

[732] *See* DRISCOLL—THE IMF AND THE WORLD BANK, *supra* note 720, p. 9.

[733] KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 297. Kirgis also notes, however, that "[i]n practice, no country allows a completely free float of its currency; central banks still intervene to make sure that the float does not go too far up or down."

[734] *See* DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 1-2; *See* DRISCOLL—THE IMF AND THE WORLD BANK, *supra* note 720, p. 9.

[735] *See* DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 1-2.

[736] *See* DRISCOLL—THE IMF AND THE WORLD BANK, *supra* note 720, p. 9; DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 12.

The debt crisis of the 1980s forced the IMF to make substantial loans to many of its members so that they could service their debts and meet their financial obligations. In so doing, the Organization played the important role of "lender of last resort" for many developing countries.[737] It continued to play this role during the early 1990s in what was a very sensitive transition phase for countries shifting from a centrally planned to a market economy.[738] More recently it has pursued its lender role in several Asian countries which have experienced balance of payment difficulties.[739]

b) Membership and Institutional Composition

Headquartered in Washington, D.C., the IMF was established as a *universal* IGO.[740] Its membership is open to all states which fulfill the obligations contained in the IMF's constituent act.[741]

Since its creation, the IMF's membership has consistently increased. As with other universal IGOs, growth was particularly rapid during the decolonization period of the 1960s when several new Asian and African countries were admitted, and again in the 1990s when a number of newly independent states joined. From its 44 founding nation-states in 1944—today the IMF is composed of the quasi-totality of the world's nation-states as—its current membership stands at 182 states.[742]

The IMF is governed by three decision-making bodies: (1) the **Board of Governors**; (2) the **Executive Board** and; (3) the **Managing Director**.[743] The principal powers of

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[737] COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, pp. 186-187; DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 10.

[738] COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 181; DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 10, 16-18. In addition to the Eastern Bloc countries—i.e. Ukraine, Russia, etc.—in the mid-1990s, Mexico also benefited from IMF assistance during its financial crisis.

[739] *See generally The IMF in Action* (Review and Outlook), THE WALL STREET JOURNAL, May 19, 1998, at A22; Stephen Fidler, Edward Luce and Gillian Tett, *Banks request postponement of Indonesia debt talks*, FINANCIAL TIMES, May 19, 1998, at 8.

[740] *See* Rawert, *supra* note 715, p. 724.

[741] *See* IMF ARTICLES OF AGREEMENT art. II, Sec. 2; JOSEPH GOLD, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL LAW: AN INTRODUCTION 3-4 (1965) [hereinafter 'GOLD—IMF AND INTERNATIONAL LAW']; DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 4-5.

See also SCHERMERS & BLOKKER, *supra* note 1, p. 921; IBRD ARTICLES OF AGREEMENT art. 6, Sec. 3, noting the membership link between the IMF and the World Bank which enables membership to the former to obtain membership to the latter. As a result, a state which ceases to be a member of the IMF usually also loses its membership to the World Bank.

[742] For a list of the IMF's member states *see* Annex V.

[743] *See* IMF ARTICLES OF AGREEMENT art. XII, Sec. 1; Rawert, *supra* note 715, p. 726.

the IMF are vested in the Board of Governors.[744] However, this body delegates most of its decision-making powers to the Executive Board, which is responsible for executing the regular business operations of the IMF.[745] The Managing Director acts as Chairman of the Executive Board and thus oversees the IMF's ordinary business.[746] As the Board of Governors and the Executive Board are the IMF's principal decision-making bodies[747] they are, therefore, the focus of the current chapter.

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[744] IMF ARTICLES OF AGREEMENT art. XII, Sec. 2; BOWETT, *supra* note 13, p. 125; GOLD—IMF AND INTERNATIONAL LAW, *supra* note 741, p. 8.

[745] *See* IMF ARTICLES OF AGREEMENT art. XII, Sec. 2(b) & Sec. 3(a); *IMF By-Laws Rules and Regulations*, *supra* note 726, Sec. 15; Rawert, *supra* note 715, p. 726. The only powers which have not been delegated by the Board of Governors are those relating to (i) the admission of new member states, (ii) the determination of quotas and (iii) the allocation of Special Drawing Rights (SDRs).

[746] *See* IMF ARTICLES OF AGREEMENT art. XII, Sec. 4a; Rawert, *supra* note 715, p. 726.

[747] *See* IMF ARTICLES OF AGREEMENT art. XII, Sec. 2(g).

2. THE INTERNATIONAL MONETARY FUND'S CONSTITUTIONAL FOUNDATIONS AND FRAMEWORK

Although the IMF is an independent IGO,[748] with distinct legal status,[749] like the ILO, it has entered into agreement with the UN and has become its Specialized Agency.[750] Accordingly, the IMF has undertaken to abide by UN SC resolutions,[751] and by UN GA resolutions.[752] Indeed, in virtue of its status as a UN Specialized Agency, the IMF is thus subject to the terms of the UN Charter, including those relating to the principle of SE.[753] Thus, the IMF is subject to the principle of SE contained in the preamble, art. 1(2), art. 2(1), art. 55, and art 78 of the UN Charter.[754] As previously noted, all of these UN Charter provisions underline the importance of the principle of SE in the UN system, a system of which its Specialized Agencies are an integral part.[755] Accordingly, equality of its member states before the law has also been established as an IMF principle.[756]

It is said that the IMF's indirect but *de jure* foundation on the concept of SE theoretically consists of both formal equality and uniformity.[757] Of course, as Gold (1980) correctly stated "equality before the law does not connote equality in all conceivable respects" in this Organization.[758] In practice, the application of the principle of SE in the IMF's decision-making structure, as with other IGOs, is deficient. In the following subsections I discuss

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[748] *See Agreement Between the United Nations and the International Monetary Fund* (1947), art. 1, para. 2 *in fine*, [hereinafter '*UN and IMF Agreement*'], which provides that "[b]y reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is, and is required to function as, an independent international organization."

[749] *See* Seidl-Hohenveldern—Specialized Agencies, *supra* note 609, p. 1203.

[750] GOLD—IMF AND INTERNATIONAL LAW, *supra* note 741, p. 2; BOWETT, *supra* note 13, p. 66. *See* UN CHARTER arts. 57 & 63.

[751] *See UN and IMF Agreement*, *supra* note 748, art. VI, para. 1 provides:

> "1. The Fund takes note of the obligation assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have due regard for decisions of the Security Council under Article 41 and 42 of the United Nations Charter."

[752] *See* Meng—Article 63, *supra* note 618, p. 854.

[753] *See supra* Part. III.B.1.b for a discussion on the legal status of UN Specialized Agencies and SE.

[754] *See* Annex III.

[755] *See* Seidl-Hohenveldern—Specialized Agencies, *supra* note 609, p. 1203.

[756] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 70.

[757] *See id.* at 73.

[758] *See id.* at 70.

the implications of the principle of SE on the composition of its plenary and restrictive organs, as well as on the legal value of its decisions.

a) The Impact of Sovereign Equality on the International Monetary Fund's Plenary and Restrictive Organs

The Board of Governors is the IMF's plenary organ. It is composed of one Governor and one Alternate who are appointed from each member state, which serve until a new appointment is made.[759] Currently, the Board of Governors is composed of 182 Governors and 182 Alternates.[760] Given that most Governors are the ministers of finance in their home states and, thus, occupied with national issues, they meet only annually to discuss IMF issues.[761] The daily operations of the IMF are, therefore, handled by their representatives who form the Executive Board.[762]

The Executive Board is the IMF's restrictive organ. It is currently composed of 24 Executive Directors who select the Managing Director of the IMF.[763] Of the twenty-four Executive Directors, five are appointed by the member states with the largest financial contributions to the IMF.[764] Of the remaining 19, two Directors may also be appointed by the two member states who (1) are not otherwise entitled to appoint Executive Directors because of the size of their membership fees and (2) had subscribed or lent the IMF the largest resources and, thus, have been in the largest creditor positions in the IMF within the preceding two year period.[765] If these two conditions are not met, then there are no additional appointments and, accordingly, the remaining Executive Directors are all elected. Thus, depending on whether five or seven have been appointed, the remaining—either seventeen or nineteen—Executive Directors are elected by states which usually form

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[759] IMF ARTICLES OF AGREEMENT art. XII, Sec. 2, para. a. *See* Rawert, *supra* note 715, p. 726; BOWETT, *supra* note 13, p. 125; DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 6. *See also* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, pp. 69-70.

[760] *See* Annex V for a list of the 182 Governors and Alternate members of the IMF.

[761] DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 6.

[762] *Id.*

[763] *See id.* noting that the established tradition calls for the IMF's Managing Director to be non-American (and quite often a European), while the President of the World Bank is usually an American.

[764] *See* SCHERMERS & BLOKKER, *supra* note 1, p. 212; Rawert, *supra* note 715, p. 726; DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 6. Although they are not the finance ministers of their member states (like the Board of Governors), the Executive Directors are usually chosen amongst the finance ministries of their home states. *See also* Annex V for a list of the 24 Executive Directors. The five appointed Executive Directors are from the US, Germany, Japan, France and the UK. The remaining 19 Directors represent a total of 174 states.

[765] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 70.

regional constituencies,[766] or even by states which regroup other considerations and interests to form other constituencies.[767] Each Director is deemed to represent the interests of the constituency which has elected him/her.[768]

The universality of membership in the Board of Directors is consistent with the principle of SE. However, in the Executive Board the principle of SE is breached. First, it is breached because the Executive Board constitutes a non-plenary decision-making body within which five of its twenty-four members are endowed with a different status.[769] Second, it is breached because two of the remaining 19 representatives may be elected on the basis of financial criteria as opposed to the 17 representatives usually elected according to regional factors.

b) The Implications of Sovereign Equality on the Legal Value of the International Monetary Fund's Decisions

When states join the IMF and agree to adhere to its constituent act, they are granted certain rights in exchange for some obligations.[770] The most consequential of these obligations is the duty to forsake their domestic jurisdiction in favour of the IMF on issues relating to the regulation of money.[771] In so doing, member states of the IMF accept to be bound by the decisions of this Organization and, thus, "in a spirit of enlightened self-interest, to relinquish some measure of national sovereignty by abjuring practices injurious to the economic well-being of their fellow member nations."[772]

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[766] *See* IMF ARTICLES OF AGREEMENT Schedule E; Rawert, *supra* note 715, p. 726; SCHERMERS & BLOKKER, *supra* note 1, p. 212.

[767] *See* Rawert, *supra* note 715, p. 726. *See also* GOLD—IMF VOTING AND DECISIONS, *supra* note 714, p. 65, noting that "[t]he negotiations by which members combine, whether in permanent, semi-permanent or occasional group, for the election of an executive director are conducted through channels external to the Fund, and are sometimes quite complex."

[768] SCHERMERS & BLOKKER, *supra* note 1, p. 212.

[769] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 70.

[770] *See id.* at 7.

[771] *See id.* at 5.

[772] DRISCOLL—THE IMF AND THE WORLD BANK, *supra* note 720, p. 3. *See* GOLD—IMF AND INTERNATIONAL LAW, *supra* note 741, p. 10. Mr. Gold also notes that "[t]he adoption of [...IMF] rules is a remarkable development in international relations because it represents massive agreement on the introduction of the rule of law into an area in which previously the discretion of states to act as they wished was almost wholly unlimited." *But see* DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 6, offering a divergent view on sovereignty within the IMF by noting that it is the "membership itself [which] dictates to the IMF the policies it will follow. The chain of command runs clearly from the governments of member countries to the IMF and not vice versa."

Although both the Board of Governors and the Executive Board are authorized to adopt decisions for the business of the IMF,[773] these decisions take various forms depending on the body from which they emanate. For the most part, the IMF's decisions include: (1) ***By-Laws***; (2) ***Rules***; (3) ***Regulations***; (4) ***Decisions*** (*stricto sensu*) and; (5) ***Recommendations*** and ***Guidelines***. By-Laws are enacted by the Board of Governors, while rules and regulations are adopted by the Executive Board.[774] Decisions (*stricto sensu*), recommendations and guidelines may be established by both the Board of Governors and the Executive Board.[775]

As with other IGOs, there is a tendency to consider that most IMF decisions constitute legal norms.[776] However, unlike some other IGOs' norms which are non-hierarchical, the IMF's legal norms are hierarchically classified in the following order: (1) IMF Articles of Agreement; (2) Board of Governors' by-laws, resolutions, and other decisions (*stricto sensu*); (3) Executive Board rules, regulations and other decisions (*stricto sensu*) and; (4) recommendations and ruidelines.[777] As a result of this hierarchical order, the IMF's decisions have different legal implications. For instance, while the by-laws issued by the Board of Governors have the same legal character as other decisions issued by this body, the former are deemed less likely to be amended than the latter.[778] The same holds true for Executive Board rules and regulations *vis-à-vis* other decisions issued by this body.[779]

With the exception of decisions qualified as recommendations or guidelines, all classes of norms are legally binding on IMF member states.[780] This means that, once an IMF decision is adopted, a member state's sovereign will, and its SE, is irrelevant. Thus, although a state may not favour, support or consent to a given decision, its non-compliance with it is considered a breach of its obligations to the Organization.[781] This could subject the defaulting state to sanctions.[782] Otherwise, the IMF Articles of Agreement provide only

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[773] *See* IMF ARTICLES OF AGREEMENT art. XII, Sec. 2(g).

[774] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 21.

[775] *See id.* at 22-23.

[776] *See id.* at 10.

[777] *See id.* at 5, 21. There is also another category of decisions issued by the Managing Director and known as directives. IMF ARTICLES OF AGREEMENT art. XII, Sec. 2(g).

[778] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 21.

[779] *See id.*

[780] *See id.* at 2, 7-11, 22-23; KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, pp. 431, 435-436. *See also* p. 296, noting that the IMF occasionally "asserts authority in ways that bear some legislative characteristics."

[781] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, pp. 26-39. On page 32 Mr. Gold holds that the IMF's reluctance to apply remedies for the non-observance of legal norms by member states "are close to *leges imperfectae*.".

[782] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, pp. 11, 22.

one case under which a member state may not be bound to IMF decisions. This involves member states opting out of decisions regarding the issuance or adjustment of their membership fee.[783]

[783] *See* IMF ARTICLES OF AGREEMENT art. III, Sec. 2 para. d, noting that "[t]he quota of a member state shall not be changed until the *member has consented* and until payment has been made unless payment is deemed to have been made in accordance with Section 3(b) of this Article." (emphasis added); SCHERMERS & BLOKKER, *supra* note 1, p. 564; GOLD—IMF VOTING AND DECISIONS, *supra* note 714, pp. 102-103.

3. *DECISION-MAKING IN THE INTERNATIONAL MONETARY FUND*

> "The most dramatic difference among members is the difference in their quotas and voting power and therefore in the role they can play in the process by which decisions are taken in the Fund."
>
> Joseph Gold[784]

Upon joining the IMF each member state of this Organization is required to pay a membership subscription according to the "quota" which is assigned to it and which is based on its financial standing in the world.[785] The quota are expressed in SDRs and are established via a complex economic formula based, *inter alia*, on the state's Gross National Product (GNP), its currency reserves and its foreign trade prospects.[786] Essentially, the quota formula is proportionate to the economic size and strength of each member state, whereby the richer states pay more than the poorer ones.[787]

Financial contributions—be it in the form of quota or other type of subscription—for member states are common in most IGOs. However, what is uncommon in the IMF is that this quota is also used to determine each member state's rights and obligations[788]—e.g. the amount which a state has the right to borrow depends on its financial contributions to the Organization.[789] Furthermore, and more importantly for the purposes of this study, these quota are used to determine each member state's voting power in the IMF.[790]

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[784] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 71.

[785] IMF ARTICLES OF AGREEMENT art. III, Secs 1 & 2. *See* DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 5-6.

[786] *See* IMF ARTICLES OF AGREEMENT art. III, Secs 1 & 2; GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 71; Rawert, *supra* note 715, p. 727; DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 5-6. Given the importance of these quota subscriptions they are reviewed by the Board of Governors every five years or upon the application for a review made by a member state.

See INTERNATIONAL FINANCIAL ORGANIZATION AND OPERATIONS OF THE IMF, *supra* note 720, Appendix I. As IMF quotas are expressed in SDRs, *see supra* note 745 for an explanation of SDRs. *See also* Annex V for a list of quota currently assigned to the IMF's member states.

[787] DRISCOLL—THE IMF AND THE WORLD BANK, *supra* note 720, p. 5.

[788] *See* DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 5-6.

[789] IMF ARTICLES OF AGREEMENT art. I; GOLD—IMF AND INTERNATIONAL LAW, *supra* note 741, pp. 22-23; *See* DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 5-6.

[790] *See* GOLD—IMF AND INTERNATIONAL LAW, *supra* note 741, p. 22; DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 5-6.

As is common with most international financial organizations *vis-à-vis* international political organizations, the IMF adopted the distinctive feature of a weighted voting rule for its decision-making processes. Moreover, it has renounced unanimity and opted for *de jure* majoritarianism and *de facto* consensus for its VMs and VPs. I address these voting rules and mechanisms hereinafter.

a) The Weighted Voting Rule in the International Monetary Fund's Decision-Making

Unlike the political IGOs examined thus far (i.e. the UN and the ILO), the IMF does not grant equal voting power to its members. Instead it employs weighted voting which confers unequal decision-making influence to the various member states.[791] This type of voting is common to financial IGOs—e.g. the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC)—and particularly prevalent in regional development banks—e.g. the African Development Bank (AfDB), the Asian Development Bank (AsDB), the Caribbean Development Bank (CDB), the Inter-American Development Bank (IADB), etc.[792]

Each IMF member state's voting power is weighted on the sole basis of its financial obligations—i.e. "quota subscriptions"—to the Organization.[793] Thus, since both the Board of Governors and the Executive Board use a weighted voting formula, the largest financial contributors to the IMF also have the greatest number of votes in these decision-making organs[794] and, thus, the greatest influence in its decision-making.[795]

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[791] GOLD—IMF AND INTERNATIONAL LAW, *supra* note 741, p. 9. *See also* CAROL BARRETT AND HANNA NEWCOMBE, WEIGHTED VOTING IN INTERNATIONAL ORGANIZATIONS 1 (1968). The authors hold that there are seven reasons which justify the existence of the weighted voting rule. The are:

> "1. Some may have a greater financial stake. 2. Some may be more affected by the decisions. 3. Some may be better informed about the issues. 4. Some may have greater seniority rights. 5. Some may have more personal power than others, and ... wish to formalize this power rather than having it exercised informally by influencing the votes of others. 6. Some may be in a better position to carry out the decisions. 7. Some may represent larger organizations."

[792] *See* SCHERMERS & BLOKKER, *supra* note 1, pp. 522-523.

[793] DOMINIQUE CARREAU, THIÉBAUT FLORY & PATRICK JUILLARD, DROIT INTERNATIONAL ÉCONOMIQUE 68 (3e éd. 1990) [hereinafter 'CARREAU ET AL.']. *See* INTERNATIONAL FINANCIAL ORGANIZATION AND OPERATIONS OF THE IMF, *supra* note 720, Appendix I.

[794] *See* Rawert, *supra* note 715, p. 726; GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 72; KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 432.

The IMF's weighted voting formula is applied only after each of its member states receives a basic number of votes, i.e. 250 per state—irrespective of the state's size, population, military or economic strength.[796] Following this initial allotment, each state receives additional votes on the basis of its contributions to the Fund—i.e. one vote per 100,000 SDRs of its quota.[797] Weighted in this manner, the voting power of one state can differ greatly from another. For example, the US currently has 265,518 votes representing 17.78% of IMF's total voting power while Canada has 43,453 votes representing only 2.91% of the IMF's total voting power.[798] This unequal voting power varies over time as member states' quota subscriptions are periodically adjusted to reflect the changing economic realities.[799]

By its own account, the IMF's voting rule has a dual, yet contradictory, purpose. First, the basic allotment of 250 votes per member state reportedly serves to recognize "the classical doctrine of the equality of all states in international law."[800] The reason for giving each member state, irrespective of the size of its quota, a minimum of 250 votes is presumably to protect the sovereignty of the economically smaller member states.[801] Initially, this protection was meant to take place by giving each state a proportion of voting power which would give meaning to its participation in the IMF's decisions. Of course, given the large increase of IMF member states through the years, this objective is now questionable.[802] Second, its distribution of votes on the basis of quota subscriptions is intended to reflect real differences between member states[803] and to protect the interests of the more economically powerful members. This, however, invariably breaches the principle of SE as it means that all states do not have equal status within the IMF's decision-making structure.

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[795] *See* MARC WILLIAMS, INTERNATIONAL ECONOMIC ORGANIZATIONS AND THE THIRD WORLD 67 (1994) [hereinafter 'WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS'].

[796] *See* IMF ARTICLES OF AGREEMENT art. XII, Sec. 5a, provides that "[e]ach member shall have two hundred fifty votes plus one additional vote for each part of its quota equivalent to one hundred thousand special drawing rights."

[797] *See* SCHERMERS & BLOKKER, *supra* note 1, p. 522; Rawert, *supra* note 715, p. 726; IMF ARTICLES OF AGREEMENT art. XII, Sec. 5a.

[798] *See* Annex V.

[799] IMF ARTICLES OF AGREEMENT art. III, Sec. 2; GOLD—IMF AND INTERNATIONAL LAW, *supra* note 741, p. 22. *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 71.

[800] GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 71. *See* INTERNATIONAL MONETARY FUND, THE ROLE AND FUNCTION OF THE INTERNATIONAL MONETARY FUND, 27 (1985) [hereinafter 'IMF ROLE & FUNCTION']; SCHERMERS & BLOKKER, *supra* note 1, p. 522.

[801] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 71.

[802] *See id.*

[803] IMF ROLE & FUNCTION, *supra* note 800, p. 27; *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 71.

(i) The Application of Weighted Voting in the Board of Governors and in the Executive Board

In the Board of Governors each member state casts its allotted votes through its Governor.[804] For instance, at the annual meeting of the Board of Governors, the Canadian Minister of Finance, who sits as the Governor for Canada, is entitled to cast 43,453 votes on a given decision. Similarly, his American counterpart, the US Treasury Secretary, is entitled to cast 265,518 votes and the same applies for the remaining 180 Governors which are members of the IMF. The quorum requirement at this annual general congress is two-thirds of the total voting power of all 182 member states[805]—i.e. 995,735 out of the total number of 1,493,603 votes. With the current distribution of votes, 18 states—holding jointly 1,005,920 votes—suffice to constitute a quorum.[806]

The appointed Directors of the Executive Board act and vote on behalf of the IMF member state for which they have respectively been appointed to represent. In contrast, the elected Directors have the duty to present the views, and represent the interests, of the ensemble of states which have elected him/her.[807] This means that when taking decisions, each one of the 19 elected Executive Directors is "entitled to cast the number of votes which counted towards his election."[808] Given that a quorum in the Executive Board is composed of the majority of Directors which hold at least fifty percent of total voting power[809] only 13 out of 24 Directors representing 794,194 out of 1,493,603 votes are required to hold a meeting and decide issues relating to the ordinary business of the IMF.[810] It is indeed

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[804] GOLD—IMF AND INTERNATIONAL LAW, *supra* note 741, p. 9; GOLD—IMF VOTING AND DECISIONS, *supra* note 714, p. 65.

[805] IMF ARTICLES OF AGREEMENT art. XII Sec. 2.d; *IMF By-Laws, Rules and Regulations*, *supra* note 726, Sec. 13.e.

[806] *See* Annex V. The 18 states which jointly have the requisite number of votes (1,005,920) to constitute a quorum, (presented in a decreasing order of number of votes), are: 1. United States (265,518); 2. Japan (82,665); 3. Germany (82,665); 4. France (74,396); 5. United Kingdom (74,396); 6. Saudi Arabia (51,556); 7. Italy (46,157); 8. Canada (43,453); 9. Russia (43,381); 10. Netherlands (34,692); 11. China (34,102); 12. Belgium (31,273); 13. India (30,805); 14. Switzerland (24,954); 15. Australia (23,582); 16. Brazil (21,958); 17. Venezuela (19,763); 18. Spain (19,604).

[807] SCHERMERS & BLOKKER, *supra* note 1, p. 212; GOLD—IMF AND INTERNATIONAL LAW, *supra* note 741, p. 9.

[808] IMF ARTICLES OF AGREEMENT art. XII, Sec. 4.i.(iii).

[809] IMF ARTICLES OF AGREEMENT art. XII, Sec. 3.h.

[810] *See* Annex V. Fifty percent of the current total voting power of 1,493,603 in the IMF is 746,801.5 votes. Currently this means that the following Directors can constitute 50% of the total voting power (794,194 votes) in the IMF Executive Board: 1. United States (265,518); 2. Germany (82,665); 3. Japan (82,665); 4. France (74,396); 5. United Kingdom (74,396); 6. Elected Director from Belgium representing 10 countries (75,983); 7. Elected Director from the Netherlands representing 12 countries (74,276) and; 8. Elected Director from Spain representing 8 countries (64,295). An additional five Directors would be required to meet the majority requirement of 13 out of 24.

disconcerting to think that no more than thirteen people could very well be establishing the world's monetary policy.

(ii) The meaning of Weighted Voting in the International Monetary Fund

The premise of the weighted voting rule was "that the IMF would function most efficiently and decisions would be made most responsibly by relating member's voting power directly to the amount of money they contribute to the institution through their quotas".[811] Of course, this is a breach of SE for it explicitly grants states with the strongest economies and, therefore, the largest financial contributions to the IMF—e.g. US—the greatest influence in establishing the policies of this Organization.[812]

However, some international scholars dispute this assessment. In particular, N. Quoc Dinh et al. (1994) advocate that, since the states adhering to a given IGO's constituent act have freely accepted to be bound by its rules, whatever they may be, the principle of SE is *not* contravened by weighted voting.[813] In fact, these prominent scholars argue that equal voting puts the super powers at a disadvantage, which can only be remedied by *unequal* voting.[814] While this may indeed be a plausible explanation for the use of the weighted voting rule, because the reality remains that this voting rule reflects unequal voting power among sovereign nation states, it is not a sufficient justification for the breach of SE.

Therefore, while the 'one state, one vote' rule of political IGOs purports to espouse *formal equality* (*weightless* voting) and presumably adheres to the fundamental principle of SE, the weighted voting rule of financial IGOs, which is by definition *formal inequality,* violates the principle of SE.[815] Indeed, in the IGOs which have equal voting power (i.e. 'one state, one vote') the majority of the members necessarily constitutes the majority of the

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[811] DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 5-6.

[812] *See id.* at 5-6.

[813] *See* QUOC DINH ET AL., *supra* note 2, p. 600, noting that "*la souveraineté des États s'exprime dans leur libre acceptation des règles statutaires, quelles qu'elles soient.*"

[814] *Id.* The authors indicate that since "*le vote [...] égalitaire désavantage en fait les grandes puissances, on y remédie dans certaines organisations en recourant au système inégalitaire de la pondération des voix*". *Cf. also* RAE ET AL., *supra* note 163, pp. 10-11. In his evaluation of various forms of equalities, Rae uses the 1976 Québec language law, Bill 101, to argue that "equality of languages has never led to equality of persons in Canada [suggesting that] perhaps inequality of languages will".

[815] *See* SERGEI A. VOITOVICH, INTERNATIONAL ECONOMIC ORGANIZATIONS IN THE INTERNATIONAL LEGAL PROCESS 78 (1995); C.N. Osieke, *Majority Voting Systems in the International Labour Organization and the International Monetary Fund,* 33 INT'L & COMP. L.Q. 381-408 (1984).

votes.[816] In the IMF, however, the unequal voting power (i.e. weighted voting) means that a minority of its member states may actually control the majority of the votes[817] and, consequently, hold the greatest decision-making influence.

b) Decision-making by Majoritarianism and Consensus in the International Monetary Fund

Like many other twentieth century IGOs, unanimity has been generally repudiated in the IMF's decision-making processes and the Organization—in concert with the trend established in other organizations of its period—adopted majoritarianism as its primary VM.[818] Majoritarianism in the IMF finds expressions in a wide range of ways: ***simple majority, qualified majority, high majority*** and ***double majority.***

As a rule, the IMF Articles of Agreement provide that most of IMF decisions be taken by ***simple majority*** of the votes cast.[819] A restricted number of issues relating to the adoption of so-called 'important decisions' require ***qualified majority*** (70% majority).[820] For the most part, these pertain to operational issues related to rates of charges and interest.[821] An even greater majority (85% majority), often referred to as ***high majority***, is required for the adoption of decisions relating to the IMF's structural issues.[822] These issues include, *inter alia*, changes in quota subscription, the adjustment of the SDRs allocations, the disposition of the IMF's gold supplies and the exceptional power

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[816] SCHERMERS & BLOKKER, *supra* note 1, p. 533.

[817] *Id.* at 533-534.

[818] *See* GOLD—THE SECOND AMENDMENT, *supra* note 728, p. 18; JOSEPH GOLD, VOTING MAJORITIES IN THE FUND: EFFECTS OF SECOND AMENDMENT OF THE ARTICLES, [Pamphlet Series No. 20] 1 (1977) [hereinafter 'GOLD—VOTING MAJORITIES IN THE FUND'].

Prior to the second amendment to the IMF's Articles of Agreement, a *de jure* veto was foreseen through the voting requirement of unanimity in cases where the Executive Board wanted to suspend the operations of its constituent provisions. *See* SCHERMERS & BLOKKER, *supra* note 1, p. 551; IMF ARTICLES OF AGREEMENT art. XXVII, Sec. 1 (original). Today, unanimous consent of the Executive Board is required exceptionally when considering issues which are not on the agenda; *IMF By-Laws, Rules and Regulations, supra* note 726, Rule C-8.

[819] IMF ARTICLES OF AGREEMENT art. XII Sec. 5 para. c, foresees that "[e]xcept as otherwise specifically provided, all decisions of the Fund shall be made by a majority of the votes cast." *See IMF By-Laws, Rules and Regulations, supra* note 726, Sec. 11; Rawert, *supra* note 715, p. 726; BOWETT *supra* note 13, p. 138; KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 295.

[820] *See* WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795, p. 67; Rawert, *supra* note 715, pp. 726-727; SCHERMERS & BLOKKER, *supra* note 1, p. 550.

[821] *See e.g.* IMF ARTICLES OF AGREEMENT art. III, Sec. 3, para. d; art. V, Sec. 7, para. e; art. V, Sec. 8, para. d; art. V, Sec. 12, para j.

[822] *See* Rawert, *supra* note 715, p. 727; SCHERMERS & BLOKKER, *supra* note 1, p. 550.

to suspend provisions of the IMF Articles of Agreement.[823] A ***double majority*** is required for the adoption of decisions regarding the ordinary course of business in the IMF Executive Board (i.e. (i) the majority of Directors (13/24) with (ii) 50% of the total voting power), and for the adoption of a constitutional amendment (i.e. (i) 3/5 of the member states and (ii) 85% of the total voting power is required).[824]

(i) De Facto Veto by High Majority Rule

Like the UN Charter, the IMF Articles of Agreement do not expressly foresee the veto in its voting procedures. Nevertheless, and similar to the UN SC's VM, the requirement of high majority (i.e. 85%) provides a *de facto* veto power[825] in the IMF. However, in contrast to the UN Charter which grants the five permanent members of the SC the power to veto, the IMF Articles of Agreement, by providing for a system of allocation of votes on the basis of quota subscriptions, *de facto* grant this right to one member state only, namely the US. The US, being the largest financial contributor to the IMF—i.e. US$ 38 billion or 17.78% of the Fund's total quota subscriptions[826]—*de facto* holds the power to veto decisions, both in the Board of Directors and in the Executive Board, which require a high majority of 85%.[827]

Of course, the pooling of votes by a group of countries can also veto IMF decisions. For instance, the fifteen members of the European Union voting jointly can exercise a veto on a proposal requiring high majority.[828] Similarly, the high majority requirement enables other interest or regional groups of states—i.e. Commonwealth, Arab, and other monolithic groups—to band together and block or veto an IMF proposal.[829]

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[823] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 24. *See also e.g.* IMF ARTICLES OF AGREEMENT art. III, Sec. 2, para. c; art. V, Sec. 12, para. b; art. XII, Sec. 1; art. XXIX, para. b. for some of the structural issues which require high majority.

[824] IMF ARTICLES OF AGREEMENT art. XII, Sec. 3(h), art. XXVIII; SCHERMERS & BLOKKER, *supra* note 1, p. 550.

[825] *See* Rawert, *supra* note 715, p. 727. *Cf.* HAAS—Integration, *supra* note 114, p. 408, discussing how "economically strong countries [...] possess a *de facto* veto power".

[826] *See* Rawert, *supra* note 715, p. 727; DRISCOLL—WHAT IS THE IMF, *supra* note 716, pp. 5-6. *See also* Annex V for a list of the percentage of the total of the weighted votes held by IMF member states.

[827] *See* VOITOVICH, *supra* note 815, p. 79; Rawert, *supra* note 715, p. 727.

[828] *See* Rawert, *supra* note 715, p. 727; GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 49; SCHERMERS & BLOKKER, *supra* note 1, p. 550; WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795, p. 67.

[829] *See* IMF ROLE & FUNCTION, *supra* note 800, p. 28; WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795, p. 67.

(ii) From De facto to De jure Consensus

> "Harmony in the relations among participants ...might be disturbed if majority and minority were forced into confrontation by a vote".
>
> Joseph Gold[830]

The IMF Articles of Agreement provide for formal voting for its decision-making processes—i.e. the votes cast are recorded.[831] However, in practice, formality has given way to expediency as both the Board of Governors' and the Executive Board's decisions rarely proceed to formal voting.[832] Instead, most are reached by *consensus*.[833]

Consensus is generally understood to mean that decision-making takes place by common consent. Specifically, it is defined as "the majority view",[834] a "collective opinion",[835] a "general agreement"[836] or "the judgment arrived at by most of those concerned".[837] Therefore, consensus does not mean absolute agreement but, rather, the general or majority will of the parties, expressed without a vote, formal or otherwise.[838] The legal value of decisions adopted with or without vote is the same.[839]

The single voice heard with consensus[840] often conceals an uncomfortable coalition between dissatisfied parties repressing dissent[841] and hiding behind a facade of unanimity.[842] However, this compromise is very important in avoiding interpretative

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[830] GOLD—IMF VOTING AND DECISIONS, *supra* note 714, p. 179.

[831] *See* IMF ARTICLES OF AGREEMENT art. XII, Sec. 5(c).

[832] Holder, *supra* note 722, p. 201; SCHERMERS & BLOKKER, *supra* note 1, p. 511; DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 6.

[833] GOLD—IMF AND INTERNATIONAL LAW, *supra* note 741, p. 10; Holder, *supra* note 722, p. 201; WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795, p. 68; GOLD—VOTING MAJORITIES IN THE FUND, *supra* note 818, p. 1.

[834] THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 200 (7th ed. 1982).

[835] FUNK & WAGNALLS STANDARD COLLEGE DICTIONARY 288 (Canadian ed. 1982).

[836] *Id.;* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 246 (10th ed. 1996).

[837] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra*, note 836, p. 246.

[838] SCHERMERS & BLOKKER, *supra* note 1, p. 770.

[839] QUOC DINH ET AL., *supra* note 2, p. 604.

[840] *See* Christophe Reymond, *Institutions, Decision-Making Procedure and Settlement of Disputes in the European Economic Area*, COMMON MKT L. REV. 449, 458 (1993).

[841] QUOC DINH ET AL., *supra* note 2, p. 604.

[842] *Id.*

difficulties[843] and overcoming potentially serious voting problems,[844] thus ensuring the Organization's maximum efficiency. By allowing for decision-making without resorting to formal VMs, consensus is thought to shelter IGOs from excessive politicization of sensitive issues.[845] In practice, it enables many IGOs' decisions to be taken by bureaucrats.[846]

Although not originally foreseen in the IMF's constituent act, the practice of consensus has since been enshrined in the IMF's by-laws, rules and regulations.[847] Thus, *de facto* consensus has now become the *de jure* consensus in the IMF.

Decision-making by consensus is not however an IMF innovation as this process has evolved similarly in other IGOs. Indeed, although very few IGOs have formally enshrined this type of decision-making in their constituent acts,[848] consensus has been the established *practice* in a wide range of IGOs and has developed as a *de facto* trend in international decision-making.[849]

For instance, although the voting procedures provided in the ILO require its Governing Body to adopt certain decisions by majority or, at times, by unanimity, in practice the

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[843] *See* M. J. Bowman, *The Multilateral Treaty Amendment Process: A Case Study*, 44 INT'L & COMP. L.Q. 540, 550 (1995).

[844] *See id.* discussing how the Regina Conference—of the environmental treaty known as the 'Ramsar Convention on Wetlands of International Importance'—avoided a problematic voting eligibility issue by approving the amendments under consideration by consensus.

[845] *See* DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 6.

[846] Zamora, *supra* note 33, p. 576. The author refers to a study by H.M. Chung entitled "Decision Making in the IBRD and the ILO: Comparative Analysis of the Rules and Practices" (Diss., U. Penn. 1970).

[847] *IMF By-Laws, Rules and Regulations*, *supra* note 726, Sec. 11. "... At any meeting the Chairman may ascertain the sense of the meeting in lieu of a formal vote but he shall require a formal vote upon the request of any Governor...". Rule C-10 provides that "[t]he Chairman shall ordinarily ascertain the sense of the meeting in lieu of a formal vote. Any Executive Director may require a formal vote to be taken with votes cast as prescribed in Article XII, Section 3*(i)*, or Article XXI*(a)(ii)*."

[848] The OECD—which will be examined in Part V.B—is one of the IGOs which enshrined consensus in its constituent act.

See Reymond, *supra* note 840, p. 458. The European Economic Area (EEA), established in 1993, has formally incorporated the VM of consensus for its decision-making. In fact, the EEA requires a dual consensus between both the European Community (EC) and the European Free Trade Association (EFTA). *See also* GEF INSTRUMENT art. 25. One of the world's youngest IGOs, (created in 1991 and restructured in 1994), the Global Environment Facility (GEF) has benefited from other organizations' VPs. Accordingly, the GEF has modeled its VMs to reflect decision-making by consensus.

[849] *See generally* Buzan, *supra* note 64. Discussing negotiation by consensus and the current developments in technique at the United Nations Conference on the Law of the Sea, Buzan notes that, in addition to the IMF, other organizations, international committees and/or commissions use consensus as the norm in their decision-making processes. They include, *inter alia*, the: 1) Sea-bed Committee (1968-1973); 2) Committee on the Peaceful Uses of Outer Space; 3) Economic Commission for Europe; 4) United Nations Development Programme (UNDP); 5) United Nations Conference on Trade and Development (UNCTAD); 6) UN Advisory Committee on Peaceful uses of Atomic Energy; 7) Advisory Committees on the UN Emergency Force (UNEF); 8) Congo Operation (ONUC) and 9) International Law Commission.

Governing Body prefers to reach its decisions by consensus.[850] This preference is also shared by the Organization's employer and employee groups who generally use the consensus rule within their own internal proceedings.[851] The same practice holds true for the UN's GA and SC whose decision-making often and increasingly takes place by consensus.[852]

The *raison d'être* for the practice of consensus differs between IGOs which employ equal voting power (e.g. the UN and the ILO) and those which employ unequal voting power (e.g. the IMF and the IBRD). In the former IGOs, consensus is used because the 'one state, one vote' rule, in conjunction with the 'majority rule' is relatively ineffective—unless there exist common interests and goals amongst the member states. In the latter IGOs, existence of this unequal distribution of votes is said to be the critical impetus for the formation of consensus.[853]

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[850] GHEBALI, *supra* note 645, p. 150; OSIEKE, *supra* note 697, pp. 114-115.

See Buzan, *supra* note 64, p. 326. The author discusses how the Governing Body of the ILO like other principal organs of international organizations (the UN General Assembly the UN Security Council, the Executive Directors of the IMF and the IBRD) often make their decisions by merely consenting and not resorting to formal voting.

See also JERZY KRANZ, ENTRE L'INFLUENCE ET L'INTERVENTION: CERTAINS ASPECTS JURIDIQUES DE L'ASSISTANCE FINANCIÈRE MULTILATÉRALE 17 (1994) where the author points out that, in practice, the members of international financial organizations do not usually use formal voting in their decision making processes. *See also* Rüdiger Wolfrum, *Consensus, in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 1, 350-355 (Rüdiger Wolfrum and Christianne Philipp eds, 1995) [hereinafter 'Wolfrum—Consensus']. Discussing the development and impact of consensus, Mr. Wolfrum indicates that, in recent years, even political IGOs have made consensus part of their practice. Falling short of calling this VP a trend, the author points out that there has been a "tendency to take decisions by consensus in the United Nations, especially in the General Assembly".

[851] *See* GHEBALI, *supra* note 645, p. 150. *Cf. also* p. 115. In fact, failing to decide by consensus the ILO's Governing Body resorts to yet another VP, not foreseen in its basic constituent or regulatory instruments, and adopts its decisions by simple majority.

[852] Buzan, *supra* note 64, p. 326.

[853] *See* William N. Gianaris, *Weighted Voting in the International Monetary Fund and the World Bank*, 14 FORDHAM INT'L L.J. 910, 918-27 (1991). Commenting on voting power within the IMF, the author notes that "while votes are held rarely, voting strength remains important in building a consensus before making decisions."; Head, *supra* note 42 p. 605 n.56. Assessing the third amendment to the IMF Articles of Agreement, Head notes that voting rights are "often not directly relevant to IMF decisions, since the IMF operates largely on the basis of consensus. Nevertheless, voting percentages form an important backdrop on the formation of that consensus". *See also* WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795, p. 68, providing an historic explanation for the reasons behind the practice of decision-making by consensus in the IMF, Williams notes that:

> "Consensus in the IMF arose mainly from the efforts of the G10 to exercise collective management. The Bretton Woods regime ushered in an era of collective management but for approximately the first 15 years after the end of World War II the United States enjoyed unprecedented hegemony. The resurgence of Europe and Japan and the growth of interdependence created the conditions whereby international economic cooperation among the leading industrial countries for the provision of international public goods began to resemble a bargaining model instead of a dominance model."

For instance, given that IMF decisions rarely proceed to formal voting, it would seem that there is little use for the voting rights allotted to IMF members. However, in practice, it is precisely because the Executive Board is cognizant of the disproportionate distribution of voting power between its member states that "there is reluctance to give the minority the impression of coercion by the majority".[854] In order to avoid the use of unequal decision-making influence, and, therefore, the breach of the principle of SE, the IMF organs avoid voting altogether and opt to reach their decisions by consensus. Thus, it could be argued that the practice of consensus rectifies, or somewhat compensates for, the violation of the principle of SE resulting from the IMF member states' unequal voting strength.[855]

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[854] *See* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 72, noting that "[t]he practice of avoiding formal voting and attempting to reach consensus or broad agreement is inspired in part by the differences in voting power"; Gianaris, *supra* note 853, p. 925; Head, *supra* note 42, p. 605 n.56. *See also* WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795, p. 68.

[855] *See* WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795, pp. 69-70, noting that "the development of consensus decision-making provides the Third World with a measure of greater equality". *See also* pp. 69-79 where Williams adds that:

> "A system based solely on voting procedures would place them [i.e. developing states] in a position of permanent inferiority since they could never muster sufficient votes to defeat the large quota holders and, moreover, would not be consulted on proposals. Secondly, the provision for special majorities on important decisions combined with weighted voting effectively gives the developing countries veto power. Thirdly, the development of group politics in the IMF strengthened the Third World bargaining position. The G24 gives a sense of purpose and direction to Third World diplomacy in the Fund. This enables the Third World to achieve greater unity in the bargaining process and provides technical support to the least developed members of the coalition. But it is, nevertheless, difficult to coordinate the diverse Third World membership."

DIAGRAM VI CHARTING DECISION-MAKING IN THE INTERNATIONAL MONETARY FUND

BOARD OF GOVERNORS & EXECUTIVE BOARD

MEMBERSHIP	
BOARD OF GOVERNORS	Universal & Plenary = 182 Governors
EXECUTIVE BOARD	Restricted = 24 Directors representing all member states
DECISIONS	Binding
VOTING RULE	Weighted = 250 basic votes plus one vote per 100,000 SDRs of quota subscriptions
VOTING MECHANISMS & PRACTICES	
—REGULAR DECISIONS	
VM	Simple Majority (50%+1 of the total voting power)
—IMPORTANT DECISIONS	
VM *(De jure)*	Qualified Majority (70% or 75% of the total voting power)
	High Majority (85% of the total voting power)
	Double Majority (Majority of Directors (13/24) with 50% of the total voting power) or (3/5 of the member states with 85% of the total voting power)
-Exceptional (considering issues which are not on the agenda)	Unanimity
	Consensus
VP *(De facto)*	Veto

4. *The Level of Sovereign Equality's Functional Legitimacy in the International Monetary Fund*

a) The Breach of the Doctrine of Sovereign Equality in the International Monetary Fund's Decision-Making Structure

The four factors used to measure SE's functionality in this study—(i) the composition of its decision-making organs, (ii) the legal value of the IGO's decisions; (iii) the voting rule employed and, (iv) the voting mechanisms and practices employed—as well as the four criteria used to establish its legitimacy—(i) determinacy, (ii) symbolic validation, (iii) coherence, and (iv) adherence—show that this principle has been breached in the IMF. On the basis of these factors and criteria, in the following subsections I elaborate on the non-conformity to the principle of SE in both the IMF's Board of Governors and Executive Board's decision-making structure.

(i) The Non-Functionalism of Sovereign Equality

All member states of the IMF hold one seat in the Board of Governors. Accordingly, the composition of this decision-making body is in compliance with the principle of SE. Membership to the Executive Board, however, is restricted to 24 Directors, and this is in clear violation of the principle of SE. A further violation occurs because five of the 24 Directors are appointed by and, therefore, represent one state, while the remaining 19 are usually elected to represent groups of states. Given that the Executive Board is responsible for the daily decision-making of the IMF, the consequences to the breach of SE is the norm in the IMF's decision-making.

The principle of SE is further breached because most IMF decisions—unlike other organizations, e.g. the ILO—impose binding obligations directly on its member states.[856] Excepting decisions classified as recommendations or guidelines and decisions relating to the apportionment of quota—where member states have the right to choose whether or not

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[856] KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 431.

to comply with the decision—states are not afforded the opportunity of opting out or not complying with decisions taken by either the Board of Governors or the Executive Board. This invariably subordinates states' sovereign will to that of the IMF thus violating the principle of SE.

The weighted voting rule which, by definition, represents unequal apportionment of voting power, also breaches the principle of SE. By granting one state greater voting power than another, the IMF in effect concedes to economic superiority. While this may realistically reflect the importance of power relations in the structure of the international community, it nonetheless subordinates the sovereign will of the economically poorer states (i.e. developing states) to that of the economically wealthier ones (i.e. developed states).[857]

Finally, violation of the principle of SE in the IMF also occurs with the use of the majoritarianism rule. First, as is common with majoritarianism, the will of the minority is generally disregarded—i.e. decision-making in both its Board of Governors and in its Executive Board, can take place by disregarding the will of its member states holding the minority number of shares (which are numerically the majority of IMF states).[858] Second, because of the IMF's weighted voting system, majoritarianism may very well result, and often does, in the majority's will being disregarded in both these IMF organs. Moreover, due to (i) its weighted voting rule and (ii) its 85% majority rule, the quasi totality of the world's states' will (i.e. all but the US) can be blocked by the will of one state—i.e. the US. Thus, the IMF's weighted voting rule in conjunction with the majoritarian process further compounds the violation of the principle of SE.[859]

(ii) The Illegitimacy of Sovereign Equality

In addition to the IMF's voting mechanisms and practices failing to satisfy the functional factors for the principle of SE, they also fail to meet the criteria for the legitimacy of the principle. First, the ***determinacy*** of the principle of SE cannot be established in the IMF

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[857] *See also* WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795, p. 69, noting that the "Third World [...] enjoys numerical superiority in most international organizations but little effective decision-making power".

[858] *See* Annex V for a list of all IMF member states and the number of votes which they have been allotted. These figures clearly illustrate that the overwhelming numerical majority of states holds the minority of votes.

[859] *See also* WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795, p. 69, discussing how "[f]rom the point of view of developing countries [the IMF's decision-making ...] structure of influence discriminates against them on two counts."

for basically two reasons. Its meaning is obscured not only because it is undefined in the IMF's Articles of Agreement and in its by-laws, rules and regulations but, also because—save the plenary composition of the Board of Governors—the notion of SE has not found any clear expression in either the composition, structure, voting rules or processes of its Board of Governors and its Executive Board.

Second, SE finds ***symbolic validation*** only in the Board of Governors' plenary membership composition. It is absent from virtually every other aspect of the IMF's decision-making structure, including (i) the Executive Board's restricted composition, (ii) the Board of Governors and the Executive Board's weighted voting system, and (iii) the Board of Governors and the Executive Board's majoritarian voting mechanism.

The principle of SE also fails to meet the ***coherence*** criterion of legitimacy because it is not consistently applied throughout the IMF's decision-making organs—i.e. while it finds application in the composition of Board of Governors (i.e. plenary organ), it is completely disregarded in the composition of the Executive Board (i.e. restricted organ).

The only legitimacy criterion of SE to be satisfied in the IMF's decision-making structure is that of ***adherence***. Despite the fact that the principle is not directly enshrined in the IMF Articles of Agreement, it is the Organization's association with the UN, (i.e. as a UN Specialized Agency), which makes it compliant with a higher constitutional order of norms (*see supra* Diagram III) provided in the UN Charter (i.e. articles 1(2), 2(1), 55, and 78).

b) Reforms in the International Monetary Fund's Decision-Making Structure

Traditionally, calls for reform in the IMF's decision-making structure have corresponded to developing states seeking to "'democratize' voting [...] by introducing the 'one state, one vote' principle".[860] However, as Gianaris (1991) correctly stated, "[w]hat the developing countries do not address [...] is that it is the realistic apportionment of voting strength that makes the IMF and the World Bank such viable and effective organizations."[861] Accordingly, these calls for reform remain unanswered because

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[860] Seidl-Hohenveldern—Specialized Agencies, *supra* note 609, p. 1206.

[861] Gianaris, *supra* note 853, p. 943.

weighted voting has been a functional and a legitimate rule in financial organizations, like the IMF.[862]

In recent years, as the right to democratic governance has gained increased prominence in the international legal community,[863] there have been renewed calls for reforming the IMF's decision-making structure.[864] These calls for reform seek to make the IMF's decisions "be more democratic in the sense of moving away from the strong dominance of a small number of powerful economies."[865] Such proposals are meant to favour developing countries and involve adjusting the weighted voting system in relation to economic reality of the member state (i.e. GNP based on equal purchasing power) as opposed to the current system which is based on the conventional GNP.[866]

While no weighted voting-related reforms have yet materialized in the IMF, nor are any being seriously considered, this IGO has recently undergone some other changes to its decision-making structure. I address these hereinafter.

(i) Reforming Decision-Making by Imposing Exclusionary Sanctions

Although the IMF's wide spectrum of hierarchical norms (i.e. Articles of Agreement, by-laws, resolutions, decisions, directives, etc.) are binding, they are not always adhered to by member states and, until recently, moral pressure was often used to persuade delinquents to respect their obligations.[867] Persistent violators were threatened with loss of their rights to borrow from the IMF or with removal from the Organization altogether.[868] In recent years voting-related sanctions have been added to the list of measures against non-complying member states.

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[862] *See* Seidl-Hohenveldern, *supra* note 609, p. 1206. Discussing the decision-making structure of organizations like the IMF, and other UN Specialized Agencies (e.g. IBRD, IDA, etc.) Seidl-Hohenveldern notes that "weighted voting in these organizations is *appropriate*, as the voting power of each member state depends on the amount of its shares in the capital stock, that is on the financial risk assumed by the state." (emphasis added). *See also* Gianaris, *supra* note 853, p. 944, noting that the "adoption of an equal voting system is not the answer because it would only weaken the effectiveness of the IMF".

[863] *See generally* Franck—Democratic Governance, *supra* note 365; CRAWFORD—DEMOCRACY IN INTERNATIONAL LAW, *supra* note 357.

[864] COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 187.

[865] *Id.* at 187-188, 223.

[866] *Id.* at 188, 243, 343.

[867] *See* DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 7.

The debt crisis of the 1980s had a direct and adverse effect on both the IMF and its members respectively.[869] During that time, a great number of countries defaulted on their financial obligations. Consequently, the IMF experienced serious financial difficulties which threatened both its credibility and viability.[870] While the IMF had the means to sanction its defaulting member states—i.e. by declaring defaulting states ineligible to its financial assistance or even to exclude it from the Organization altogether—these sanctions were *punitive* not *coercive*.[871] The fact that the IMF had *no means to coerce* its member states to live-up to their obligations became blatantly clear and increasingly worrisome as a growing number of its members states defaulted on their financial obligations.

As the problem of arrears in financial obligations by debt-ridden countries steadily deteriorated, "the magnitude of the problem required a more varied and effective approach than before."[872] Expressing serious concerns over the growing arrears, IMF sought to impose "remedial and deterrent measures", as opposed to penalties.[873] However, the IMF Articles of Agreement were silent on the means to be taken to "strengthen and enhance the instruments available to the Fund to prevent and deter overdue financial obligations."[874]

Seeking to minimize the growing arrears and to impede further defaults, the US favoured the imposition of exclusionary sanctions. In the absence of any express coercive provisions in the IMF constituent act, it looked at the implied powers of international organizations for guidance.[875] That route, however, proved not to be viable because the principle of SE affords only limited powers to IGOs.[876] The only recourse, therefore, was a formal amendment to the IMF Articles of Agreement. Accordingly, the IMF adopted an additional measure to sanction its policy of zero tolerance of member states in arrears. In 1992, and for the third time in its history, the IMF Articles of Agreement were amended to include an

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[868] *See* Martha, *supra* note 42, pp. 89, 113 (1994); DRISCOLL—WHAT IS THE IMF, *supra* note 716, p. 7.

[869] *See* Head, *supra* note 42, p. 598.

[870] *See* Martha, *supra* note 42, p. 112.

[871] *See also* Head, *supra* note 42, p. 606, discussing the inadequacy of the IMF's punitive sanctions Head comments on "the gravity associated with the ultimate exclusionary sanction of expulsion" by noting that since "[u]niversal membership is a goal of the IMF, [...] expulsion of a member naturally would run counter to that objective."

[872] *Id.* at 602.

[873] *Id.* at 603.

[874] *See* Martha, *supra* note 42, p. 90.

[875] *See* Head, *supra* note 42, pp. 607-612.

[876] *See Id.* at 628.

exclusionary clause which effectively suspends the voting rights of members in arrears.[877]

Interestingly, the same type of exclusionary sanctions can also be found in the constituent acts of the foremost political IGOs, i.e. the UN and the ILO. Like the IMF, both of these organizations suspend the voting rights of states in arrears of their contributions.[878] However, in contrast to the IMF which applies sanctions when a state breaches *any* one of its obligations to the IMF, neither the UN nor the ILO provide for sanctions for breach of any other obligation.

While the impetus for imposing sanctions on voting in the IMF was the increasing arrears in the members' financial obligations, the initiators of the 1992 amendment of the Organization's Articles of Agreement went beyond their initial intentions. Unlike the exclusionary provisions found in political IGOs the third amendment of the IMF's constituent act provides for the suspension of voting rights in all cases where members breach their obligations to the Organization. In this respect, this amendment goes further than the arrears problem, for it enlarges the scope for the application of voting sanctions.

It is important to note that the implications of the loss of the right to vote are different in political and financial organizations. In the former, it usually involves but one vote, while in the latter, it can represent considerable voting power and, thus, considerable loss of decision-making influence.

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[877] In this respect, Article 1(a) & (b) of the third amendment of the IMF Articles states:

> " 1. The text of Article XXVI, Section 2, shall be amended to read as follows:
> a) If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the general resources of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article V, Section 5 or Article VI, Section 1.
> b) If, after the expiration of a reasonable period following a declaration of ineligibility under (a) above, the member persists in its failure to fulfill any of its obligations under this Agreement, the Fund may, by seventy percent majority of the total voting power, *suspend the voting rights of the member*. During the period of suspension, the provisions of Schedule L shall apply. The Fund may, by seventy percent majority of the total voting power terminate the suspension at any time ..." (emphasis added).

[878] In this respect, Article 13 (4) of the ILO Constitution provides:

> "A member of the Organization which is in arrears in the payment of its financial contribution to the Organization shall have no vote in the Conference, in the Governing Body, in any committee, or in the elections of members of the Governing Body, if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years: Provided that the Conference may by a two-thirds majority of the votes cast by the delegates present permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of its Members".

Article 19 of the UN Charter provides an identical provision, sanctioning the loss of voting rights for members states due to non-payment of membership contributions.

(ii) The Significance of Exclusionary Sanctions and Calls for Further Reforms in the International Monetary Fund's Decision-Making Processes

The suspension of voting rights adopted in the IMF Articles of Agreement is not uncontroversial.[879] The practical consequences of these voting-related sanctions is that a defaulting member will have his Governor and Alternate removed from the Board of Governors and may even see its Director removed from the Executive Board.[880] As such, not only will the defaulting state lose its right to vote but it will also lose its right to participate in this Organization's decision-making process. Indeed, it is only after a request has been made by the defaulting state and only on issues which particularly affect it that a state which has had its voting rights suspended will be entitled to send a representative to attend these meetings but, even then, it will be unable to attend other IMF committee meetings.[881]

Moreover, although it can be argued that the US and its supporters were well intentioned in their initiative to address the problem of arrears, their action was clearly a reaction and not a solution to the problem because the suspension of voting rights has limited value for at least two reasons.

First, if this kind of exclusionary sanction was meant as a weapon against arrears and other breaches of obligations, it can hardly be effective. Given that most IMF decisions are taken by consensus, the effect of a given member state's exclusion from a vote is not felt.

Second, the virtual lack of decision-making power and/or substantive influence of

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[879] *See* Head, *supra* note 42, pp. 640-642, discussing the "wisdom" of this third amendment to the IMF Articles of Agreement.

[880] *See* IMF ARTICLES OF AGREEMENT Schedule L foresees some of the consequences of the suspension of voting rights, namely:

> "(a) The Governor and Alternate Governor appointed by the member shall cease to hold office.
> [...]
> (c) The Executive Director appointed or elected by the member, or in whose election the member has participated, shall cease to hold office, unless such Executive Director was entitled to cast the number of votes allotted to other members whose voting rights have not been suspended. In the latter case:
> (i) if more than ninety days remain before the next regular election of Executive Directors, another Executive Director shall be elected for the remainder of the term...
> (ii) if not more than ninety days remain before the next regular election of Executive Directors, the Executive Director shall continue to hold office for the remainder of the term."

[881] IMF ARTICLES OF AGREEMENT Schedule L, art. 4.

individual members (save for the US) in the decisions of the IMF, makes the suspension of voting rights neither a remedial nor a corrective sanction. For most IMF members, and certainly for its mini-states, casting their votes is merely a symbolic act, a formal gesture exercised in observance of the fundamental principle of SE of all members. Whether or not most states vote on IMF decisions is usually irrelevant to the outcome. Only block voting can change or effect decisions. A recalcitrant member state, therefore, is not motivated to resume its obligations simply because its voting rights have been suspended. As such, a lot of effort went into a seemingly powerless provision. It seems that in their rush for a quick solution, IMF member states merely succeeded in making but a cosmetic change to the IMF Articles of Agreement.

B. THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (MIGA)

> "To a great extent, the world is now knit together in one economy. Economic integration has contributed to unprecedented economic and social progress worldwide. But the family of man is made up of many nations, fiercely independent and none too trusting of outsiders. As a result, uncertainties and risk continue to constitute impediments. In the end, we all recognize that everyone's prosperity—and security—depends, in part, on finding ways to reduce distrust and foster cooperation.
> The Multilateral Investment Guarantee Agency represents one potentially important means of reducing the risk of the transfer of capital among nations for mutual benefits and prosperity."
>
> Ibrahim F.I. Shihata[882]

1. GENESIS AND STRUCTURE

By all accounts, the **World Bank** is a leading international financial organization. Created in the aftermath of W.W.II to assist in the reconstruction and development of Europe, it has since shifted its role to promoting economic development in Third World countries. Today, the World Bank has expanded into what is commonly known as the **World Bank Group**, comprised of five institutions: 1) the **World Bank** otherwise known as the **International Bank for Reconstruction and Development** (IBRD); 2) the **International Development Association** (IDA); 3) the **International Finance Corporation** (IFC); 4) the **International Centre for the Settlement of Investment Disputes** (ICSID); and 5) the **Multilateral Investment Guarantee Agency** (MIGA).

Established in 1988, MIGA is the newest member of the World Bank Group.[883] As with other members of this Group, it is a *financial* IGO which plays a key role in international economic development.[884]

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[882] IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS 286 (1991) [hereinafter 'SHIHATA—THE WORLD BANK'].

MIGA was born in response to the numerous difficulties related to foreign investments which compromised economic development world-wide.[885] These difficulties were most pronounced in the 1960s as many foreign investments were nationalized and expropriated in developing countries.[886] By the 1980s, the debt servicing problems of many countries compounded economic development difficulties and produced a reduction in investment flows which slowed economic growth, particularly in developing countries.[887] Recognizing the need to promote and protect foreign investment so as to encourage economic development, MIGA was created.[888]

MIGA aims to build confidence and enhance relations between governments of states hosting foreign investments (i.e. host states) and foreign states (i.e. whose nationals are investing) by providing two distinct services.[889] First, its mandate is to advise developing

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[883] CONVENTION ESTABLISHING THE MULTILATERAL INVESTMENT GUARANTEE AGENCY, (1985), [hereinafter 'MIGA CONVENTION'] is the founding document of this IGO. Signed in 1985, the MIGA Convention came into force in 1988, and MIGA subsequently began operations in 1989. It issued its first guarantee in 1990.

[884] *See* Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1 AM. U.J. INT'L LAW & POL'Y 97, 98, 106, 107 (1986) [hereinafter 'Shihata—The Role of the World Bank'].

[885] *See* SHIHATA—THE WORLD BANK, *supra* note 882, pp. 271, 298-299 & pp. 325-326 note 57, for a discussion on the background initiative to MIGA's establishment. *Cf. generally Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention Establishing the Multilateral Investment Guarantee Agency*, The World Bank, (Sept. 12, 1985) [hereinafter *'IBRD Report on the Establishment of MIGA'*]. In the 1950s, 1960s and 1970s there were several initiatives for the creation of a multilateral investment insurance agency. However, it was only after the renewed initiative of the World Bank President (Mr. Claussen) in 1981, and the effort of the World Bank Vice-President and General Counsel (Ibrahim F.I. Shihata) which eventually led to the establishment of the MIGA Convention in 1985.

[886] *See* Ibrahim F.I. Shihata, *The Multilateral Investment Guarantee Agency*, 20 INT'L LAW. 485-488 (1986) [hereinafter 'Shihata—MIGA']; SHIHATA—THE WORLD BANK, *supra* note 882, pp. 271, 298-299, for a discussion on the background initiative to MIGA's establishment.

[887] *See* Jurgen Voss, *The Multilateral Investment Guarantee Agency: Status, Mandate, Concept, Features, Implications*, 21 J.W.T.L. 5, 7-8 (1987) [hereinafter 'Voss—MIGA'], noting that "[i]n terms of global economic efficiency, the decline of investment flows to most developing countries is costly, because the productivity of investment capital is substantially higher in developing countries than in developed countries."; HEINZ B. BACHMANN, INDUSTRIALIZED COUNTRIES' POLICIES AFFECTING FOREIGN DIRECT INVESTMENT IN DEVELOPING COUNTRIES, [Volume I: Main Report—Policy and Advisory Services, Multilateral Investment Guarantee Agency Research Paper Series] 1 (1991), stating that "[d]uring the 1980s, the economies of the developing countries have been marked by growing foreign debt burdens, worsening balance of payments difficulties and a lack of resources for new investment." *See generally* IBRAHIM F. SHIHATA, MIGA AND FOREIGN INVESTMENT: ORIGINS, OPERATIONS, POLICIES AND BASIC DOCUMENTS OF THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (1988) [hereinafter 'SHIHATA—MIGA & FOREIGN INVESTMENT'].

[888] MIGA CONVENTION preamble.

[889] SHIHATA—THE WORLD BANK, *supra* note 882, p. 327; Shihata—MIGA, *supra* note 886, p. 485; Shihata—The Role of the World Bank, *supra* note 884, p. 108; MIGA CONVENTION art. 2 entitled "Objective and Purposes" provides:

> "The objective of the Agency shall be to encourage the flow of investments for productive purposes among member countries, and in particular to developing countries, [...]
>
> To serve its objective, the Agency shall:

countries through a wide range of investment-related services, including promotional activities, technical support, research, etc.[890] Second, its objective is to guarantee new foreign investments against non-commercial risks (otherwise known as political risks) made in developing countries.[891] These guarantees generally involve protection against the risk of (i) currency transfer, (ii) expropriation, (iii) breach of contract by the host government, and (iv) war and civil disturbance.[892] Additional types of non-commercial

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(a) issue guarantees, including coinsurance and reinsurance, against non-commercial risks in respect of investments in a member country which flow from other member countries;

(b) carry out appropriate complementary activities to promote the flow of investments to and among developing member countries ..."

In this article, as well as throughout the entire MIGA Convention, the term 'guarantee' is used as a synonym of the term 'insurance'. The founding members of MIGA were under the impression that 'guarantee' had a broader meaning and application than the traditional term 'insurance'.

[890] MIGA CONVENTION art. 2, para b & art. 23; Shihata—The Role of the World Bank, *supra* note 884, p. 110; Shihata—MIGA, *supra* note 886, pp. 485, 491; Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency, (1985) paras 41-44 [hereinafter 'MIGA Commentary']. *See also generally* LOUIS T. WELLS, JR. & ALVIN G. WINT, MARKETING A COUNTRY: PROMOTION AS A TOOL FOR ATTRACTING FOREIGN INVESTMENT [Foreign Investment Advisory Service Occasional Paper 1] (1990); LOUIS T. WELLS, JR. & ALVIN G. WINT, FACILITATING FOREIGN INVESTMENT: GOVERNMENT INSTITUTIONS TO SCREEN, MONITOR AND SERVICE INVESTMENT FROM ABROAD [Foreign Investment Advisory Service Occasional Paper 2] (1991), examining a host of foreign investment promotion-related issues.

[891] Shihata—The Role of the World Bank, *supra* note 884, p. 108; Shihata—MIGA, *supra* note 886, p. 485; MIGA CONVENTION preamble, arts 2 & 14. *See also* SHIHATA—THE WORLD BANK, *supra* note 882, p. 336 noting that MIGA's guarantees apply to foreign investments not necessarily to foreign investors. A local investor in a developing state would be eligible for MIGA's political risk protection if the investment is financed from capital repatriated from abroad. *See generally* Ibrahim F.I. Shihata, *Eligibility Requirements for MIGA's Guarantees*, 2 ICSID REV. FOREIGN INV. L.J. 373 (1987), discussing the various eligibility criteria for the issuance of MIGA's protection—i.e. the type and form of eligible investment, the time-frame for the investment, the eligibility of investors, the eligibility of host countries and the eligible risks covered.

[892] MIGA CONVENTION art. 11, para. a, entitled "Covered Risks" provides:

"(a) Subject to the provisions of Sections (b) and (c) below, the Agency may guarantee eligible investments against a loss resulting from one or more of the following types of risk:

(i) Currency Transfer
any introduction attributable to the host government of restrictions on the transfer outside the host country of its currency into freely usable currency or another currency acceptable to the holder of the guarantee, including a failure of the host government to act within a reasonable period of time on an application by such holder for such transfer;

(ii) Expropriation and Similar Measures
any legislative action or administrative action or omission attributable to the host government which has effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories;

(iii) Breach of Contract
any repudiation or breach by the host government of a contract with the holder of a guarantee, when (a) the holder of a guarantee does note have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach, or (b) a decision by such forum is not rendered within such reasonable period of time as shall be prescribed in the contracts of guarantee pursuant to the Agency's regulations, or (c) such a decision cannot be enforced; and

(iv) War and Civil Disturbance

risks may also be covered upon a joint application by the host country and the investor.[893]

Legal Foundations

Although MIGA was created under the auspices of the World Bank, and is associated with the UN as one of its Specialized Agencies, it is a completely independent organization both on a financial as well as on an operational basis.[894] Despite its symbolic link with the World Bank, it has an autonomous juridical personality and its own capital, as well as its own organs.[895]

MIGA's administrative and operational functions are funded entirely by its members which contribute to this Organization by paying a specified number of subscription shares.[896] These subscriptions are based primarily on a state's economic status and have been pre-established for MIGA's member states as well as for its prospective member states.[897]

Institutional Framework

MIGA's organizational structure is patterned after the IBRD and the IFC.[898] As such, its constituent act provides for three principal organs for MIGA.[899] Besides its (1) **President** who exercises broad management powers in this IGO,[900] MIGA has two distinct governing

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any military action or civil disturbance in any territory of the host country to which this Convention shall be application as provided in Article 66."

[893] MIGA CONVENTION art. 11, para. b; Shihata—The Role of the World Bank, *supra* note 884, p. 109. *See also* MIGA, *International Political Risk Symposium*, MIGA NEWS 8 (Winter 1997/1998), summarizing speaker's Louis T. Wells Jr. comments at a MIGA organized symposium (entitled "International Political Risk Management Techniques and the Role of Political Risk Insurance") this article notes that Professor Wells "postulated that investors now face a set of 'new risks', such as corruption, organized crime, increasing nationalism and the power of international pressure groups."

[894] Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. FOREIGN INVEST. L.J. 1, 14 (1986) [hereinafter 'Shihata—Towards a Greater Depoliticization of Investment Disputes'].

[895] *See* MIGA CONVENTION art. 1, para. b; Shihata—Towards a Greater Depoliticization of Investment Disputes, *supra* note 894, p. 16; Shihata—The Role of the World Bank, *supra* note 884, p. 110; Shihata—MIGA, *supra* note 886, p. 493; Voss-MIGA, *supra* note 887, p. 16.

[896] MIGA CONVENTION art. 6.

[897] MIGA CONVENTION Schedule A.

[898] *IBRD Report on the Establishment of MIGA, supra* note 885, para. 12; Dietmar W. Bachmann, *MIGA—Multilateral Investment Guarantee Agency, in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 2, 884, 886 (Rüdiger Wolfrum and Christiane Philipp eds, 1995).

[899] MIGA CONVENTION art. 30.

[900] *See* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 314; MIGA CONVENTION art. 33, para. a; MIGA Commentary, *supra* note 890, para. 59.

bodies the (2) **Council of Governors** and the (3) **Board of Directors.**[901] The Council of Governors is vested with MIGA's key decision-making powers but (as is the case with the IMF Board of Governors) may delegate many of these powers to the Board of Directors.[902] As these two independent bodies are MIGA's key decision-makers they are the focus of the present study.

a) Membership Composition

Headquartered, in Washington, D.C.,[903] like the other four institutions of the World Bank Group, MIGA is a universal IGO. Its membership is open to any state member of the World Bank and Switzerland.[904] Currently, it is composed of 145 member states.[905]

MIGA's Council of Governors resembles the IMF's Board of Governors. It is a plenary body which meets annually and, unless otherwise expressly foreseen, is vested with all the Organization's powers.[906] However, with the exception of specific powers which are foreseen in its constituent act, the Council of Governors may also delegate many of its powers to the Board of Directors.[907] Composed of one Governor and one Alternate appointed by each member state,[908] this body currently includes 145 Governors and 145 alternates, amongst which one Governor is selected as Chairman.[909]

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[901] MIGA CONVENTION art. 30; MIGA Commentary, *supra* note 890 para. 56.

[902] MIGA CONVENTION arts. 31, 33; SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 294; *Multilateral Investment Guarantee Agency By-Laws*, (June 1988) Sec. 12 [hereinafter '*MIGA By-Laws*'].

As provided throughout MIGA's constituent instrument the powers which may not be delegated from the Council of Governors to the Board of Directors are important and extensive. *See also* SHIHATA—MIGA AND FOREIGN INVESTMENT, *supra* note 887, pp. 294-295, for a succinct list of the powers exempt from delegation.

[903] MIGA CONVENTION art. 36; MIGA Commentary, *supra* note 890, para. 61.

[904] MIGA CONVENTION art. 4(a); Voss-MIGA *supra* note 887, p. 16; Shihata—The Role of the World Bank, *supra* note 884, p. 110.

[905] *See* Annex VI for MIGA's membership list. An additional 16 countries are in the process of fulfilling membership requirements. This additional membership would enable MIGA to increase its capital and, consequently, its operations.

[906] MIGA CONVENTION art. 31, para. a; MIGA Commentary, *supra* note 890, para. 57. *See also MIGA By-Laws, supra* note 902, Sec. 1, discussing Council of Governors' meetings.

[907] MIGA CONVENTION art. 31, para. a; MIGA Commentary, *supra* note 890, para. 57.

[908] MIGA CONVENTION art. 31, para. b; Shihata—The Role of the World Bank, *supra* note 884, p. 110; Shihata—MIGA, *supra* note 886, p. 493; Voss-MIGA, *supra* note 887, p. 16; MIGA Commentary, *supra* note 890, para. 57.

[909] *See* MULTILATERAL INVESTMENT GUARANTEE AGENCY, 1997, ANNUAL REPORT 68-70 (1997) [hereinafter '1997 MIGA ANNUAL REPORT'], for a list of MIGA's Governors and Alternates. *See also MIGA By-Laws, supra* note 902, Sec. 5, providing for the selection of the Council of Governors' Chairman.

MIGA's Board of Directors, although not identical to its IMF counterpart, somewhat resembles it. Exercising all the powers which it has been delegated, it is responsible for MIGA's so-called "general operations" or "ordinary business".[910] Moreover, the Board of Directors is a restrictive body elected by the Council of Governors.[911] It is currently composed of 24 Directors, and 24 alternates, 5 of which are elected by the states with the largest subscription of shares to MIGA, while the remaining 19 are elected by regional constituencies of MIGA's shareholders.[912] The President of the World Bank is also MIGA's President and is *ex officio* Chairman of its Board of Directors.[913]

As with other IGOs, the 145 member states of MIGA include industrial as well as developing states. However, unlike most IGOs, MIGA's Convention separates its membership into two categories.[914] Members in Category I are from developed countries and those in Category II are from developing countries. A list of all potential member states with the corresponding number of their prospective membership shares, is included in Schedule A of the MIGA Convention.[915]

Currently, MIGA's membership consists of, 20 industrialized states and 125 developing states.[916] This classification impacts on MIGA's entire organizational structure. First, the services MIGA offers are exclusive to either Category I or II, but not to both. For instance, an investment is only eligible for a MIGA guarantee if it is undertaken in a developing country (Category II).[917] Similarly, promotional and technical investment services are only available to Category II member states.[918] More importantly, for the purposes of the present study, the segregation of its membership has been the reason behind MIGA's novel voting structure which I will discuss further in this chapter.

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[910] *MIGA By-Laws*, *supra* note 902, Sec. 12; MIGA CONVENTION art. 32; Shihata—The Role of the World Bank, *supra* note 884, p. 110; Shihata—MIGA, *supra* note 886, p. 493; SHIHATA—THE WORLD BANK, *supra* note 882, p. 329.

[911] MIGA CONVENTION art. 32, art. 41, para. a, Schedule B; *MIGA By-Laws*, *supra* note 902, Sec. 14; Shihata—The Role of the World Bank, *supra* note 884, p. 110; Shihata—MIGA, *supra* note 886, p. 493.

[912] MIGA CONVENTION art. 41 & Schedule B; MIGA Commentary, *supra* note 890, para. 58. *See* 1997 MIGA ANNUAL REPORT, *supra* note 909, pp. 4, 71-72, for a list of MIGA's Board of Directors and its alternates.

[913] MIGA CONVENTION art. 32, para. b & art. 33, para. b; MIGA Commentary, *supra* note 890 para. 62.

[914] MIGA CONVENTION Schedule A.

[915] When the MIGA Convention was drafted, in 1985, 21 states were listed in Category I and 128 in Category II for a total of 149 prospective member states. As the structure of international society has changed, today, there are 182 potential members of MIGA (i.e. 181 are members of the World Bank plus Switzerland).

[916] *See* Annex VI for MIGA's membership list.

[917] *See* 1997 MIGA ANNUAL REPORT, *supra* note 909, p. 11.

[918] *See* MIGA CONVENTION art. 23.

b) Legal Value of Decisions

As with the IMF, MIGA has a hierarchy of legal instruments.[919] They are: (1) the ***MIGA Convention***; (2) ***By-Laws, Rules and Regulations*** and other ***Council of Governors' Decisions*** *(sricto sensu)* and; (3) ***Board of Directors' Decisions*** *(stricto sensu)* ***and Recommendations***.[920] Save its recommendations, all of MIGA's constituent instruments and decisions are binding on its member states.

Other than its constitutional, organizational and operational decisions (i.e. MIGA Convention, by-laws, rules and regulations), most MIGA decisions involve the issuance of guarantee contracts to investors who are generally nationals of developed states members of MIGA.[921] These guarantee contracts ensure that, should an investor suffer a financial loss due to the realization of a political risk in a country hosting its investment, MIGA would compensate the insured party (i.e. the foreign investor/investment) and would then (be subrogated into the investor's rights and) have recourse against the host country for the claim paid.[922]

Remarkably, MIGA's decisions to guarantee a foreign investment are only issued after this IGO has obtained the consent of the host country. This voluntarism is presumably "[i]n recognition of host governments' sovereign control over the admission of foreign investment into their territories".[923] Thus, a state's membership in MIGA does not automatically legally bind it to reimburse this IGO upon the realization of a political risk. A country hosting a foreign investment must expressly consent to be bound by the terms of MIGA's contract of guarantee through an agreement on legal protection for the investment and type of coverage to be guaranteed.[924] Otherwise, MIGA cannot issue its guarantee without the host country's approval.

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[919] *Cf. MIGA By-Laws*, *supra* note 902, noting the hierarchical order in the introduction by providing that "[i]n the event of a conflict between anything in these By-Laws and any provision or requirement of the Convention, the Convention shall prevail."

[920] *See* Shihata—MIGA, *supra* note 886, p. 492; SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 295.

[921] *See also* SHIHATA—THE WORLD BANK, *supra* note 882, p. 336, noting that "MIGA's protection attaches to this peculiar situation of the investors rather than to their nationality: to the extent that they transfer assets from abroad, local investors can also qualify. The investment must be foreign but not necessarily the investor."

[922] *See* MIGA CONVENTION art. 18; MIGA Commentary, *supra* note 890, para. 26; SHIHATA—THE WORLD BANK, *supra* note 882, p. 331.

[923] *See* Shihata—The Role of World Bank, *supra* note 884, p. 110; SHIHATA—THE WORLD BANK, *supra* note 882, p. 328.

[924] *See* MIGA CONVENTION art. 15 entitled "Host Country Approval" which provides that "[t]he

For example, should a Canadian company (i.e. incorporated in Canada, Category I member state) decide to invest in Yugoslavia (Category II member state), in principle, it would be eligible for a MIGA guarantee because both investor and host states are members of MIGA. However, in order to issue this guarantee, first, MIGA does its own legal and feasibility assessment. If it decides to proceed, then, MIGA attempts to enter into a bilateral agreement with Yugoslavia. With this agreement, if a political risk is realized in Yugoslavia (e.g. war), and the Canadian investor sustains losses, once MIGA pays the claim which it had guaranteed, (it would be subrogated in the Canadian investor's rights and), it would be able to recover the sums paid from the government of Yugoslavia.[925] Thus, although it has acceded to the MIGA Convention, until the government of Yugoslavia formally approves the foreign investment and the non-commercial risk designated for coverage, MIGA cannot issue a guarantee contract to the Canadian investor.

Agency shall not conclude any contract of guarantee before the host government has approved the issuance of the guarantee by the Agency against the risks designated for cover."; MIGA Commentary, *supra* note 890, para. 25. *See also* MIGA CONVENTION art. 57, para. b, providing that the agreement between the host country and MIGA must also provide for a dispute settlement mechanism.

[925] *See* MIGA CONVENTION art. 18; MIGA Commentary, *supra* note 890, para. 26.

2. THE CONSTITUTIONAL FOUNDATIONS AND DECISION-MAKING FRAMEWORK OF THE MULTILATERAL INVESTMENT GUARANTEE AGENCY

Historically, investment-related disputes created serious diplomatic problems between states hosting foreign investments (i.e. host states) and states whose nationals were doing the investing (i.e. foreign investors). Often, these disputes became politicized and resulted in abuse of the diplomatic protection claimed by the state of the foreign investor and, at times, even the use of force.[926] These investment-related problems were particularly pronounced in Latin American states. As a result, at the turn of the century, the **Calvo Doctrine** was established.[927]

Premised on the principle of equality of states, the Calvo Doctrine prohibited foreign states' intervention for the settlement of disputes in Latin American states and considered any such intervention a violation of their territorial integrity.[928] Through the inclusion of the so-called "Calvo clause" in investment contracts, foreign investors were thus compelled to waive the right to settle investment-related disputes through *international or diplomatic channels* and undertook to settle any such disputes strictly via the *domestic jurisdiction* of the host state.[929] As such, the Calvo Doctrine constituted a *regional challenge*[930] to the principle of diplomatic protection which had long been established in *international customary law*.[931]

The Calvo Doctrine became so important to Latin American states that it was embodied in a number of their constitutions and restated in many of their legal instruments.[932] With

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[926] *See* SHIHATA—THE WORLD BANK, *supra* note 882, pp. 309, 334.

[927] The establishment of the Calvo Doctrine is credited to Carlos Calvo (1824-1906) who was an Argentine diplomat and an international law publicist. He formulated the so-called "Calvo Clause" which was included in investment contracts between Latin American countries and foreign investors. This clause stipulated that foreign investors effectively renounce recourse before international law fora and allowed redress for investment-related disputes only before local tribunals. *See* SHIHATA—THE WORLD BANK, *supra* note 882, pp. 310-312; QUOC DINH ET AL., *supra* note 2, pp. 765-766.

[928] *See* SHIHATA—THE WORLD BANK, *supra* note 882, pp. 310, 333.

[929] *See id.* at 310, noting that the Calvo Doctrine "denied that foreign nationals were entitled to special rights and privileges and emphasized that controversies related to the claims of such nationals against host states were to be settled exclusively under domestic law and domestic tribunals."

[930] *See* QUOC DINH ET AL., *supra* note 2, pp. 75, 766.

[931] *See* SHIHATA—THE WORLD BANK, *supra* note 882, p. 312.

[932] *See Id.* 310.

time this doctrine also gained increased international prominence and was enshrined in the *UN Charter of Economic Rights and Duties of States*.[933]

Originally, the Calvo clause was upheld in international law for it represented the contractual will of the parties (i.e. investor state and host state). Ultimately, however, this clause was invalidated because a state's right to exercise diplomatic protection was ruled to be an inherent right of its sovereignty, which cannot be renounced even by its own nationals.[934] This means that while the Calvo clause may apply directly to the foreign investor, who has accepted the terms of this clause, it cannot be applied against a third party—i.e. the foreign investor's home state.

As an IGO, MIGA is sheltered from the Calvo Doctrine.[935] Indeed, because the political supervision and financial responsibility of foreign investments is shared equally by both home and host states,[936] MIGA creates "a buffer against diplomatic intervention and politicization" of investment disputes.[937] As such, MIGA is deemed "to promote a

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[933] *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, 29 UN GAOR SUPP. (No. 31) at 50, UN Doc. A/9631 (1974). Chapter II, Article 2(2)c of the Charter stipulates that:

> "2. Each States has the right:
> [...]
> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation give rise to controversy, it shall be *settled under the domestic law* of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the *sovereign equality* of States and in accordance with the principle of free choice of means." (emphasis added).

See also BASIC DOCUMENTS IN INTERNATIONAL LAW 240 (Ian Brownlie ed., 4th ed. 1995) noting that the UN GA resolution of the Charter of Economic Rights and Duties of States was adopted on December 12, 1974 "by a vote of 120 in favour, 6 against (Belgium, Denmark, German Federal Republic, Luxembourg, United Kingdom, United States) and 10 abstentions (Canada being one of those abstained). *Cf.* SHIHATA—THE WORLD BANK, *supra* note 882, p. 311, remarking that Mexico played a prominent role in drafting this UN resolution.

[934] *See* QUOC DINH ET AL., *supra* note 2, p. 766. *See also* SHIHATA—THE WORLD BANK, *supra* note 882, p. 312, noting that while "[a] Calvo Clause may well be binding on the investor who accepts it, [...it] does not, however, mean that it deprives the government of the investor of its own right to present an international claim for an injury to its own interests arising from the alleged violation of international law that resulted in an injury to its national."

[935] *See* SHIHATA—THE WORLD BANK, *supra* note 882, p. 333; Shihata—Towards a Greater Depoliticization of Investment Disputes, *supra* note 894, p. 19.

[936] *See* SHIHATA—THE WORLD BANK, *supra* note 882, p. 334.

[937] *See id.* at 325, 334. *See also* p. 337 where Mr. Shihata in fact asserts MIGA's compatibility with the Calvo Doctrine, by stating that:

> "Not only is MIGA compatible with the objective of the Calvo Doctrine, it may even further such objective in a more effective manner than that achieved by a typical Calvo Clause. By providing guarantees against political risk, MIGA rolls over these risk, and the losses resulting from them, from the investor and the economy of his home country to an international institution and thus reduces or even eliminates the potential of a conflict between the investor's home country and

compromise between the far-reaching expectations of investor and industrialized countries and the concerns of developing member states in respect of their economic sovereignty."[938]

However, MIGA's Convention does not explicitly refer to the principle of sovereignty or adhere to the principle of SE. Nor are these principles foreseen in its By-Laws, Regulations or any other of its basic legal instruments. However, like sixteen other IGOs (including those of the World Bank Group—i.e. IBRD, IDA and IFC) MIGA is a UN Specialized Agency. As such, MIGA indirectly adheres to the principle of SE enshrined in articles 1(2), 2(1), 55 and 78 of the UN Charter (*see supra* III.B.1.b). Below, I explore the role of SE in MIGA's decision-making framework as it pertains to its majoritarian VMs (IV.B.2.a) and its weighted voting rule (IV.B.2.b).

a) A Majoritarianism Decision-Making Process

As noted earlier, there has been a widespread renunciation of the rule of *unanimity* in most twentieth century universal IGOs. Since W.W.II, various levels of majoritarianism have been adopted as the voting rule in most IGOs. Such is the case with MIGA's Convention, which generally requires ***simple majority*** or ***special majority*** for the decisions it takes. Exceptionally, MIGA's Convention also requires ***unanimity*** for constitutional amendments related to the right to withdraw from the organization.[939]

While simple majority is applied to a limited number of MIGA decisions,[940] 'special majority' is required for the overwhelming number of its decisions,[941] including MIGA's decision-making regarding its regulations and its important decisions.[942]

The special majority rule is generally represented by double majority provisions requiring (i) two-thirds of the voting power, and (ii) representing 55% of the subscriptions

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the host country."

See also generally Shihata—Towards a Greater Depoliticization of Investment Disputes, *supra* note 894, discussing MIGA's role in the depoliticization of investment disputes.

[938] Bachmann, *supra* note 898, p. 890.

[939] MIGA CONVENTION art. 59, para. a(i).

[940] *See* MIGA CONVENTION art. 40, para. a; art. 41, para. b; art. 42, para a; art. 42, para b; *MIGA By-Laws*, *supra* note 902, Sec. 14.

[941] *See* MIGA CONVENTION art. 3 para d; art. 5, para c; art. 10, para. a(iii); art. 11, para. b; art. 12, para. b; art. 13, para. c; art. 20, para. a; art. 22; art. 23, para b(ii); art. 27, para. b; art. 36, para. a; art. 39; art. 55, para. a; art. 57, para. b; art. 59, para. b.

[942] *See* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 314.

shares to MIGA.[943] However, additional special majorities, representing different double majority combinations, are also foreseen in MIGA's Convention. For instance, a double majority requirement applies for decisions related to (1) the suspension of membership, and (2) amendments to MIGA's Convention and Annexes.[944] In the first case, the VM requires (i) a majority of MIGA's member states, (ii) representing a majority of the total voting power. In the second case, the double majority rule is even greater for constitutional amendments necessitate (i) a vote by 3/5 of the Governors, (ii) representing 4/5 of the total voting power.

The required quorum for decision-making in the Council of Governors is the majority of the Governors representing two-thirds of the total voting power.[945] In the Executive Board the required quorum is a bit lower as decision-making may take place with the majority of the Board holding at least half of the total voting power.[946]

b) The Classic Weighted Voting Rule of Financial Organizations

Since MIGA opted for the use of *weighted voting* power, the subscription of shares is directly related to the number of votes assigned to each member state.[947] In this respect, as with other international financial organizations, including all members of the World Bank Group, MIGA's weighted voting formula represents the economic inequality of the participant states.

Indeed, like other Bretton Woods institutions (i.e. IMF, IBRD, IDA & IFC) MIGA's weighted voting structure takes place after each member state first receives a basic and an equal number of votes. Similarly to the IMF, IBRD and IFC where member states are all allocated 250 votes, and to the IDA where member states are all allotted 500 votes,[948] MIGA's member states are each allocated 177 votes.[949] This basic allotment is meant to

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[943] MIGA CONVENTION art. 3, para d. As I will discuss in Part IV.B.3.a, (due to MIGA's novel decision-making structure which grants supplementary votes in order to achieve equality between its categories), unlike other Bretton Woods institutions, the voting power of MIGA's members is not representative of their subscription of shares.

[944] MIGA CONVENTION arts 52 & 59.

[945] MIGA CONVENTION art. 40, para. b; *MIGA By-Laws*, *supra* note 902, Sec. 9, para d.

[946] MIGA CONVENTION art. 42, para. b.

[947] Voss—MIGA, *supra* note 887, p. 19.

[948] SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 315.

[949] MIGA CONVENTION art. 39, para. a indicates that:

reflect the so-called "equal interest" of its two categories[950] and, presumably, adhere to the principle of SE of its membership.

The balance of member states' votes in MIGA are weighted according to their respective membership contributions (i.e. subscription shares) which constitute this Organization's capital stock. The initial capital stock authorized was 1 billion SDRs divided into 100,000 shares with a par value of 10,000 SDR per share.[951] Each member state is allotted one vote for each membership share assigned.[952] The assignment of these shares, and consequently the allotment of these votes, recognizes and reflects the inherent economic inequalities of states.[953] This, however, is the extent of its similarities with other weighted VMs. In reality, MIGA's VM differs substantially from all others found in financial IGOs, including those of the Bretton Woods institutions. I examine MIGA's *sui generis* decision-making structure hereinafter.

> "In order to provide for voting arrangements that reflect the *equal interest* in the Agency of the two Categories of States list in Schedule A of this Convention, as well as the importance of each member's financial participation, each member shall have 177 membership votes plus one subscription vote for each share of stock held by that member." (emphasis added).

See Voss-MIGA, *supra* note 887, p. 20.

[950] *See* MIGA CONVENTION art. 39, para. a; MIGA Commentary, *supra* note 890, para. 63; SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 316.

[951] MIGA CONVENTION art. 5, para a; MIGA Commentary, *supra* note 890, para. 4.

[952] MIGA CONVENTION art. 39, para. a; Voss-MIGA, *supra* note 887, p. 20.

[953] *See* MIGA CONVENTION Schedule A. This Schedule reflects a predetermined list of all of MIGA's potential member states and the proportional number of shares which have been attributed to the them.

3. THE *SUI GENERIS VOTING PARITY IN THE DECISION-MAKING PROCESS OF THE MULTILATERAL INVESTMENT GUARANTEE AGENCY*

a) The Innovation of Weighted Voting Parity

Arguably, the "principle of weighted voting gives tremendous economic advantage to the economically strong, capital-exporting countries".[954] However, MIGA's founders recognized that this Organization, like most other universal IGOs—would be numerically dominated by developing member states.[955] Since MIGA insures foreign investments made from investor (Category I) to host (Category II) states, it was thought essential to provide both categories with an equal say in the protection of investments. There are a couple of reasons for this thinking.

For one, in order to be encouraged to invest, Category I states need assurance that their investments are going to be adequately protected. Protection against political risks—such as, *inter alia*, expropriation, nationalization, war and civil disturbance—sufficiently assure foreign investors that their investments would not carry the ultimate burden of financial losses upon the realization of such risks.[956]

On the other hand, while Category II states need to attract foreign investors, they also want to exercise full economic sovereignty in their territories.[957] Thus, Category II states are deemed to have an equal stake on the decision to issue a MIGA guarantee for a prospective foreign investment.

Accordingly, MIGA's success was thought to be contingent on a "voting structure which would alleviate the suspicion of developing countries while maintaining the equally needed

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[954] *See also* Claudia von Monbart, *IBRD—International Bank for Reconstruction and Development (World Bank), in* UNITED NATIONS: LAW, POLICIES AND PRACTICE, VOL. 1, 656-663, 656 (Rüdiger Wolfrum and Christiane Philipp eds, 1995). The author further recognizes that the rule of weighted voting "sets the World Bank Group apart from the [UN] General Assembly and most specialized agencies of the United Nations, where every member state controls an equal vote [...] and where the Third World nations consequently dominate".

[955] *See* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 310, noting that the numerical dominance of developing states may be six times greater *vis-à-vis* developed states' membership to MIGA.

[956] *See id.* at 308.

[957] *See id.*

confidence of investors and their home states."[958] Determined not to have one Category more powerful than the other, so as not to undermine MIGA's credibility,[959] its founders introduced the innovation of voting power ***parity*** between its two categories of member states.[960]

In order to achieve voting power parity with MIGA's weighted voting power, each state is allocated a supplementary number of votes.[961] Thus, in addition to the 177 votes, and the one vote per subscription share that each member state is allotted, supplementary votes are pro rated, "according to the proportion of the actual votes of each member in the total votes of the Category".[962] These supplementary votes would ensure that, when MIGA attains full membership, (although, numerically, the ratio would be 6 to 1 in favour of developing states) the aggregate voting power of its Category I member states would equal the total

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[958] SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 308. *See also Directions in Development: MIGA, The First Five Years and Future Challenges*, MIGA 4 (1994), [hereinafter '*MIGA, The First Five Years and Future Challenges*'], noting that "[i]t was thought that an insurance service jointly established by home and host governments might be able to deter unfair or illegal treatment of these investors."; MULTILATERAL INVESTMENT GUARANTEE AGENCY ANNUAL REPORT 1995 9 (1995), explaining the importance of political risk insurance by stating that "uncertainty about the continuity and future course of the political, legal and regulatory regimes governing FDI [Foreign Direct Investment] constitutes an often intractable form of risk from the point of view of prospective foreign investors. Host government authorities are equally concerned about how to demonstrate the credibility of their policy reforms."

[959] *See* MIGA Commentary, *supra* note 890, para. 63. MIGA's Commentary explains the rationale behind this additional voting requirement. Paragraph 63 foresees that "[t]he Voting structure of the Agency reflects the view that Category One and Category Two countries have an equal stake in foreign investment, that cooperation between them is essential, and that both group of countries should, when all eligible countries become members, have equal voting (50/50)...". *See also* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 313. In the years preceding the establishment of MIGA, the Vice-President of the World Bank—Ibrahim Shihata—submitted a memorandum to its Executive Directors where he eloquently addressed the reasons for the principle of equality in MIGA's voting structure between the two categories of member states. Mr. Shihata wrote:

> "...In a sensitive area like the treatment of foreign investments, a drastically positive change in the outlook of host countries requires a much greater degree of mutual confidence than exists at present. Such confidence is likely to develop faster when host countries are given, in principle, an equal say. The principle itself will provide the impetus for many such countries to join the Agency and to accept extensive cooperation under its umbrella. This impetus is badly needed in many cases as the mere protection of foreign investments is hardly a popular issue for any government...".

[960] MIGA CONVENTION art. 39. *See* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 308.

[961] *See* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 316.

[962] *See id.* at 312, 316. *Cf. also* p. 315, Mr. Shihata explains that:

> "[I]f the Bretton Woods Institutions pattern was adopted for MIGA without any change, it would be extremely difficult to allot equal membership vote in a lesser number than the 250 votes provided for in the IBRD and the IFC Articles of Agreement. (IDA's Articles provide for 500 equal votes for each member.) Given MIGA's small capital, such a number, coupled with votes corresponding to subscriptions from Category Two countries close to 40 percent of total capital (if all Bank members joined MIGA) would actually give the latter countries more votes than those of Category One countries."

voting power of its Category II member states—i.e. 50% and 50%.[963]

Parity is premised on the *bloc voting* phenomenon in that "[w]hen there is a high coincidence of interest or common belief among the members of a regional or other organized group, bloc voting may be anticipated."[964] Presumably, developed states within MIGA form a bloc because they have common interests (e.g. protection of their investments so as to ensure a high rate of return). Similarly, developing members states also form a bloc because they have their own common interests (e.g. attracting foreign investment while safeguarding their sovereignty and minimizing their obligations to pay for claims following the realization of political risks). By assuring parity in voting power, MIGA assures that the interests of its developed member states are balanced with those of its developing member states. Otherwise, the will of the developed member states (Category I), due to the weighted voting system, would constantly dominate the will of its developing member states (Category II).

b) The Challenge of Weighted Voting Parity

MIGA's innovation of parity was intended to be achieved when its full membership potential would be realized—i.e. 181 states.[965] However, when MIGA was established its membership was but a fraction of this membership goal—i.e. in 1988, 42 states joined MIGA and subscribed to 53% of its capital of US$ 1,082,000,000.[966] Since it was difficult to accurately predict how many states of either category would join MIGA, the principle of parity was initially challenged for it was deemed inequitable to assign equal voting power to MIGA's two Categories before its definitive membership was known.[967]

Recognizing that full membership would not be realized at the outset, MIGA's founders foresaw a transitory provision by which they would artificially attempt to balance the voting rights of the two Categories. Accordingly, the MIGA Convention provided Category II

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[963] *See* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, pp. 311-314. *See also* MIGA Commentary, *supra* note 890, para. 63, noting that "...The number of membership votes is computed so as to ensure that if all Bank members joined the Agency, developing countries as a group would have the same voting power as developed countries as a group."

[964] Ball, *supra* note 418, p. 105. *See* Bachmann, *supra* note 898, pp. 886-887.

[965] *See* Annex VI, indicating the total number of prospective members.

[966] *See* MIGA, MULTILATERAL INVESTMENT GUARANTEE AGENCY FINANCIAL INSTITUTIONAL GUIDE, 5 (2nd ed. Feb. 1996). MIGA *Coming of Age: MIGA Turns 10*, 7 MIGA NEWS 2, 3 (1998).

[967] SHIHATA—THE WORLD BANK, *supra* note 882, p. 330.

states a guarantee of 40% of the votes.[968] Initially, this percentage of the votes was guaranteed through supplementary votes issued to Category II countries on a pro rata basis, so as to provide the developing world a relative protection in the critical early years of MIGA, and "would be cancelled when such total votes equaled 40% of the aggregate voting power in the Agency (as a result of the admission to membership of countries of the same Category or to future increases in subscriptions of existing members)."[969]

For example, at the end of 1990, MIGA's membership included 15 Category I states and 49 Category II states. According to the distribution of weighted voting power, Category I states had 54,579 shares representing 57,234 votes (67.89%) and Category II states had 27,068 shares representing 27,068 votes (32.11%).[970] Evidently, this distribution of shares did not meet the parity requirement or the 40% voting power guaranteed during MIGA's initial years.[971] Thus, pro-rated adjustments were initially made in order to meet the obligations of MIGA's constituent voting provisions.[972] These adjustments were meant to cease three years after MIGA's creation, at which time a reallocation of shares for all member states was meant to take place.[973] However, as I will discuss later (*infra* IV.B.4.b) the review of this reallocation has been twice postponed.

During its short life, MIGA's membership has constantly and significantly risen. As such, the gap in voting power has been somewhat reduced. Yet, the quest for parity

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[968] MIGA CONVENTION art. 39, para. b provides that:

> "If at any time within three years after the entry into force of this Convention the aggregate sum of membership and subscription votes of members which belong to either of the two Categories of States listed in Schedule A of this Convention is less than 40 percent of the total voting power, members from such Category shall have such number of supplementary votes as shall be necessary for the aggregate voting power of the Category to equal such a percentage of the total voting power. Such supplementary votes shall be distributed among the members of such Category in the proportion that the subscription of votes of each bears to the aggregate of subscription votes of the Category. Such supplementary votes shall be subject to automatic adjustment to ensure that such percentage is maintained and shall be canceled at the end of the above-mentioned three-year period."

[969] SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, pp. 315-316. *See* MIGA CONVENTION art. 39, para. b; *See also* Commentary, *supra* note 890, para. 63 explaining that:

> "... In order to protect the minority group before such equality is reached, this group would receive, during the three years after entry into force of the Convention, supplementary votes which would allow it to have as a group 40 percent of the total voting power. These supplementary votes would be distributed would be distributed among the members of the group concerned in proportion to their relative subscription votes and would be automatically increased or decreased as the case may be so as to maintain the 40 percent voting power of the group".

[970] *See* Barber B. Conable, *Revised Memorandum to the Board of Directors on the Review of Allocation of Shares*, [MIGA Memorandum] 2 (March 5, 1991).

[971] *See* MIGA CONVENTION art. 39, para. b.

[972] *See* Conable, *supra* note 970, p. 3.

[973] *See* MIGA CONVENTION art. 39, para. b.

remains unfulfilled. For instance, by 1993, the voting power was respectively 57% for Category I states and 43% for Category II states.[974] But even if parity had been attained between its developed and developing member states, when a new state joins this IGO, the voting power in its Category increases, and so the parity is upset. Of course, a balance of voting power can be achieved by limiting the states joining MIGA. However, MIGA needed member states in order to increase both its capital and to increase its clientele since its credibility and its success hinged on how it operated and the number of projects it insured. It was, therefore, undesirable to limit its membership.

Although only those states that were full members benefited from voting rights, the number of prospective shares had nonetheless been set aside for the states which could eventually become members. This was done, initially, through Schedule A of the MIGA Convention which drew up a potential membership list of both its Categories and assigned shares to prospective members.

In addition, MIGA's By-Laws foresaw for the Council of Governors to determine the capital subscriptions for newly created states (not originally listed as prospective members in Schedule A of MIGA's Convention).[975] For instance, the accession of former republics of the defunct USSR and of the former Yugoslavia has caused an imbalance to MIGA's parity voting and its temporary 40% provision. This is due to the fact that a new member state is entitled to its 177 basic votes plus the additional votes weighted as per its membership subscription.[976] "Therefore, in order to maintain parity, a number of shares equal to that subscribed by the new member plus 177 shares ... would have to be subscribed by any or all of the countries in the Category with the minority voting power."[977] This would also require an increase in MIGA's capital.[978]

Moreover, during the past decade, several MIGA states have transferred their membership from Category I to Category II and vice versa.[979] For instance, Spain,

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[974] Lewis T. Preston, *Memorandum to the Board of Directors: Review of Allocation of Shares*, [MIGA Memorandum], 4 (March 29, 1993).

[975] *See MIGA By-Laws*, *supra* note 902, Sec. 17, provides the application procedure for members which were not original members of MIGA. *See also Requirement for Membership in the Multilateral Investment Guarantee Agency* 2 (Aug. 1990), providing the procedure for the initial and subsequent membership subscriptions to MIGA's capital stock.

[976] Preston, *supra* note 974, p. 4. *See also MIGA By-Laws*, *supra* note 902, Sec. 17, noting the procedure for the application for membership by non-original members of MIGA.

[977] Preston, *supra* note 974, p. 4.

[978] *See* MIGA CONVENTION art. 5, para. c.

[979] This transfer between categories is usually requested by a member country and it does not require objective criteria. The control for such change is ultimately left to the Council of Governors.

Portugal and Greece, initially in Category II, moved to Category I, while South Africa, originally in Category I, moved to Category II. However, MIGA's constituent act and other basic instruments do not foresee the eventuality of its member states switching Categories. Consequently, it does not provide an adjustment or a reclassification of its shares. This has presented yet another difficulty within MIGA's current VM for, like new members, these transfers also create an imbalance in the percentage of votes in each Category. Consequently, a constant reshuffling of the balance of voting powers is required.

Remarkably, in practice, the challenges to its parity voting power—created by the influx of new memeber states and by states which have switched categories—has been avoided for MIGA does not usually resort to formal voting when adopting decisions.[980] As is the practice in other international financial organizations, MIGA's decisions are usually taken by consensus.[981]

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[980] *See* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, pp. 310, 314. *See also* Wolfrum—Consensus, *supra* note 850, pp. 350-355, discussing the developing practice of decision-making by consensus in IGOs.

[981] *See* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 310. In addition to the VP of consensus, Mr. Shihata also remarks that "in practice, a great deal of the control of international financial institutions is in the hands of their management, i.e. the technocrats who do not participate in voting and are prohibited from being influenced by political considerations". *See also MIGA By-Laws, supra* note 902, *Sec.* 8, para a, noting that "[a]t any meeting the Chairman of the Council of Governors may ascertain the sense of the meeting in lieu of formal vote but he shall require a formal vote upon the request of any Governor...".

DIAGRAM VII CHARTING DECISION-MAKING IN THE MULTILATERAL INVESTMENT GUARANTEE AGENCY

COUNCIL OF GOVERNORS & BOARD OF DIRECTORS

MEMBERSHIP	Universal = 145 States
COUNCIL OF GOVERNORS	Universal & Plenary = 145 Governors & 145 Alternates
BOARD OF DIRECTORS	Restricted = 24 Directors & 24 Alternates
DECISIONS	Binding
VOTING RULE	Weighted = 177 basic shares plus one vote per number of shares subscribed & Parity between its two Categories
VOTING MECHANISMS & PRACTICES	
VM	Simple Majority (50%+1 of the total voting power)
—REGULATIONS AND IMPORTANT DECISIONS	Special Majority (Double Majority = 2/3 % of the votes representing 55% of the subscriptions)
—SUSPENSION OF MEMBERSHIP	Special Majority (Double Majority = Majority of member states + Majority of total voting power)
—CONSTITUTIONAL AMENDMENTS	Special Majority (Double Majority = 3/5 of Governors + 4/5 of total voting power)
VP	Consensus

4. The Impact of Sovereign Equality in the Multilateral Investment Guarantee Agency

a) The Violation of the Doctrine of Sovereign Equality in the Multilateral Investment Guarantee Agency's Decision-Making

(i) Sovereign Equality's Lack of Functionalism

The principle of SE has been disregarded in MIGA's voting structure as it has shown not to be a functional proposition.[982] Indeed the four criteria used to determine the application of SE in this study—(i) the composition of its decision-making organs, (ii) the legal value of its decisions, (iii) its voting mechanisms, and (iv) its voting rule—reveal MIGA's non-compliance with this principle.

First, while all member states each have their own representatives in the Governing Body (i.e. a plenary body) this is not the case in the Executive Board (i.e. restricted body) which is responsible for most of MIGA's ordinary business. Second, because MIGA's decisions are legally binding, once a decision has been adopted, the sovereign will of each individual member state is disregarded as the collective will of the member states prevails. Third, MIGA's majoritarianism decision-making is yet another sign of the violation of the principle of SE as some states' will (i.e. the minority) is disregarded in favour of other states (i.e. the majority). Finally, the weighted voting rule which, by definition, represents unequal voting, also violates the principle of SE for it recognizes the superior voting power of some states *vis-à-vis* others based on their economic strength.

Moreover, while the initial support of voting power parity may have come from developing states some of these states nonetheless considered that this novel VM "stood short of the international principle of equality of states and should have adopted instead the one country-one vote rule."[983] On the other hand, although MIGA's developed member

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[982] *See also* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 311, citing a report issued on June 14, 1987, by the World Bank Subcommittee on the creation of MIGA which established that this IGO's voting structure had to "accommodate the concerns of prospective members while allowing for an *effectively functioning institution*." (emphasis added).

[983] *See* SHIHATA—MIGA & FOREIGN INVESTMENT, *supra* note 887, p. 309.

states eventually embraced the novel weighted voting parity as its VM, initially, these Category I member states (including the OECD member states) opposed this equality between the two categories, and preferred the Bretton Woods formula.[984] Of course, unlike the Bretton Woods institutions, MIGA is not a lending institution but rather it is a policy instrument meant to improve the investment environment world-wide and, particularly, in developing states.[985] Indeed, MIGA's additional requirement of voting power parity was ultimately adopted, not because of the principle of SE but, because it was viewed as a functional mechanism to balance cooperation between investor and host states.

(ii) Sovereign Equality's Want of Legitimacy

Similarly to its Functionalist failure, the principle of SE also fails to meet the four criteria—(i) determinacy, (ii) symbolic validation, (iii) coherence, and (iv) adherence—for the legitimacy analysis, as this principle finds virtually no legitimacy in MIGA's decision-making structure.

First, the ***determinacy*** of the principle of SE cannot be established in MIGA for basically two reasons. On the one hand, its meaning is obscured because this principle is undefined in the MIGA Convention. Moreover, (notwithstanding the plenary composition of the Council of Governors), the notion of SE has not found any clear expression in either the composition, the structure, the voting rules or processes of MIGA's Board of Directors or in the voting rules or processes of its Council of Governors.

Second, SE finds ***symbolic validation*** only in the Council of Governors' plenary membership composition while it is absent in virtually every other aspect of the MIGA's decision-making structure. This includes its absence from (i) the Board of Directors' restrictive composition, (ii) both the Council of Governors' and the Board of Directors weighted voting parity rule, and (iii) both the Council of Governor's and the Board of Directors' majoritarian voting mechanisms.

The third failure is that the principle of SE does not meet the ***coherence*** criterion of the legitimacy theory because it fails to be consistently applied throughout MIGA's decision-making organs. Indeed, while it finds application in the composition of the Council of

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[984] *See id.*
[985] *Id.* at 310.

Governors (i.e. plenary organ) it is completely disregarded in the composition of its Board of Directors (i.e. restricted organ).

Finally, as with the IMF, the only legitimacy criterion to be satisfied *vis-à-vis* the principle of SE complies in MIGA's decision-making structure is that of ***adherence.*** Although the principle of SE is not directly enshrined in the MIGA Convention, through its association with the UN (as a UN Specialized Agency) this principle complies to a higher constitutional order of norms (i.e. art. 1(2), 2(1), 55 and 78 of the UN Charter. *See also supra* Diagram III).

b) Decision-Making Reforms in the Multilateral Investment Guarantee Agency

In addition to attaining a functional balance of interests between developed and developing states, clearly, MIGA's parity requirement was sought to encourage membership by as many developing countries as possible. After all, increased membership is coupled with additional shares. This means a welcomed increase in MIGA's authorized capital and additional opportunities to issue guarantee contracts of foreign investments. As such, MIGA promised developing states that they would be on *equal* footing with the developed states.

The theoretical perspective of voting parity may be considered to reflect a type of egalitarianism. Of course, in a general context, one may question the camaraderie between states of the developed and the developing world. However, in a specific context of the encouragement, protection and guarantee of foreign investments, MIGA's functions and its members' common interests can make parity an attainable quest.

However, as MIGA's membership increased or its members switched Categories, (e.g. developing states become developed states and move from Category II to Category I), the pursuit of parity has lead to ongoing imbalances in the votes of one Category over the other. Consequently, the re-allocation of shares (which must be authorized by MIGA's Council of Governors) was required in order to obtain parity.

Initially, the transitory provision in MIGA's voting structure—ensuring 40% of the total voting power to its Category II member states—was intended as protection for only a three

year term, which was considered the critical growth period of this organization.[986] After that time, MIGA's Convention called for a new VM to be implemented through the reallocation of shares between its two Categories.[987] Three years came and went and no new VM was established, hence, no resolution to MIGA's voting problem. At the expiration of the temporary provision, there was a need to reform its voting allocations and to implement a new voting structure. Following the failure to review the allocation of shares attributed to the two Categories, in 1991 the Council of Governors extended the application of the current VM.[988] A second extension was made in 1993.[989] The review of allocation of shares between its two Categories has thus been postponed until 1998, by which time a new VM is expected to be implemented.

Evidently, there is a need for the voting parity problem to be addressed. At first glance, one would think that the key is to find acceptable criteria by which a balance between the two Categories can be reached and, more importantly, maintained upon changes in its membership. While considering decision-making reforms MIGA's Council of Governors ought to consider primarily functional and legitimate, rather than egalitarian, concepts.

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[986] MIGA Commentary, *supra* note 890, para. 63.

[987] *See* MIGA CONVENTION art. 39, para. c provides:

> "During the third year following the entry into force of this Convention, the Council shall review the allocation of shares and shall be guided in its decision by the following principles:
> (i) the votes of members shall reflect actual subscriptions to the Agency's capital and the membership votes as set out in Section (a) of this Article;
> (ii) shares allocated to countries which shall not have signed the Convention shall be made available for reallocation to such members and in such manner as to make possible voting parity between the above-mentioned Categories; and
> (iii) the Council will take measures that will facilitate members' ability to subscribe to shares allocated to them."

Since MIGA's Convention came into force on April 12, 1988—according to its article 39(c)—its Council of Governors was required to review the allocation of its shares prior to April 12, 1991.

[988] *See Review of Allocation of Shares*, MIGA Council Gov. Res. 20 (April 12, 1991). In 1991, the Council of Governors extended MIGA's transitory voting provision for a two year term.

[989] *See Review of Allocation of Shares*, MIGA Council Gov. Res. 43 (June 8, 1993). In 1993, the Council of Governors renewed the extension for an additional five year term, thus, postponing the decision to adopt a new VM until 1998.

V. DECISION-MAKING IN INTERNATIONAL ORGANIZATIONS WHICH ARE IN A LEAGUE OF THEIR OWN

In the next part of the study I examine two international institutions which stand in a league of their own, namely the **European Union** (EU)—one of the most integrated multi-functional organizations of the post W.W.II era—and the **Organisation for Economic Co-Operation and Development** (OECD)—one of the most economically influential institutions of the same period. From virtually every perspective—i.e. composition, structure, VMs and VPs, etc.—these two organizations differ both substantively and substantially from other political and financial IGOs. They differ, first, in that they are both non-universal organizations with relatively small membership. Second, unlike most other IGOs, the key decision-making organs of the EU and the OECD are plenary—not restricted—bodies. Third, contrary to the twentieth century trend towards majoritarianism, both of these IGOs maintain unanimity in their decision-making processes. Finally, with the growing prospect of the expansion of their membership, both the EU and the OECD face imminent challenges to their respective decision-making processes which were originally conceived for organizations with a relatively small number of members.

In the first chapter I provide a brief historical overview of the EU and discuss its different and multiple purposes in the various phases of its existence (V.A.1). I then proceed to elaborate its institutional framework and its current situation—i.e. from its membership composition, to its institutional organs (V.A.2). In the subsequent section I explore its key decision-making bodies, their evolution and their relation to the principle of SE (V.A.3 & 4). In the final section, I examine the role that the principle of SE and democracy have played in the EU and discuss their functional legitimacy (V.A.5). As more states accede to the EU, its conventional VMs and VPs will necessarily be challenged. I contemplate the impact that such enlargement prospects can have on the principles of SE and democracy in the EU's decision-making processes.

In the following chapter, I study the somewhat unique role that the principle of SE has played within the OECD's structure (V.B.1). I discuss how, contrary to other economic-related IGOs, this Organization disregarded the 'weighted voting' rule in favour of the 'one

state, one vote' rule (V.B.2). I then explore how the OECD's VMs and VPs of unanimity and consensus deviate from the voting trends typified in most other IGOs (V.B.3). Finally, I examine the remarkable adherence to the principle of SE within this Organization's decision-making structure (V.B.4) and consider the future and inevitable sacrifice of this principle in this Organization's decision-making processes in view of the prospect of enlargement of its membership.

A. THE EUROPEAN UNION (EU)

> "Si notre siècle aura été celui de la dispersion des Empires coloniaux et communiste, le XXI[e] siècle sera—et les indices de cela se multiplient—l'ère de l'éclatement structurel-fonctionnel de l'État souverain".
>
> "[L]'éclatement structurel-fonctionnel de l'État-nation et son insertion dans l'économie globalisée et dans des blocs économiques régionaux posent la question de la démocratie au sein d'un État perforé dans son tissu de souveraineté socio-économique (par le flux de l'économie globalisée et les stratégies des firmes transnationales) et politico-institutionnel (incapacité structurelle-fonctionnelle de prendre des décisions dans des domaines où la souveraineté formelle est paralysée par des considérations économiques globales ou par des transferts de droits souverains à des institutions supranationales—exemple, CE)".
>
> Panayotis Soldatos[990]

1. THE STRUCTURE OF THE EUROPEAN UNION

The European Union is classified as an IGO in so far as (1) it consists of a continuous structure, (2) it is established by agreement between more than two sovereign states and, (3) its objective is to pursue the common interests of its members.[991] Otherwise, the

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[990] Panayotis Soldatos, *Le débat sur le déficit démocratique de l'Union européenne: paramètres et démystification, L'éclatement structurel fonctionnel de l'État-nation à l'origine de nouvelles formes de déficit démocratique, in* L'UNION EUROPÉENNE DE L'AN 2000: DÉFIS ET PERSPECTIVES 138, 142 (Christian Philip & Panayotis Soldatos eds, 1997) [hereinafter 'Soldatos—Le débat sur le déficit démocratique'].

[991] *See* Part I.A.1; ARCHER, *supra* note 13, pp. 38-45, for a common and generally accepted definition of an IGO. *See also generally* SCHERMERS & BLOKKER, *supra* note 1; KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16; BOWETT, *supra* note 13; BENNETT, *supra* note 41; TAYLOR—IO IN THE MODERN WORLD, *supra* note 67; WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795; FELD & JORDAN, *supra* note 67, BUERGENTHAL & MAIER, *supra* note 5, Zamora, *supra* note 33, p. 582, all referring to the European Union (and/ or its previous incarnations) as an IGO. *Cf. also* Charles Pentland, *The Eastward Expansion of the European Union: "Oui, mais...", in* L'UNION EUROPÉENNE DANS LE CONTEXTE DE LA CONFÉRENCE INTERGOUVERNEMENTALE DE 1996 67, 71-73 (Panayotis Soldatos ed., 1997). Discussing its prospective enlargement, Professor Pentland refers to the European Union in the context of IGO's by noting that "another Brussels-based organization is also currently debating the issue of eastward expansion. The *Study on NATO Enlargement*, ... describes the parallel processes of expansion in the two organizations as complementary and mutually supportive." (emphasis in original); Vlad Constantinesco, *Les Clauses de «cooperation renforcée»: Le protocole sur l'application des principes de subsidiarité et de proportionnalité*, 4 REV. TRIM. DR. EUR. 751, 755 (1997) also refers to the European Union in the context of international organizations.

But see Maurice Croisat & Jean-Louis Quermonne, *L'Union européenne: Fédéralisme intergouvernemental et déficit démocratique, in* L'ÉTAT-NATION AU TOURNANT DU SIÈCLE: LES ENSEIGNEMENTS DE L'EXPÉRIENCE CANADIENNE ET EUROPÉENNE 133, 135 (Panayotis Soldatos & Jean-Claude Masclet eds, 1997) acknowledging that "*[l]es interprétations sur la nature de l'Union européenne sont*

European Union is not a classic IGO for its structure is unmatched by any other such organization.[992] Its uniqueness results from its historic multi-phase creation, its regional membership composition and its distinctive institutions. All of these particularities have contributed to the European Union's novel and multiple decision-making processes which are the focus of this chapter.

a) The Genesis and Evolution of the European Union

The unification of Europe has been an age-old sought process. Once attempts to unify it through force and hegemony failed, other peaceful and voluntary schemes of association between European states emerged.[993] The idea of a willful unification first surfaced in the aftermath of the First World War but it began to be realized only after the devastation of the Second World War[994] when a plan was conceived to rebuild and unify Europe in order to prevent future wars.[995] To accomplish this objective, a series of economic and political European alliances were forged. These alliances have been expressed in a variety of

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nombreuses et souvent opposées. Cet « objet politique non identifié » (OPNI), selon l'expression chère à Jacques Delors, offre aux spécialistes de droit constitutionnel, des politiques publiques ou des relations internationales, un champ nouveau d'investigation en constante évolution depuis 1951". See also p. 140 where Croisat and Quermonne attribute the reasons for the "*difficulté de l'entreprise de conceptualisation s'explique par le fait que l'Europe communautaire, par sa méthode d'engrenage, a privilégié les dispositions d'ordre économique pour étendre et approfondir l'intégration, sans jamais poser clairement la question de l'Europe politique, dont la définition reste tributaire des idéologies ou de la position géopolitique de ses différentes composantes.*"; Marie-Françoise Labouz, *La Subsidiarité dans le cadre national et ses conséquences sur l'État-nation et l'Union Européenne, in* L'ÉTAT-NATION AU TOURNANT DU SIÈCLE: LES ENSEIGNEMENTS DE L'EXPÉRIENCE CANADIENNE ET EUROPÉENNE 205, 209 (Panayotis Soldatos & Jean-Claude Masclet eds, 1997) characterizes the EU as a "*néo-fédéralisme européen sans État central fédéral, ou si l'on veut cette sorte de confédération fédérale*"; Jean-Claude Masclet, *La Conférence intergouvernementale de 1996: Enjeux et Perspectives, in* L'UNION EUROPÉENNE DE L'AN 2000: DÉFIS ET PERSPECTIVES 17, 32 (Christian Philip & Panayotis Soldatos eds, 1997), [hereinafter 'Masclet—La CIG'], notes that "*les lignes de clivage persistent entre les États membres: fédéral contre intergouvernemental.*"

But see also Soldatos—Le débat sur le déficit démocratique, *supra* note 990, p. 144, noting the European Union's "*originalité de système politique à mi-chemin entre l'organisation internationale classique et l'État fédéral.*"

[992] *See* Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963) ECR 1. [hereinafter '*Van Gend en Loos Case*']; *Costa v. ENEL* (1964) ECR 585. In these landmark cases, the European Court of Justice ruled that the European Union's predecessor, the European Economic Community, (i.e. EEC Treaty, *see infra* note 999), was not part of the ordinary international legal order but instead had created its own new and distinct legal order. *See also* T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 4 (2nd ed. 1988), noting that "[i]t is generally recognized that [European] Community law is a separate legal system, distinct from, though closely linked to, both international law and the legal systems of the Members States." *Cf.* Croisat & Quermonne, *supra* note 991, pp. 150-151, noting that "*il est remarquable que, par opposition aux organisations internationales de type classique, la Communauté européenne ait fait place à une institution parlementaire.*"

[993] *See* KLAUS-DIETER BORCHARDT, EUROPEAN INTEGRATION: THE ORIGINS AND GROWTH OF THE EUROPEAN UNION 5 (1995) [hereinafter 'BORCHARDT—EUROPEAN INTEGRATION'].

[994] *Id.*

[995] *See* PASCAL FONTAINE, EUROPE IN TEN POINTS 5 (1995) [hereinafter 'FONTAINE—EUROPE POINTS']; LASOK & BRIDGE, *supra* note 386, p. 3.

innovative ways and, as will be shown hereinafter, have established unique forms of international co-operation.

The seed of European unification was planted in 1949 when France and Germany, seeking to diminish the potential of armed conflict,[996] conceived the *Schuman Plan* and unified their coal and steel resources, raw materials essential in the production of their respective warfare arsenals.[997] The *Schuman Plan* came into being in 1950. In 1951, France and Germany were joined by Belgium, Italy, Luxembourg and the Netherlands and created the *European Coal and Steel Community* (ECSC),[998] a treaty which established a common market for the control of these states' coal and steel industries.

In 1957 the same six European states forged a new alliance by signing two more intergovernmental agreements creating: 1) the *European Economic Community* (EC Treaty),[999] and 2) the *European Atomic Energy Community* (Euratom Treaty).[1000] Although it has since undergone substantial revision, the EC Treaty was initially the core of the Europe's unification process[1001] for it established the framework for a common economic market.[1002] The Euratom Treaty was created to conduct common research and development in the nuclear industry and to ensure that atomic energy was used to peaceful ends.[1003]

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[996] LASOK & BRIDGE, *supra* note 386, p. 11. *See also* Werner Weidenfeld, *Upheaval in Europe, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 7-8 (Werner Weidenfeld & Wolfgang Wessels eds, 1997); Olaf Hillenbrand, *The ABC of Europe, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 220, 225-226 (Werner Weidenfeld & Wolfgang Wessels eds, 1997). In the post W.W.II era there was another European unification movement seeking to promote co-operation and to create a European federation—i.e. what Sir Winston Churchill referred to as the "United States of Europe". While in 1946 this was a Federalist movement, by 1949 it resulted in a cooperative intergovernmental organization known as the *Council of Europe*. Today the *Council of Europe*, composed of 40 member states, exists and operates independently of the EU.

[997] LASOK & BRIDGE, *supra* note 386, 11; BORCHARDT—EUROPEAN INTEGRATION, *supra* note 993, p. 9; Weidenfeld, *supra* note 996, p. 20. Although the idea originated from Jean Monnet who headed the French National Planning Institute, this plan was named after Robert Schuman who, in 1950, was France's Foreign Minister.

[998] BORCHARDT—EUROPEAN INTEGRATION, *supra* note 993, p. 9. *See generally* TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, April 8, 1951 [hereinafter 'ECSC TREATY']. Also referred to by many publicists as the Treaty of Paris, it came into force on July 23, 1952.

[999] *See generally* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, March 25, 1957. Originally, this treaty referred to the *European Economic Community* and was thus known a the "EEC Treaty". It has since been renamed and is now known as the *European Community*—i.e. "EC Treaty". The name change occurred when a subsequent constitutive instrument—the EU Treaty—came into force, in November 1993. *See* EU TREATY art. G(A)(1). For facility, the newer term "EC Treaty" is used throughout this study.

[1000] *See generally* TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, March 25, 1957 [hereinafter 'EURATOM TREATY']. Signed in Rome, the EC and Euratom treaties are often referred to as the 'Treaties of Rome'. Both treaties came into force on January 1, 1958.

[1001] Hillenbrand, *supra* note 996, p. 228.

[1002] EC TREATY art. 2; Hillenbrand, *supra* note 996, p. 228.

[1003] LASOK & BRIDGE, *supra* note 386, pp. 16-17; Weidenfeld *supra* note 996, p. 10; Hillenbrand, *supra* note 996, pp. 229-230.

In 1965, less than a decade later, a merger treaty was signed which amalgamated the executives (Council and Commission) of the three communities—i.e. ECSC, the EEC and Euratom—the other two institutions (Parliament and Court of Justice) were already common.[1004] Although from an institutional and political standpoint the merger created one organizational structure,[1005] from a legal standpoint each organization continued to exist separately, governed by the rules of its own distinct treaties.[1006] Given this, when the merger was implemented, in 1967, it became known as the *European Communities.*

The path towards further European unification stagnated in the 1970s,[1007] only to resume in the mid-1980s with the signing of the *Single European Act* (SEA Treaty).[1008] Signed in 1986, the SEA Treaty amended the EC Treaty and furthered the process of European integration. Once entered into force, in 1987, it sought to complete a single market between its member states by the end of 1992. This meant eliminating internal frontiers by establishing the free movement of goods, capital, services and persons.[1009]

The next turning point occurred with the 1992 signing of the *Treaty on European Union* (EU Treaty), in Maastricht.[1010] Besides realizing extensive reforms of its prior founding instruments, the EU Treaty has advanced the process towards further European unification by providing for a common foreign and security policy and a timetable for a complete monetary union.[1011] The current status of the *European Union* (EU)[1012] includes the broad

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[1004] TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, April 8, 1965 [hereinafter the 'MERGER TREATY']. The treaty came into force on July 1, 1967. *See* HARTLEY, *supra* note 992, p. 4.

[1005] I.e. the EC Commission and the Euratom Commission joined forces to form the "Commission of the European Communities". *See* Dietrich Rometsch, *European Commission, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 108, 109 (Werner Weidenfeld & Wolfgang Wessels eds, 1997).

[1006] BORCHARDT—EUROPEAN INTEGRATION, *supra* note 993, p. 7.

[1007] *See* Robert O. Keohane and Stanley Hoffmann, *Institutional Change in Europe in the 1980s, in* THE NEW EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE 1-39, 6 (Robert O. Keohane & Stanley Hoffmann eds, 1991) [hereinafter 'Keohane & Hoffmann']. One of the key reasons for the stalling of further European integration was France's opposition to the elimination of unanimity from the EC's decision-making process.

[1008] *See generally* TREATY OF THE SINGLE EUROPEAN ACT, Feb. 7, 1986 [hereinafter 'SEA TREATY'].

[1009] EC TREATY art. 8a, as supplemented by SEA TREATY art. 13.

[1010] HARTLEY, *supra* note 992, p. 5. *See generally* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) [hereinafter 'EU TREATY'].

[1011] Commission Report for the Reflection Group, Intergovernmental Conference 1996, 13 (1995) [hereinafter 'IGC 1996—Commission Report']; Weidenfeld, *supra* note 996, pp. 16-17. *See also* COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPE IN A CHANGING WORLD: THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITY (Europe on the move Series) 16-19 (1993), for a discussion on the impact of the EU Treaty on Europe's collective security and external relations. *See generally* COMMISSION EUROPÉENNE, LA POLITIQUE ÉTRANGÈRE ET DE SÉCURITÉ COMMUNE DE L'UNION EUROPÉENNE (L'Europe en mouvement Series) (1996).

[1012] The first indirect reference of the term 'European Union' is found in the preamble of the EC Treaty which "[d]etermined to lay the foundations of an ever closer union among peoples of Europe". The term 'European Union' was then directly presented as an EC objective at the 1972 Paris meeting held by the

institutional framework created by prior treaties—i.e. ECSC, EC, Euratom, SEA—which continue to exist, albeit amended, under the umbrella of the EU Treaty. One of the most significant structural contributions of this new umbrella treaty is that it has amalgamated several issues and has thereby re-organized the EU into three areas, often called Pillars: Pillar 1 involves the EC and, specifically, issues relating to a customs union, a single market, a common agricultural policy, a structural policy, and an economic and monetary policy; Pillar 2 involves the EU's common foreign and security policy and; Pillar 3 involves co-operation in justice and home affairs.[1013]

In 1997 the process of European unification reached yet another milestone. An Intergovernmental Conference (IGC) between EU member states—created with a mandate to review the EU Treaty and, *inter alia*, to improve the efficiency of EU institutions and decision-making procedures[1014]—concluded with the drawing up of the Treaty of Amsterdam.[1015] Albeit not yet in force,[1016] this treaty provides, *inter alia*, for an enlarged and strengthened EU with greater rights of freedom, movement and employment for its citizens.[1017] Most importantly, however, for the purposes of the current study, the Treaty of Amsterdam calls for the reformation of the EU's current decision-making processes. I shall examine these proposed changes in subsequent sections of this chapter.

The unique constitutional framework of the EU—i.e. in that it is composed of multiple constituent acts instead of a single founding act as is the case in most other organizations—is a result of its constant and on-going evolution. Indeed, all of the aforementioned treaties are considered to be the EU's constitutive acts and are often referred to in their totality as

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Heads of State or Government of the member states. It was then incorporated at the preamble of the SEA Treaty which moved to "transform relations as a whole among their States into a European Union" and also "[r]esolved to implement th[e] European Union". This same designation was once again directly referenced in article A of the EU Treaty. This term and its acronym 'EU' have now come to be known as the most recent stage of Europe's integration. *See* Wolfgang Wessels & Udo Diedrichs, *European Union, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 138 (Werner Weidenfeld & Wolfgang Wessels eds, 1997).

[1013] *See* Wessels & Diedrichs, *supra* note 1012, p. 139.

[1014] *See* EU TREATY art. N(2); Mathias Jopp, *Intergovernmental Conference, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 163 (Werner Weidenfeld & Wolfgang Wessels eds, 1997); PHILIP MORRIS INSTITUTE (ED.), BEYOND MAASTRICHT: THE ISSUES AT STAKE IN THE 1996 IGC (Conference Proceedings of the Philip Morris Institute For Public Policy Research) 3-5 (31 January 1995) [hereinafter 'PHILIP MORRIS INSTITUTE—BEYOND MAASTRICHT'].

[1015] *See generally* TRAITÉ D'AMSTERDAM MODIFIANT LE TRAITÉ SUR L'UNION EUROPÉENNE, LES TRAITÉS INSTITUANT LES COMMUNAUTÉS EUROPÉENNES ET CERTAINS ACTES CONNEXES, 2 octobre 1997 [hereinafter 'TREATY OF AMSTERDAM'].

[1016] In order to enter into force, this treaty needs to be ratified by all EU member states in accordance with their respective national constitutional requirements.

[1017] *See generally* TREATY OF AMSTERDAM, *supra* note 1015.

the EU's constitution.[1018] Furthermore, and very importantly, there is no legal hierarchy between these multiple intergovernmental agreements. They are all of equal rank and importance. This unique and pioneering framework, however, has resulted in a complex and often cumbersome constitutional base and despite the numerous amendments of these EU treaties, calls for their hierarchical classification and change of their legal status have remained unrealized.[1019]

b) The European Union's Regional Membership and its Distinctive Institutions

Unlike the previously discussed IGOs which are universal in their composition, the EU is a regional IGO.[1020] Originally composed of six member states, today, the EU's membership has more than doubled. Currently, it is comprised of fifteen European member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.[1021] Other states have since applied for membership and are expected to join the Union in the near future.[1022]

The EU's structural framework is currently composed of five main institutions[1023] which, for the most part, are unlike those of other IGOs. They include: (1) the **European**

[1018] The so-called EU's constitution differs substantially from other written constitutions of nation states or other IGOs which are usually composed of a single instrument. Some, however, do not regard these multiple treaties as the EU's constitution claiming that the evolutive nature of this Organization prevents the enactment of a single constitutional act. Others, still, advocate the contrary thesis—i.e. the establishment of a single EU constitution. Whether or not these treaties are linguistically termed the EU's constitution, charter, convention, etc., however, it remains clear that they all form the founding and primary EU principles. *See* Anita Wolf-Niedermaier, *Treaties, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 212 (Werner Weidenfeld & Wolfgang Wessels eds, 1997).

[1019] *See* EUROPEAN POLICY CENTRE, CHALLENGE IN EUROPE: MAKING SENSE OF THE AMSTERDAM TREATY 110 (1997) [hereinafter 'CHALLENGE IN EUROPE'].

[1020] *See* KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16, p. 165; BENNETT, *supra* note 41, pp. 223, 239-240; FELD & JORDAN, *supra* note 67, pp. 19, 111; TAYLOR—IO IN THE MODERN WORLD, *supra* note 67, pp. 24-28.

Cf. CANADA, CANADA IN THE WORLD 6-7 (1995), noting the rise of regional IGOs such as: the Asian-Pacific Economic Co-operation (APEC); the North American Free Trade Agreement (NAFTA); the Organization of American States (OAS); the Organization of African Unity (OAU), etc.

[1021] The six original members of 1951 were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. They were joined in 1973 by Denmark, Ireland and the United Kingdom 3; followed in 1981 by Greece; joined in 1986 by Spain and Portugal; and, finally, followed in 1995, by Austria, Finland and Sweden.

[1022] *See infra* Part V.5.b.

[1023] There are also five auxiliary European institutions: (1) the *Committee of the Regions* (COR); (2) the *Economic and Social Committee* (ESC) and (3) the *Ombudsman*; (4) the *European Monetary Institute* (EMI) and (5) the *European Investment Bank* (EIB). The ESC and the COR are advisory groups to three of

Commission (EU Commission);[1024] (2) the **Council of the European Union** (EU Council);[1025] (3) the **European Parliament** (EP); (4) the **European Court of Justice** (ECJ);[1026] and (5) the **Court of Auditors.**[1027] Three of these institutions—the EU Commission, the EU Council and the EP—are involved in the EU's decision-making system.

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the EU's main institutions—i.e. its Commission, its Council and its Parliament—while the Ombudsman inquires into disputes between citizens and EU authorities. As for the EMI, it was created with a mandate to realize monetary unification within the EU. Finally, the EIB is a financial institution which loans money for capital investment within the EU. *See generally* SERVING THE EUROPEAN UNION: A CITIZEN'S GUIDE TO THE INSTITUTIONS OF THE EUROPEAN UNION (1996), [hereinafter 'GUIDE TO THE INSTITUTIONS'], for a brief description of the key institutions of the EU.

[1024] *See* Rometsch, *supra* note 1005, p. 111. *See generally The European Commission: 1995-2000* 1995. *See* FONTAINE—EUROPE POINTS, *supra* 995, pp. 11-12. The Commission was created when the executives of the three European communities (the ECSC, the EC and Euratom) merged on July 1, 1967. As of January 5, 1995, there is a total of 20 commissioners, including the president. Subject to the approval of the European Parliament, each Commissioner is appointed by the members states for a five-year term. In principle, the Commissioners are independent 'Eurocrats'—acting independently from the will of the national governments of EU's member states. France, Germany, Italy, Spain and the United Kingdom have two commissioners each and the remaining ten countries have one each.

While the *EU Commission's* role is to introduce proposals for legislation and to implement common policies throughout its EU territory, this body has no direct control over the outcome of EU's decision-making.

[1025] The *EU Council*, otherwise known as the *Council of Ministers of the European Union*, also known as the *Council of the European Union* or—prior to the implementation of the EU Treaty (November 1, 1993)—the *Council of Ministers*, is to be distinguished from the *European Council* also known as the *European Summit*. The EU Council is a key EU institution while the European Council is a body—composed of the Heads of state/government of EU member states, along with their Foreign Ministers and the President of the EU Commission, assisted by a member of the EU Commission—which congregates at least twice annually, under the Presidency of the Head of state/government of the member state that holds the Presidency of the EU Council, to determine broad policies in areas relating to foreign relations and security. Since the SEA of 1987, these meetings between EU national leaders have been formalized and have been instrumental in assisting EU members to coordinate their diplomatic positions and demonstrate solidarity via a common foreign and security policy on current international issues. Heads of states/government have also been known to use these summits to resolve issues, via unanimity, which have been highly contentious within the EU Council. *See* HARTLEY, *supra* note 992, p. 20; SEA TREATY art. 2; FONTAINE—EUROPE POINTS, *supra* note 995, p. 9. *See also* Wolfgang Wessels, *European Council, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 114-15 (Werner Weidenfeld & Wolfgang Wessels eds, 1997) [hereinafter 'Wessels—European Council']. While recognizing that it is not an EU institution, and is, therefore, outside the EU system's 'checks and balances', the author claims that "in the case of financial or institutional disputes the European Council has become the Community's central decision-making body", for the policies it approves often give shape to the legislation which is eventually adopted through the EU's normal institutional processes.

These fora are to be distinguished from the *Council of Europe* which is a separate entity from the EU, its predecessors and its institutions. The *Council of Europe* is not empowered to enact legally binding legislation. It merely adopts intergovernmental conventions which must be ratified individually by its member states in order to be legally enforceable. *See* Hillenbrand, *supra* note 996, pp. 225-226.

[1026] *See* Thomas Läufer, *European Court of Justice, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 120 (Werner Weidenfeld & Wolfgang Wessels eds, 1997); FONTAINE—EUROPE POINTS, *supra* note 995, pp. 12-13. Located in Luxembourg, the *European Court of Justice*, also known as the *Court of Justice of the European Communities* or simply as the *Court of Justice* is composed of 15 judges and 9 advocate generals appointed by mutual agreement between the member states for a renewable six-year term. The mandate of the Court is to interpret and implement EU law in accordance with the Treaties.

[1027] *See* EUROPEAN COMMISSION DELEGATION TO THE UNITED STATES, THE EUROPEAN UNION: A GUIDE, 6 (1994) [hereinafter 'EU GUIDE']; FONTAINE—EUROPE POINTS, *supra* note 995, p. 13. The EU Treaty established, and the Treaty of Amsterdam reinforced, the *Court of Auditors* as the 5th institution of the EU. Composed of 15 appointed members, for a six year term, upon mutual agreement by the members states, its mandate is to verify and control that the Community's revenues and expenditures conform to EU budgetary rules and regulations.

c) The European Union's Parallel Decision-Making System: Intergovernmental Agreements & Joint-Institutional Processes

The EU has a unique parallel external and internal decision-making system by which decisions are taken both outside and within its institutional structure.[1028] The external system is an intergovernmental method which operates at the level of the state governments and involves a conventional political exercise and a relatively simple process. Known as the European Council, the Heads of state/government of member states and the President of the EU Commission, assisted by the member states' foreign ministers and by a member of the EU Commission, meet at least twice annually, under the Presidency of the Head of state/government of the member state that holds the Presidency of the EU Council, to discuss and decide on a wide range of issues. The internal system is a community method constituted by a balance between the EU Commission, the EU Council and the EP and is infinitely more innovative and considerably more sophisticated than the external decision-making system.

(i) The European Union's Intergovernmental Decision-Making Processes

The external mechanism operates via decisions (some of which provide broad guidelines on policies, others which are declaratory in nature and others still culminate in intergovernmental agreements) reached at the annual fora held by the European Council.[1029] In the past these have included a series of the EU's constitutive treaties—i.e. from the original ECSC Treaty to the most recent Treaty of Amsterdam. While decisions adopted at these meetings often result in the drawing-up of complex agreements, the process by which decisions are reached is relatively simple. Namely, the representative of each member state—i.e. the Head of state or government—holds one vote and all decisions require unanimity. As such, this intergovernmental decision-making method is thought to be "*pleinement respectueuse des souverainetés nationales.*"[1030]

[1028] *See* Joseph Janning, *Models of European Integration, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 177, 179 (Werner Weidenfeld & Wolfgang Wessels eds, 1997); Wolf-Niedermaier, *supra* note 1018, p. 214; Masclet—ICG, *supra* note 991, p. 27.

[1029] *See supra* note 1025 regarding the function of the *European Council*; EC TREATY art. 103.

[1030] *See* Masclet—ICG, *supra* note 991, p. 27.

(ii) The European Union's Joint-Institutional Community Decision-Making Processes

The internal mechanism operates through *joint-institutional decision-making processes* which are unique in international institutional law. The cause and effect of this uniqueness is attributed to the fact that—unlike other IGOs studied thus far which have *de facto* one decision-making body (i.e. IMF and MIGA) or two decision-making bodies with distinct jurisdictional powers (i.e. UN and ILO)—the EU's decision-making consists of *complex* and *novel* joint processes.

The complexity of the processes is due to the existence of more than twenty different decision-making procedures within the EU.[1031] In most every one of these different procedures the EU's various founding treaties—ECSC, EC, Euratom, SEA and EU—provide a wide range of additional rules regarding: 1) which an EU institution has authority to act on a given issue (EU Commission, EU Council or the EP); 2) what legislative or other measure may be adopted (Regulation, Decision, Directive or Recommendation) and, consequently, the legal force such measure will take (binding or non-binding) and; 3) the type of voting rule (majority or unanimity).[1032] These elaborate rules multiplied by twenty-some procedures make for multifarious and cumbersome decision-making processes,[1033] and many proposals have been tabled for simplification of these processes.[1034] When the Treaty of Amsterdam is implemented these processes will be substantially reduced and facilitated.[1035]

The novelty of the processes arises from the use of a three stage process: 1) initiative, 2) consultation, and 3) decision-making, which is taken by three institutions: a) the EU Commission, b) the EP, and c) the EU Council.[1036] In the early days of the Union,

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[1031] Claude Blumann, *Aspects institutionnels*, 4 REV. TRIM. DR. EUR. 721, 728-729 (1997). *See* Croisat & Quermonne, *supra* note 991, p. 148. *See also* IGC 1996—Commission Report, *supra* note 1011, pp. 32, 80-84; Thomas Läufer, *Decision-making procedures, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 61, 66 (Werner Weidenfeld & Wolfgang Wessels eds, 1997), [hereinafter 'Läufer—Decision-making Procedures'], for a list and a discussion on the various special decision-making procedures which exist in the EU.

[1032] Läufer—Decision-making Procedures, *supra* note 1031, p. 62.

[1033] *See* Lionel Barber, *IGC: What It Means, Intergovernmental Conference Shapes New Europe*, EUROPE 22, 23 (March 1996).

[1034] *See* Blumann, *supra* note 1031, pp. 728-729.

[1035] The Treaty of Amsterdam will leave but three main decision-making procedures in the EU: 1) assent; 2) consultation and; 3) co-decision. *See* Blumann, *supra* note 1031, p. 737, noting the three notable improvements which the Treaty of Amsterdam brings, namely: "*une simplification des procédures législatives, [...] une extension de la procédure de codécision qui, progressivement, acquiert la qualité de principale procédure législative communautaire et enfin à une simplification relative de cette dernière.*"

[1036] *See* Läufer—Decision-making Procedures, *supra* note 1031, p. 61.

decisions were adopted when the EU Commission initiated a proposal, the EP issued an opinion on the proposal and, finally, the EU Council rendered its final decision on the said proposal.[1037] From the time of its creation in the 1950s to this day, the EU Commission's role, has remained relatively unchanged. However, the EU Council's role, and that of the EP's, in the EU's joint decision-making processes have undergone significant changes.

The Executive Role of the European Commission

Within these joint decision-making processes, the EU Commission had, and continues to have, no determining authority regarding the *result* of these processes.[1038] Instead, it held, and continues to hold, the important role of legislative initiator as it is often the exclusive *starting point* of the EU's decision-making processes.[1039] Indeed, because the quasi-totality of the EU's decision-making originates from proposals issued by the EU Commission,[1040] this institution is at the heart of the EU's legislative direction.[1041] However, once its proposals have been initiated, the EU Commission cannot control their adoption or rejection because—while it is free to withdraw or amend them at any stage,[1042]—it lacks the voting and decision-making power to determine their final outcome. Notwithstanding the fact that it lacks the ability to adopt its proposals, the EU Commission's role in the EU's joint decision-making processes remains significant for it provides the impetus which propels the other two decision-making organs—the EP and the EU Council—into action.[1043]

The Legislative Role of the European Parliament

The EP's role in these joint decision-making processes has varied throughout the life of the EC/EU. Originally, the EP was able to participate but had little input in the EC's/EU's decision-making. Its participation involved the right to be consulted, and to issue an

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[1037] *See* COMMISSION OF THE EUROPEAN COMMUNITIES, THE INSTITUTIONS OF THE EUROPEAN COMMUNITY, 2 (8/1991) [hereinafter 'EC—INSTITUTIONS'].

[1038] *See* IGC 1996—Commission Report, *supra* note 1011, pp. 8, 22, 23; Rometsch, *supra* note 1005, p. 109-111. The EU Commission is the executive branch of the EU. Its role is to prepare, implement and supervise common policies throughout EU territory. As such, it is often said that this institution acts as 'guardian' of the Organization's Treaties.

[1039] Läufer—Decision-making Procedures, *supra* note 1031, p. 61. *See* Croisat & Quermonne, *supra* note 991, p. 144.

[1040] *See* Rometsch, *supra* note 1005, p. 110. Except for cases regarding the EU's enlargement or its association with non-member states, all other legislation is based on the EU Commission's initiatives.

[1041] *See* IGC 1996—Commission Report, *supra* note 1011, p. 28.

[1042] *See also* Rometsch, *supra* note 1005, p. 110.

[1043] *See also* LASOK & BRIDGE, *supra* note 386, pp. 188-194, examining the functions and powers of the European Commission.

opinion, on most legislative proposals.[1044] However, the EP's opinion had no binding force because, ultimately, the EU Council was free to disregard this opinion.[1045] Indeed, since the EC's/EU's constitutive acts gave the EU Council exclusive power to adopt or reject virtually all legislative initiatives, submitting such initiatives to the EP was therefore but a symbolic gesture. With time, however, and as I will elaborate in the following sections of this chapter, the EP has played a much more prominent role in the EU's decision-making.

The Principal Legislative Role of the Council of the European Union

The EU Council, has been the key and final decision-maker in the EC's/EU's joint decision-making processes throughout most of the Union's existence.[1046] In the past decade, however, the EU Council has increasingly shared its legislative functions, on a selective number of issues, with the EP.[1047]

For the purposes of this study, I focus on the two institutions which are now most directly responsible for the *outcome* of the EU's joint decision-making processes: the EU Council and the EP. After a discussion on the Union's foundational principles (Part V.A.2), I explore the unique institutional forms of the EU Council (Part V.A.3) and the EP (Part V.A.4), and the effect each of these institutions has on the EU's decision-making. In so doing, I examine the EU's most widely used decision-making mechanisms and procedures which (according to the Treaty of Amsterdam) are likely to survive the EU's enlargement.

[1044] *See* HARTLEY, *supra* note 992, pp. 30-34. Discussing the importance of EP's rights of consultation and opinion on legislative initiatives, failing which legislative measures may be invalidated. Hartley notes that this has occurred in *Roquette v. Council* Case 138/79,[1980] ECR 3333. Ruling that the EU Council did not exhaust all avenues in order to obtain an EP opinion on a legislative measure prior to its adoption, the European Court of Justice thus invalidated the measure.

[1045] *See also* LASOK & BRIDGE, *supra* note 386, pp. 232-234, discussing the lack of legislative role in the early days of the EP.

[1046] FONTAINE—EUROPE POINTS, *supra* note 995, pp. 9-10. *See* Wolfgang Wessels, *The EC Council: The Community's Decisionmaking Center, in* THE NEW EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE 133 (R.O. Keohane & S. Hoffmann eds, 1991) [hereinafter 'Wessels—Decisionmaking'].

[1047] FONTAINE—EUROPE POINTS, *supra* note 995, p. 10; Läufer—Decision-making Procedures, *supra* note 1031, pp. 61-62. *See also* Blumann, *supra* note 1031, p. 726. While acknowledging that the EU Council increasingly works in concert with the EP in the community pillar, Blumann holds that this organ "*a vu ses compétences et ses pouvoirs réels augmenter avec le temps [...puisqu'il] a hérité de nouveaux pouvoirs dans le cadre des deuxième et troisième piliers.*"

2. THE EUROPEAN UNION'S FOUNDATIONAL FRAMEWORK

> "[L]a notion de *fédéralisme intergouvernemental* peut apparaître paradoxale à nombre d'observateurs dans la mesure où elle rend en partie caduque la séparation entre intégration et coopération et des deux stratégies qui en découlent: la première s'inspirant du principe de supranationalité privilégie la décision majoritaire pondérée, la seconde plus respectueuse de la souveraineté des États membres défend la décision à l'unanimité."
>
> Maurice Croisat & Jean-Louis Quermonne[1048]

The EU qualifies as an IGO as per the broad definition provided in the introductory chapter (i.e. it is a continuous structure, established by a series of treaties between members of more than two sovereign states, whose goal is to pursue the common interests of its members) [1049] and, as per the writings of a large number of international law publicists.[1050] However, that is the extent of its similarities with other IGOs, because, in virtually all other contexts, the EU differs substantially.[1051] Some of its key differences are examined in the following subsections.

a) A Paradigm of a Neo-functional Institution

The EU is a *regional* organization which not only holds dual functions—i.e. *political* (concerned with foreign and security policy) and *economic* (interested in a single market and a monetary policy)—but, importantly, is a *multi-functional* organization involved in

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[1048] Croisat & Quermonne, *supra* note 991, p. 156 (emphasis in original).

[1049] *See supra* Part I.A.1 for a common definition of an IGO.

[1050] HARTLEY, *supra* note 992, p. 6. *See generally* SCHERMERS & BLOKKER, *supra* note 1; KIRGIS—INTERNATIONAL ORGANIZATIONS, *supra* note 16; BOWETT, *supra* note 13; BENNETT, *supra* note 41; TAYLOR—IO IN THE MODERN WORLD, *supra* note 67; WILLIAMS—INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 795; FELD & JORDAN, *supra* note 67; BUERGENTHAL & MAIER, *supra* note 5, all referring to the European Union (and/ or its previous incarnations) as an IGO.

However, other scholars challenge EU's status as an IGO choosing instead to categorize its juridical status along federalist lines. *See generally* Croisat & Quermonne, *supra* note 991, classifying the EU as a form of "intergovernmental federalism".

[1051] *See* Jean Claude Masclet, *La répartition des compétences dans l'Union européenne, in* L'ÉTAT-NATION AU TOURNANT DU SIÈCLE: LES ENSEIGNEMENTS DE L'EXPÉRIENCE CANADIENNE ET EUROPÉENNE 179 (Panayotis Soldatos & Jean-Claude Masclet eds, 1997)

social, cultural, educational, health, agricultural and other policies.[1052]

Unlike most other IGOs, the EU and its precursors have been devoted not merely to the process of international co-operation between nations, but also to the process of *regional integration.*[1053] This regional integrationalism has been one of the most distinguishing features of the EU and is believed to have given rise to the *neo-functionalist* theory,[1054] a theory of synthesis of Federalism and Functionalism,[1055] of which the EU is its prime paradigm.

Federalism is generally understood to be a political form of government whereby the sovereign powers of a state are distributed amongst several levels of government within the state.[1056] Although there is some distribution of powers within the EU, for the most part, it does not have these characteristics. As Croisat and Quermonne (1997) aptly stated "*ce qui manque cruellement au système européen pour ressembler à celui d'un régime parlementaire dans le cadre d'un État fédéral [...] c'est l'existence d'un véritable gouvernement au sommet.*"[1057] Moreover, while there is *independence* in the separation of powers between executive and legislative branches of government in federal states, there is *interdependence* between these branches in the EU.[1058] Thus, because the EU's institutional structure does not reflect, *inter alia*, these classic Federalist features, it does not qualify as a federation.[1059] However, and as will be shown in the following sections, since the EU's

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[1052] *See* FONTAINE—EUROPE POINTS, *supra* note 995, p. 5.

[1053] *See* Johnston—Functionalism in International Law, *supra* note 77, pp. 12-13, suggesting that the theory of co-operative ethic is more firmly established at the regional—rather than the global—level of international organization. *Cf.* Janning, *supra* note 1028, pp. 180-181. According to Janning "[i]ntegration is viewed as the only contemporary response to the destructive powers of ultranationalism."

[1054] *See* PANAYOTIS SOLDATOS, LE SYSTÈME INSTITUTIONNEL ET POLITIQUE DES COMMUNAUTÉS EUROPÉENNES DANS UN MONDE EN MUTATION: THÉORIE ET PRATIQUE 47, 53 (1989).

[1055] Hans J. Michelmann and Panayotis Soldatos, *The Hard Core of European Integration Theories and Approaches: A Multivariate Track of Variable Geometry, in* EUROPEAN INTEGRATION: THEORIES AND APPROACHES 1-12, 9 (Hans J. Michelmann & Panayotis Soldatos eds, 1994) [hereinafter: Michelmann & Soldatos]. *See also* Janning, *supra* note 1028, p. 178. Discussing the two most common terms used to describe the European integration process as either a 'federal Europe' or an 'association of European States', the author concludes that the EU "structure displays characteristics from both" terms.

[1056] *See* CLAUDE-SWORDS INTO PLOWSHARES, *supra* note 79, p. 34. *See also* Janning, *supra* note 1028, p. 179, adding that the definition of a federal state also implies the application of "democratic quality of decision-making".

[1057] Croisat & Quermonne, *supra* note 991, p. 145.

[1058] *See* Soldatos—Le débat sur le déficit démocratique, *supra* note 990, p. 148. *See also* the co-operation and co-decision procedures examined (*infra* V.4.b(i) & (ii)) which exemplify the interdependence between the different branches of powers in the EU.

[1059] *See also* Croisat & Quermonne, *supra* note 991, p. 135. While claiming that the actual phase of the EU may be qualified as an "*fédéralisme intergouvernemental*", the authors acknowledge that its "*gouvernement repose sur une institutionnalisation incomplète, dans la mesure où il n'existe pas (ou pas encore) un ordre de gouvernement européen, de type fédéral, séparé des gouvernements nationaux des pays membres.*" On page 139 Croisat and Quermonne qualify the EU as "*un processus de fédéralisation par agrégation qui unit des États membres*"; Wessels & Diedrichs, *supra* note 1012, p. 139, discussing the criticism regarding the concept of Federalism within the EU.

legal system now has many federal features,[1060] it could be argued that the EU reflects a quasi-federal structure.[1061]

As for the traditional theory of Functionalism, it assumes that the political functions of an organization are separable from its economic aspects and postulates that "form follows function".[1062] Unlike this classic Functionalist logic, however, in the EC/EU "various elements of the political economy of states and regions are interconnected in such a way that problems in one area will raise problems or require solutions in another".[1063] This is what is known as the 'spill-over' effect whereby a function performed by an organization engenders a *new* function and, therefore, a Functional organization gives rise to a *Neo*-Functional one.[1064] This is precisely what has happened to the EC/EU whose regional economic integration has built up momentum and extended integration to other areas. In other words, the results and experiences of the common economic market have gradually "spilled over" into other functions—e.g. a common market for agricultural, transport and competition led to the adoption of common policies in other sectors of activity such as environment, education, social, regional, research, technology, etc.

b) Expressions of Supranationalism in the European Union

As a Neo-Functionalist organization, the EU is not merely an *inter*national organization. It is a ***supra*national** one.[1065] Supranationalism occurs when states "have pooled their

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[1060] HARTLEY, *supra* note 992, p. 47, 6.

[1061] *See* Emile Noël *Speech: Les Défis Européens et la Conférence Intergouvernementale de 1996* (Rencontre Européenne—Fondation Jean Monnet Pour l'Europe, Lausanne), 9 (10.11.1995) [hereinafter Noël—Les Défis Européens]. *Cf.* Italy, *Position of the Italian Government on the Intergovernmental Conference for the Revision of the Treaties*, (Rome, 18.3.1996) [hereinafter 'Italy—Position of the Italian Government on the IGC'], discussing the Italian Presidency's "vision of a continually-evolving integration process aimed at creating a federal structure which fully respects the historical and cultural identities of all its members".

[1062] *See supra* Part II.A.1.b(i).

[1063] David Mutimer, *Theories of Political Integration*, *in* EUROPEAN INTEGRATION: THEORIES AND APPROACHES 13-42, 29 (Hans J. Michelmann & Panayotis Soldatos eds, 1994).

[1064] Janning, *supra* note 1028, p. 181. *See also* SOLDATOS, *supra* note 1054, pp. 61-63, discussing the spill-over feature of Neo-Functionalism which was first introduced by E.B. Haas. For a distinction *cf. also* Johnston—*Functionalism in International Law*, *supra*, note 77, p. 21, n.69, who distinguishes between Functional and Neo-Functional theories in international law by indicating that, while Functionalism stresses the need for international cooperation in routine and technical sectors, Neo-Functionalism—in addition—deals with the need of international cooperation also in politically important and controversial issues.

[1065] *See* QUOC DINH ET AL, *supra* note 2, p. 566, discussing how state sovereignty is renounced in favour of supranational organizations; HARTLEY, *supra* note 992, p. 7.

sovereign rights and created a new legal order".[1066] Initially, supranationality was not intended as a *transfer* but rather a voluntary *sharing* of states' sovereignty into a higher structure.[1067] However, progressively member states did transfer a limited number of their sovereign rights to—what was soon becoming a higher order—the EC/EU.[1068] In fact, the EU's supranational powers have a direct negative correlation to those of its members states. Where the EU benefits from increased sovereign powers, the sovereign powers of its member states are proportionally decreased.[1069] This, in effect, signals the decline of significance of what is commonly recognized as the nation-state.[1070] As Rideau (1997) stated, "*[l]es transferts de compétences opérés par les traités constitutifs et par les textes qui les ont révisés ont entraîné une amputation des pouvoirs des parlements nationaux au profit des institutions communautaires.*"[1071]

From the outset, and throughout its evolution, the phenomenon of supranationality has been at the core of European integration.[1072] The epitome of this phenomenon is the EC's/EU's unique institutional framework which has featured, and continues to feature, supranational authority.[1073] Moreover, the amalgamation of sovereign powers within EC's/EU's supranational institutions resulted in the abdication of the decision-making powers typically inherent of a sovereign state. Unlike most other IGOs, the EC's/EU's supranationalism is the reason its decision-making processes have come to be known as *legislative* processes and its legally binding Decisions, Directives, and Regulations (*see infra* Part V.A.3.b) are often referred to as EU *law*.[1074]

[1066] IGC 1996—Commission Report, *supra* note 1011, p. 5. *See* Keohane & Hoffmann, *supra* note 1007, pp. 10, 13, 17.

[1067] *See* Keohane & Hoffmann, *supra* note 1007, p. 13.

[1068] *See* Wolf-Niedermaier, *supra* note 1018, p. 212. *Cf.* Juliane B. Kokott, *French Case Note: Treaty on European Union is contrary to French Constitution—amendments to Constitution—national sovereignty*, 86 AM. J. INT'L L. 824, 828-829 (1992), discussing the constitutional limitations regarding nation states' further transfer of their sovereign rights to the EU.

[1069] *See also* Croisat & Quermonne, *supra* note 991, p. 152, noting that "*[q]uant aux parlements nationaux, l'élection au suffrage universel de l'Assemblée de Strasbourg leur a fait perdre, depuis 1979, un rôle d'acteur direct au sein du processus de décision.*".

[1070] *Cf.* Mutimer, *supra* note 1063, pp. 32-33.

[1071] Joël Rideau, *Les parlementss nationaux dans l'Union européenne, in* L'UNION EUROPÉENNE DE L'AN 2000: DÉFIS ET PERSPECTIVES 155 (Christian Philip & Panayotis Soldatos eds, 1997).

[1072] *See* Rometsch, *supra* note 1005, p. 108.

[1073] *See* LASOK & BRIDGE, *supra* note 386, pp. 12-14.

[1074] *See* Jean-Louis Bourlanges, *La Conférence intergouvernementale...ou comment s'en débarasser?, in* L'UNION EUROPÉENNE DE L'AN 2000: DÉFIS ET PERSPECTIVES 35, 40 (Christian Philip & Panayotis Soldatos eds, 1997). *See also* DOMINIK LASOK, LAW & INSTITUTIONS OF THE EUROPEAN UNION 113 (6th ed. 1994) noting that:

> "[T]he law-making power of the Community organs can be identified as one corresponding to a generally accepted notion of legislation. This means that it results in rules of conduct addressed to subjects of Community law which emanate from a definite organ, are made in a set form and, by virtue of the authority vested in the organ, have an obligatory character."

Three of the key doctrines at the forefront of the EC's/EU's supranational decision-making powers enable the primacy, direct applicability and selective enactment of its legislation. They are: the *supremacy principle*, the *direct effect principle* and the *subsidiarity principle*.

(i) The Supremacy Principle

> "The transfer by the states from their domestic legal systems to their Community legal system of the rights and obligations arising under the Treaty carries with it a *permanent limitation of their sovereign rights*, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail".
>
> *Costa v. ENEL*[1075]

Although not directly foreseen in the EC/EU treaties,[1076] the principle of ***supremacy*** was established in a well-known ECJ ruling[1077] and is the most clear expression of the EC's/EU's supranationalism.[1078] Essentially, this principle means that EC/EU law prevails over the entire hierarchy of national norms of its member states, including their constitutional norms.[1079] Considering the principle of supremacy to be "corollary" to European integration,[1080] this court ruling invalidated countless of European national laws,[1081] and conferred national authorities the obligation to impose this principle.[1082]

[1075] *Costa v. ENEL*, *supra* note 992 (emphasis added).

[1076] *See* PHILIPPE MANIN, LES COMMUNAUTÉS EUROPÉENNES: L'UNION EUROPÉENNE 326 (3e ed. 1997).

[1077] *See Costa v. ENEL*, *supra* note 992; JEAN-VICTOR LOUIS, L'ORDRE JURIDIQUE COMMUNAUTAIRE 162-163 (6e ed. 1993); HARTLEY, *supra* note 992, p. 47, 215-217; MANIN, *supra* note 1076, p. 326; RALPH H. FOLSOM, EUROPEAN COMMUNITY LAW (In a nutshell series) 62-66 (1992); LASOK & BRIDGE, *supra* note 386, p. 375. *See also* p. 372. Discussing the origins of the supremacy doctrine, the authors note that, because its founding fathers considered it to be politically untenable, this doctrine developed by the EC'/EU's judicial branch—i.e. European Court of Justice—as opposed to its legislative branch—i.e. being introduced via EC'/EU's founding instruments.

[1078] *See* EU GUIDE, *supra* note 1027, p. 6; Shirley Williams, *Sovereignty and Accountability in the European Community*, *in*, THE EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE 155-176, 156 (Robert O. Keohane & Stanley Hoffmann eds, 1991).

[1079] *See* Labouz, *supra* note 991, p. 209; Williams, *supra*, note 1078, p. 156; Keohane & Hoffmann, *supra* note 1007, pp. 10-11. MANIN, *supra* note 1076, pp. 325-328. *See also* EC TREATY art. 234, para. 1; EAEC Treaty art. 105; MANIN, *supra* note 1076, pp. 327-328, 343-344. There is one exception to the supremacy principle. International obligations undertaken toward third parties prior to the enactment of the EC/EU constituent acts remain valid.

[1080] MANIN, *supra* note 1076, p. 326; LOUIS, *supra* note 1077, p. 163.

[1081] FOLSOM, *supra* note 1077, p. 63.

Because the EC's/EU's laws have precedence and supplant its member states' national laws,[1083] there is a permanent restriction of its member states' sovereign rights.[1084] In this respect, the EC/EU is distinguished from most conventional IGOs where sovereign powers remain within national control.[1085]

(ii) The Direct Effect Principle

> "[L]a Communauté constitue un nouvel ordre juridique de droit international, au profit duquel les États ont limité, bien que dans les domaines restreints, leurs droits souverains, et dont les sujets sont non seulement les États membres, mais également leurs ressortissants".
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> "[L]e droit communautaire, indépendant de la législation des États membres, de même qu'il crée des charges dans le chef des particuliers, est aussi destiné à engendrer des droits qui entrent dans leur patrimoine juridique, que ceux-ci naissent non seulement lorsqu'une attribution explicite en est faite par le traité, mais aussi en raison d'obligations que le traité impose d'une manière bien définie tant aux particuliers qu'aux États membres et aux institutions communautaires."
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> *Van Gend en Loos Case*[1086]

As with the supremacy principle, the principle of ***direct effect*** was also firmly established by an ECJ landmark judgment.[1087] In essence, direct effect holds that the

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[1082] MANIN, *supra* note 1076, p. 328. *See also* p. 330, discussing the link between the principles of supremacy and integration the author explains that the application of the supremacy principle depends on the direct effect of community law and notes that "*ce n'est qu'à l'égard des dispositions d'effet direct que les particuliers ont la possibilité de demander au juge national de sanctionner l'incompatibilité en écartant la disposition nationale incompatible.*"; LOUIS, *supra* note 1077, pp. 163-165.

[1083] LASOK & BRIDGE, *supra* note 386, p. 375.

[1084] LOUIS, *supra* note 1077, p. 163; Alex Easson, *Integration Through Law: The Court of Justice and the Achievement of the Single Market and the European Union, in* EUROPEAN INTEGRATION: THEORIES AND APPROACHES 77-97, 83 (Hans J. Michelmann & Panayotis Soldatos eds, 1994). *Cf.* Labouz, *supra* note 991, p. 217 noting that:

> "*On passe sensiblement de l'unicité à la pluralité, de l'exclusivité au partage. Les passéistes crieront à la mise à mort de la souveraineté nationale, chronique de la mort annoncée de l'État-nation. Les post-modernes préféreront la lente émergence d'un autre État. L'analyse empirique des politologues européens montre, d'ailleurs, la diminution de la fonction de gatekeeper des États et l'importance des relations imbriquées (interlocking) dans les systèmes publics.*"

[1085] *See* Keohane & Hoffmann, *supra* note 1007, pp. 11-12.

[1086] *Van Gend en Loos Case, supra* note 992.

EC's/EU's laws are not contingent on national implementation measures in order to be directly legally binding. In other words, because EC/EU law may grant rights and/or impose immediate and binding obligations not only on its member states but also *directly* on the citizens of its member states,[1088] it can have the same value as states' national legislation and, therefore, *must* be invoked and/or safeguarded by national authorities.[1089] However, "*les conditions de l'effet direct dépendent du type de source invoquée. Pour certaines, l'effet direct est automatique et de portée générale; pour d'autres, il est soumis à des conditions; pour d'autres encore, il est conditionnel et de portée restreinte.* "[1090] Moreover, the EC's/EU's laws may have a "vertical effect"—i.e. invoked by an individual against the state—as well as a "horizontal effect"—i.e. invoked amongst individuals.[1091] I discuss the various types of EC/EU decisions and their legal effects in *infra* V.A.3.b.

(iii) The Subsidiarity Principle

> "[La] distinction entre des matières qui relèvent de la coopération et d'autres qui peuvent relever de l'intégration repose sur l'idée qu'il y a des questions qui, par nature, appartiennent à la compétence de l'État parce qu'elles sont indissociables de la souveraineté. Dès lors, elles ne peuvent être remises à des institutions internationales."
>
> Jean-Claude Masclet[1092]

The principle of ***subsidiarity*** relates to the distribution of powers. This principle is typically found in federal structures where there is a clear separation of powers between national and sub-national authorities—i.e. federal and provincial/state governments.[1093] In essence, it authorizes one level of government to assume increased powers by extending its acts to more jurisdictions than those explicitly foreseen in its constitutive instrument. For example, in the Canadian federation the Constitution lists the powers which fall either

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[1087] *See id.*

[1088] *See* Easson, *supra* note 1084, p. 79.

[1089] JOËL RIDEAU, DROIT INSTITUTIONNEL DE L'UNION ET DES COMMUNAUTÉS EUROPÉENNES 746-747 (1996); LOUIS, *supra* note 1077, p. 131; FOLSOM, *supra* note 1077, pp. 68-75; HARTLEY, *supra* note 992, pp. 47, 215-217.

[1090] MANIN, *supra* note 1076, p. 310.

[1091] LOUIS, *supra* note 1077, pp. 135-137.

[1092] Masclet, *supra* note 1051, p. 182.

[1093] *See* Weidenfeld, *supra* note 996, p. 18; Janning, *supra* note 1028, p. 179.

under provincial or federal jurisdiction and provides for the balance of powers, known as the residuary powers, to fall under federal jurisdiction.[1094]

In contrast to federal structures, IGOs which are usually created by constituent acts and empowered by their member states to perform specific functions, have explicit mandates, and, despite the international organizations' doctrine of implied powers,[1095] they can not usually execute further powers without constitutional amendments. Therefore, if the EC/EU were a typical IGO, it would be unable to have decision-making power in areas which were not explicitly foreseen in one of its many constituent treaties.

The subsidiarity principle, which is now formally enshrined in the EU Treaty,[1096] has its roots in article 5 of the ECSC Treaty, article 235 of the EC Treaty, as well as in article 130 R, para. 4 of the SEA which provided the EC with *implied powers*.[1097] For instance, article 235 of the EC Treaty provides three conditions under which the EC could exercise additional powers other than those expressly foreseen in its constituent act. They include cases where the Council has unanimously decided to exercise additional powers if (1) it is necessary to take action in order to (2) realize the EC's objectives (articles 2 & 3 of the EC Treaty) (3) when the EC Treaty does not provide the necessary powers.[1098]

Subsequent to the *principle* of implied powers foreseen in its various treaties, the *theory* of implied powers was established for the EC by the ECJ.[1099] Previously developed by the ICJ for IGOs (*see supra* III.A.3.c(iii)), in the EC, this theory provides greater latitude than that already foreseen by the principle in its various treaties. For instance, unlike article 235 of the EC Treaty, the ECJ's theory of implied powers provides that the decision to exercise additional powers is not contingent on the Council's unanimous decision.[1100] In fact, the latitude allowed by ECJ's implied powers theory has proven useful in two instances: (i) determining the international powers of the EC and (ii) creating its subsidiary organs.[1101]

[1094] *See* CAN. CONST. (Constitution Act, 1867) arts 91, 92, enumerating the exclusive powers of the Parliament of Canada (article 91) and of the Provincial Legislatures (article 92), and giving residual powers to the federal government; PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 86-87, 339, 369-372 (2nd ed. 1985).

[1095] *See supra* Part III.A.3.c(iii).

[1096] EU TREATY art. 3b; Mutimer, *supra* note 1063, p. 18; Hillenbrand, *supra* note 996, pp. 247-248.

[1097] *See* Masclet, *supra* note 1051, pp. 186-190, 196.

[1098] EC TREATY art. 235. *See* Masclet, *supra* note 1051, pp. 186-187.

[1099] *See* Masclet, *supra* note 1051, pp. 188-189. Discussing the distribution of powers within the EU, Masclet cites Case 22/70 *AETR* ECR (1971) 263 as the landmark ECJ case on implied powers for the EC.

[1100] *See* Masclet, *supra* note 1051, pp. 188-189.

[1101] *See id.*

Ultimately, the ability to exercise shared or competing powers was explicitly authorized in the EU through the principle of subsidiarity defined in article 3b of the EU Treaty.[1102] This article foresees that if an issue arises which is not envisioned in one of its many founding treaties, the EU will nonetheless be empowered to take legislative and executive measures under two conditions: 1) if it is deemed that such measures cannot be effectively performed by its member states and, therefore, 2) that the EU is more suited to effectively accomplish these measures.[1103] The empowerment to legislate in areas where the decentralized authority—be it at the local or national level—would be less effective, results in the greater centralization of power.[1104] If the centralized authority were a federation it would mean greater powers for the provincial governments, as opposed to the federal government. In the case of the EU the principle of subsidiarity results in enlarged powers for its member states as opposed to the supranational Organization. However, this provision applies only for competing powers and not for exclusive powers within the EU.[1105] In other words, when there are exclusive EU powers there is primacy of EU's powers, but it does exclude member states' powers.[1106] On the other hand, when there are no exclusive powers (i.e. there are competing powers) the states have priority to exercise their national powers.[1107]

This remarkable principle of subsidiary power in the EC/EU results from the supranational characteristics which have been bestowed on this Organization, and is yet

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[1102] EU TREATY art 3b provides:

> "... In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

There are several other direct and indirect references to the principle of subsidiarity in the EU Treaty. It is expressly referenced in the preamble and article B *in fine* and it is tacitly mentioned in article A(2) and article F(3).

[1103] EU TREATY art 3b; Keohane & Hoffmann, *supra* note 1007, p. 11; Wessels & Dietrichs, *supra* note 1012, pp. 140-141; Masclet, *supra* note 1051, p. 197; Ami Barav, *Le principe de subsidiarité et sa mise en oeuvre, in* L'UNION EUROPÉENNE DE L'AN 2000: DÉFIS ET PERSPECTIVES 113, 115 (Christian Philip & Panayotis Soldatos eds, 1997).

[1104] *See* Keohane & Hoffmann, *supra* note 1007, p. 14.

[1105] *See* EU TREATY art. 3b. *See also* Masclet, *supra* note 1051, pp. 192, 195, noting that the determination of whether a power is exclusive or competing is not simple as it is not specified in the EU Treaty or its various preceding constituent acts. On page 194, however, Masclet notes that "*la plupart des compétences communautaires sont des compétences concurrentes. La compétence des États s'y exerce de plein droit. La compétence de la Communauté est conditionnelle. Elle obéit au principe de subsidiarité.*" On pp. 194-195 Masclet adds that "*la Communauté n'a de compétence vraiment exclusive dans aucune matière. Il en résulte une imbrication des compétences nationale et communautaire.*"

[1106] Masclet, *supra* note 1051, p. 192. It should also be noted that the EU's so-called *exclusive powers* do not exclude the states from acting in those areas. Instead, it merely gives the EU power to act by *priority* over those of the states. In this sense, the term exclusive powers is really a misnomer. Instead, a more accurate description should really be *priority powers*.

[1107] *Id.*

another paradigm of the EC's/EU's Neo-Functional structure. Although, subsidiarity in the EU yields less power to this Organization than that usually found in a federation,[1108] it affords it significantly more power than that typically found in other IGOs. Indeed, the ability to extend powers as permitted by the various provisions of its SEA, ECSC and EC Treaties, along with the ECJ's theory of implied powers, and the subsidiarity principle of the EU Treaty is *unprecedented* in international institutional law.[1109]

c) The Ambivalence of the Notions of Democracy and Sovereign Equality in the European Union

One of the many reasons for the EU's uniqueness is the ambivalent role that democracy and SE have played in its decision-making processes. The ambivalence results from these principles' contradictory *de jure* basis and *de facto* applications within this Organization and, specifically, within its unique supranational institutions. While some IGOs have either directly or indirectly adhered to the principle of SE (i.e. UN directly, and ILO, IMF, MIGA indirectly), and most have ignored the principle democracy in their decision-making processes, the EU has done the opposite—i.e. *de jure* adhered to democracy but ignored SE.

Throughout this chapter, I discuss the EC's/EU's *legal stance* on democracy and SE (*infra* Part V.A.2.c(i) & (ii)) and examine the *application* of these principles in its main decision-making institutions (*infra* Part V.A.3 & 4). As I consider decision-making in the EU Council and in the EP, it will become clear that there is a *de facto* semblance of the principles of democracy and SE in both institutions. What will be equally clear is that the reason these principles play a greater role in the EU than in most other IGOs of the twentieth century is due to this Organization's (i) regionalism and (ii) its relatively small size, both of which enable the existence of the EU's supranational institutions.

However, while there may be sporadic presence of democratic and SE principles in the EU's key decision-making institutions, like in most other IGOs, the functionalism and legitimacy of these principles is questionable (*infra* Part V.A.5.a). Moreover, as the EU gears towards enlargement, adherence to these principles will, in all likelihood, strain, if not paralyze, its decision-making processes (*infra* Part V.A.5.b). I shall argue that while

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[1108] *See also* Wessels & Diedrichs, *supra* note 1012, p. 140, claiming that the principle of subsidiarity "aims to prevent the EC from acquiring 'too much' influence."

[1109] Masclet, *supra* note 1051, p. 201.

the EU's institutions must be functional and legitimate, their functionalism and legitimacy is not contingent on the principles of SE and democracy in the EU Council and the EP.

(i) The Role of Democracy in the European Union

Democracy has historically been an *informal*—i.e. unwritten—principle in the EC/EU.[1110] One of the best examples of this is the EC's/EU's membership which has been exclusively composed of democratic states.[1111] This differs from the universal IGOs examined thus far whose membership includes states from the whole gamut of political systems—e.g. the UN's members include states which are not only governed democratically but also those which are ruled by totalitarianism, communism, fascism, autocracy, dictatorship, etc.

Democracy was *formalized* in the EC in 1977 by the *Declaration on Democracy,* signed by the Heads of Government of all member states and, also, by the *Joint Declaration on Fundamental Rights,* issued by the Commission, the Council and the EP.[1112] However, despite this formal commitment to democracy, the EC did not proceed to ensure that the principle be also reflected in its institutions and in its decision-making processes. While the principle of democracy was inherent in the EC by virtue of the political systems of its member states and the existence of some majoritarian voting within certain of its decision-making processes, it had originally been largely absent in the EP which was (i) non-elected, (ii) lacked government control and (iii) lacked decision-making influence. This absence, *inter alia,* was considered to be a serious flaw and was said to represent the EC's "democratic deficit".[1113]

[1110] FOLSOM, *supra* note 1077, p. 18; Philippe Manin, *L'Union européenne devant la dialectique approfondissement-élargissement, in* L'UNION EUROPÉENNE DANS LE CONTEXTE DE LA CONFÉRENCE INTERGOUVERNEMENTALE DE 1996, 21, 25-26 (Panayotis Soldatos ed., 1997).

[1111] *See also* Weidenfeld, *supra* note 996, p. 14. In the 1980s the re-established democracies of Greece, Spain and Portugal, which had overcome dictatorships, were embraced by the EU and rewarded by membership in this Organization; Manin, *supra* note 1110, pp. 25-26.

[1112] FOLSOM, *supra* note 1077, p. 18; LASOK & BRIDGE, *supra* note 386, p. 160.

[1113] *See* SOLDATOS, *supra* note 1054, p. 171. *See also* Soldatos—Le débat sur le déficit démocratique, *supra* note 990, pp. 140-141, noting the six manifestations of the democratic deficit. First, the EP lacks the essential legislative power. Second, albeit elected since 1979, the EP lacks a uniform electoral law throughout the EC. Third, the political groups are not a true system of political parties. Fourth, the EC executive—i.e. the Commission—does not emanate from the authority of the EP. Fifth, its Council of Ministers are not directly accountable to the EP and cannot be censured by the EP because each Council is composed of national ministers which are only accountable to their national parliaments. Finally, sixth, the Council which exercises the principal legislative functions is not directly elected by universal suffrage.

Signaling its intention to correct its democratic deficit, the EC/EU eventually began the process of democratization of its institutions.[1114] While I elaborate on the EC's/EU's democratization process in *infra* Part V.A. 3 & 4, at this point it is worth outlining three ways in which this process was, in part, accomplished.

First, the (then) EC elected its Parliamentarians by direct universal suffrage (*infra* V.4). Second, the elected Parliamentarians, who soon became some of the most ardent promoters of the progressive democratization,[1115] of the EC's institutions[1116] succeeded in attaining the increased use of majoritarian rule in the EC's (eventually EU's) decision-making processes. Finally, and in turn, the democratization movement allowed the EP to become an integral and influential part of the EU's decision-making, namely, through the co-decision process (*infra* V.4.b.(ii)).

The role of democracy was further elevated in 1987 and 1992[1117] as it obtained a constitutional rank through its inclusion in the SEA and EU Treaties.[1118] With these acts, the EC/EU not only established democracy as its general fundamental principle,[1119] but also confirmed its commitment to adhere to this principle in two specific contexts. First, it constitutionalized its determination to continue to provide for the admission of only democratic states in the Union[1120] and, second, it resolved to further promote democratic values in its institutions.[1121] Since its official instatement in these EC/EU treaties, the

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[1114] *See* Soldatos—Le débat sur le déficit démocratique, *supra* note 990, pp. 142-143.

[1115] *See* Otto Schmuck, *European Parliament, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION, 130, 134 (Werner Weidenfeld & Wolfgang Wessels eds, 1997).

[1116] *See id.* at 134.

[1117] Although, officially, there is no hierarchy of the EU's norms, there is nonetheless a hierarchy of basic international norms (*see supra* Diagram III) and, in the latter's context, democracy has been elevated from a primary to a secondary rule.

[1118] *See* Wessels & Diedrichs, *supra* note 1012, p. 138; IGC 1996—Commission Report, *supra* note 1011, p. 13-14; SEA TREATY preamble; EU TREATY preamble, paras 3 & 5, art. F(1); EC TREATY art. 3a (as amended by EU TREATY).

[1119] *See* SEA TREATY preamble, para. 4; EU TREATY preamble, para. 3 stipulates:

> "CONFIRMING their attachment to the principle of liberty, *democracy* and respect for human rights and fundamental freedoms and of the rule of law" (emphasis added).

[1120] EU TREATY art. F(1) provides that:

> "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of *democracy*." (emphasis added).

EC TREATY art. 3a as amended by EU Treaty art. 3a(1) foresees that:

> "...the activities of the Member States and the Community shall include ... and [be] conducted in accordance with the principle of an open market economy with free competition."

[1121] EU TREATY preamble, para. 5 stipulates:

democratic principle has been regularly affirmed and reaffirmed in the EC's/EU's acts and publications.[1122]

In this era, where international scholars increasingly advocate for the "right to democratic governance,[1123] the EC/EU has led the way regarding the democratization of IGOs. For instance, one of the latest signs of EC's/EU's democratization is evidenced in EP's power to exercise greater political power over the composition of the EU Commission.[1124] Indeed, the EU Treaty provides the EP the right to approve the nomination of the Commissioners and, the Treaty of Amsterdam entitles the EP to approve the nomination of the EU Commission's President.[1125] As I examine the democratization process in both the EU Council and the EP in the following sections, I reveal that, although the "democratic deficit" has been somewhat corrected, given the impending enlargement of the EU the elimination of this deficit is in no way imminent, or desirable, because it risks being realized at the expense of this Organization's functionality.

(ii) The Role of Sovereign Equality in the European Union

The international law principle of SE is both *de jure* and *de facto* relatively ambiguous in the EU. In this respect, the EU is different from some political and financial IGOs which are constitutionally committed to the principle of SE (i.e. the UN *directly* from the UN Charter and the ILO, IMF MIGA *indirectly* as UN Specialized Agencies),[1126] while in reality they breach this principle. The EU, however, also differs from other IGOs who both *juridically* and *factually* disregard the principle of SE (i.e. in the GEF, the principle of SE is (a) absent from its constituent acts and (b) is not reflected in its: (i) weighted voting system, (ii) restricted composition of its Council, and (iii) subsidiary majoritarian rule).[1127]

> "DESIRING to enhance further the *democratic* and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them" (emphasis added).

[1122] E.g. Democracy has again been jointly endorsed by the EU Council, the EU Commission and the EP who—during their 1993 inter-institutional conference—issued a declaration calling for democracy, transparency and subsidiarity within the EU. *See also e.g.* TREATY OF AMSTERDAM arts. 6 and 7.

[1123] *See generally* Franck—Democratic Governance, *supra* note 365; CRAWFORD—DEMOCRACY IN INTERNATIONAL LAW, *supra* note 357.

[1124] *See* Blumann, *supra* note 1031, p. 744.

[1125] *See* TREATY OF AMSTERDAM art. 214, para. 2 (replaced EU TREATY art. 158); Croisat & Quermonne, *supra* note 991, pp. 149, 151; Soldatos—Le débat sur le déficit démocratique, *supra* note 990, p. 150.

[1126] *See* Annex I: Charting Decision-Making in International Governmental Organizations.

[1127] *See generally* GEF INSTRUMENT.

Because there is no direct mention of the principle of SE in the EC's/EU's multiple constituent acts, and because the EU is not a classic IGO, it could be said that the EU does not legally adhere to this principle. However, while it may indeed be *directly* absent, there are at least two cases which must be examined in order to determine whether SE may have *indirectly* become a legal principle within the EC/EU.

The first indirect mention of SE is made in the preamble of the EC Treaty which refers to the member states' intention to "ensure the development of their prosperity in accordance with the principles of the Charter of the United Nations". Given that SE is a UN principle, this provision could be interpreted to mean that it is also, by extension, an EC/EU principle. Of course, this extrapolation is not necessarily consistent with the supranational reality of an organization like the EU which is empowered to act exclusively, in specific areas, for its member states. For instance, because member states have voluntary transferred specific rights to the EC/EU they no longer retain primary sovereignty over those sectors. Thus, the principle of SE—which can only stem from sovereignty—cannot be exercised by states which have relinquished their sovereign rights, even if they have done so only in a limited number of areas.

Another possible indirect reference to SE is made in the preamble of the SEA Treaty which establishes equality as a EC fundamental right.[1128] Given the context in which this principle is stated—i.e. along with democracy, the protection of human rights, freedom and social justice—it appears that equality is referenced *vis-à-vis* individual, not state, equality. In other words, because equality is to be applied *within* member states not *between* member states, the EC's member states are not constitutionally guaranteed equal decision-making rights.

Therefore, while the EC/EU has *de jure* ignored this principle in its multiple constituent acts, it has nonetheless *de facto* embraced some of its components. For instance, two of SE's most distinctive characteristics in the decision-making structures of other IGOs—i.e. (i) equal representation and (ii) unanimity—are present in the EU's main decision-making institutions. Concurrently, however, the EU does not allow for one of the most symbolic representations of the principle of SE in the EU Council, namely equal voting power.

[1128] SEA TREATY preamble, para. 4, where the members declare that they are:

> "DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, *equality* and social justice." (emphasis added).

Instead, it provides for weighted voting. Moreover, the EU is increasing its use of majoritarian voting which means its decisions are increasingly being made against the will of some of its member states and, therefore, against the principle of SE.

The EU's mixed signals regarding the application of the principle of SE (which is at times functional and at other times non-functional) within its parallel and joint institutional decision-making processes is remarkable. It is remarkable because, due to its unique supranational structure, the EU's decisions are not only directly binding for its member states but also take precedence *vis-à-vis* their national laws.

Given the direct effect and applicability the EU's decisions any breach of the principle of SE in its decision-making processes has greater effect than a breach of this principle in another IGO. For instance, as noted earlier,[1129] the breach of the principle of SE in the ILO's decision-making processes is tempered by the fact that, ultimately, its decisions must be ratified by its member states in order to be legally binding on them. If a decision is adopted by majority rule and, thus, against the will of a minority number of states, it will not become legally binding until it is ratified nationally by its member states. Therefore, notwithstanding its adoption, the ILO member states have the opportunity to reject the decision and, thus, not be bound by it. In the EU, however, the supranational feature of direct effect and applicability means that any violation of SE is permanent and irreparable. Therefore, once an EU legislative measure is adopted by majority—i.e. against the will of some of its member states and in breach of SE—its effect cannot be tempered later, as with other IGOs. The legislative measure in question will still be legally binding and enforceable within all member states.

Moreover, notwithstanding international conventions, treaties, or other similar instruments, and unlike the EU's internal supranational decision-making structures, the decisions of most IGOs, regardless of whether or not they are binding, are not usually imposed *within* the borders of a given state but rather within the international community as a whole. As such, they do not usually conflict or take precedence over national legislation. Prime examples are the UN and the IMF where violations of SE in their decision-making processes will not necessarily or directly have an impact on all its member states. For example, I have shown that there is an inherent breach of the principle of SE in the UN SC because of its restricted two-tier membership and of its application of majoritarianism.[1130] If this institution, therefore, adopts a binding resolution by majority vote—and thus against

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[1129] *See generally supra* Part III.B.

[1130] *See generally supra* Part III.A.

the will of most of the UN's 170 non-member states who are not represented in the SC or even against the will of some of the SC's 10 non-permanent members, and therefore, in violation of the principle of SE—the fact that the given resolution is likely to be addressed either to the international community as a whole or to a particular member state means that it is unlikely that it will affect the national legislation of most UN member states and, therefore, violate state sovereignty.

In the following sections, I examine the obscure role played by the principle of SE in the decision making processes of the EU Council (*infra* Part V.A.3) and the EP (*infra* Part V.A.4), and analyze the limitation of this principle's functionalism and legitimacy in this supranational organization (*infra* Part V.A.5).

3. THE COUNCIL OF THE EUROPEAN UNION

Headquartered in Brussels, the **Council of the European Union** (EU Council) is the EU's primary legislative body. It is responsible for establishing the EU's political objectives, coordinating the member states' national policies and resolving disputes between member states, as well as with other institutions.[1131] Part of the EU's uniqueness is attributed to the EU Council's unique composition and allocation of votes (*infra* Part V.A.3.a), its power to impose legally binding decisions on member states (*infra* Part V.A.3.b), the type of majoritarianism rule it practices (*infra* Part V.A.3.c) and its use of the unanimity rule (*infra* Part V.A.3.d). All of these features impact differently on its decision-making institutions and show a dichotomy between the functional legitimacy of the principles of democracy and SE in the EU. I address these issues in the following subsections.

a) The EU Council's Universal Composition and Weighted Voting Power

Regardless of each member state's size, population, economic and military strength, all have a seat and, therefore, a voice in the EU Council. This participation has been assured by the EU Treaty which provides that the EU "Council shall consist of a representative of each Member State at ministerial level, authorized to commit the government of that Member State."[1132] As such, the representatives of EU Council members have dual functions: (i) ministers in their home states and (ii) public servants within the EU.[1133] Like its composition, equal representation is also assured with respect to the EU Council's Presidency which each member state holds on a six-month rotational basis.[1134] Therefore, although the principle of SE is not explicitly set down in the EU's multiple constituent acts, the universality of the EU Council's composition *de facto* adheres to the spirit of SE.

[1131] GUIDE TO THE INSTITUTIONS, *supra* note 1023, p. 9.

[1132] EU TREATY art. 146, para. 1. Previously, EC TREATY art. 146, para. 1 (as amended by the MERGER TREATY art. 2) provided that the EU "Council shall consist of representatives of the Member States. Each Government shall delegate to it one of its members." The change of wording provided by the EU Treaty implies that, henceforth, the EU Council may not only be composed of "national" ministers but may indeed be composed of ministers of federated units.

[1133] Croisat & Quermonne, *supra* note 991, p. 143. The authors also characterize this "*dédoublement fonctionnel*" as a "*source d'ambiguïté et de complexité dans l'exercice de l'une et de l'autre de ces deux fonctions.*"

[1134] EU TREATY art. 146; GUIDE TO THE INSTITUTIONS, *supra* note 1023, pp. 9-10.

The EU Council began with only six member states but, given the EU's current membership, is now composed of 15 member states.[1135] The inclusion of all EU member states in the EU Council is a major differentiating factor from other IGOs which exclude a large number of their member states from their key decision-making bodies—e.g. in the UN 170/185 states are excluded from the SC and in the ILO 159/173 members are excluded from the Governing Body. And it is clear that universality was able to be made a functional concept in the EU Council because of this Organization's small and regional membership. However, given that the EU's membership is expected to progressively expand it will be more difficult, if not impossible, to sustain equal representation in the EU Council. Thus, one of the rare adherence to the principle of SE within the EU—its Council's composition—is likely to dissipate.

The EU Council's mandate is to enact the EU's legislation in matters pertaining to foreign affairs, agriculture, industry, transport, the environment, energy, development, telecommunication, etc.[1136] Although juridically, the EU Council is one entity, given its multi-faceted mandate, in practice, it takes on different forms according to the diverse sectoral activities.[1137] Thus, the EU Council is composed of the national Ministers of all 15 member states corresponding to each sector of activity—i.e. there is an EU Council on agriculture, an EU Council on culture, an EU Council on foreign affairs, etc.

Although each member state is equally represented in each of these EU Councils, the principle of SE is breached because each state has a weighted vote.[1138] This unequal voting power entitles each member to an asymmetric decision-making influence similar to financial IGOs but unlike political IGOs (e.g. the UN and the ILO employ equal voting power). There is, nonetheless, an important difference between the weighted voting rule found in financial IGOs and that which exists in the EU Council. As I have discussed in Part IV, in financial IGOs votes are usually weighted according to a member-state's contributions to the organization. In the EU Council, however, while the voting power is primarily

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[1135] Given the fifteen national ministers' respective obligations in their home states, their presence in Brussels is limited to very short periods. However, to ensure continuity of their functions during their absence they are assisted by an extensive administrative structure which facilitates and supports the EU Council's work. It consists of a General Secretariat, a Permanent Representatives Committee (Coreper) as well as about 200 working parties of national officials. *See* Christian Engel, *Council of the European Union, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 54, 57 (Werner Weidenfeld & Wolfgang Wessels eds, 1997).

[1136] GUIDE TO THE INSTITUTIONS, *supra* note 1023, p. 9; EU GUIDE, *supra* note 1027, p. 9. There are currently well over 25 different sectors of EU Council meetings.

[1137] *See* Wessels—Decisionmaking, *supra* note 1046, p.134.

[1138] *See* HARTLEY, *supra* note 992, pp. 16-17.

weighted according to a member state's population size,[1139] economic, historic, and political factors also influence the allocation of votes.[1140] This distribution of votes is to the benefit of the smaller and medium-size states.[1141] Otherwise, if the EU Council's weighted voting system was allocated strictly on the basis of proportional demographic representation, the small and medium-size states would have had significantly smaller decision-making influence than they actually do.[1142] Currently, the voting power of the EU Council is weighted as depicted in the following diagram.

DIAGRAM VIII WEIGHTED VOTING POWER IN THE EU COUNCIL

EU MEMBER STATES	VOTES EACH	TOTAL
France, Germany, Italy, United Kingdom	10	40
Spain	8	8
Belgium, Greece, The Netherlands, Portugal	5	20
Austria, Sweden	4	8
Denmark, Finland, Ireland	3	9
Luxembourg	2	2
Total votes in the EU Council		87

Clearly, the EU Council's composition and its voting power send mixed signals *vis-à-vis* the principle of SE. At an initial glance it would appear that the existence of universal representation which allows for *equal participation* to all its sovereign members adheres to the principle of SE. However, the system of weighted voting which grants some states *greater influence* in the EU's decision-making processes than it does to other member states constitutes a *de facto* breach of the principle of SE.[1143]

[1139] Läufer—Decision-making Procedures, *supra* note 1031, p. 63; Zamora, *supra* note 33, pp. 582-583; Madeleine O. Hosli, *Admission of European Free Trade Association States to the European Community: Effects on voting power in the European Community of Ministers*, 47 INT'L ORG. 629, 631-632 (1993). *See also* p. 638, n.24 discussing the reunification of Germany, the author acknowledges that, despite its population growth, political reasons made it unrealistic to increase Germany's allocation of votes within the EU Council.

[1140] Zamora, *supra* note 33, p. 583. *See* Hosli, *supra* note 1139, p. 632.

[1141] *See also* Bourlanges, *supra* note 1074, p. 38.

[1142] *See also* Masclet—La CIG, *supra* note 991, p. 22.

[1143] HARTLEY, *supra* note 992, p. 17.

b) Binding and Non-Binding Decision-Making in the European Union

Decision-making in the EU institutions may take one of the following four forms: (1) ***Recommendations*** and ***Opinions***; (2) ***Decisions (stricto sensu);*** (3) ***Directives*** and; (4) ***Regulations.***[1144] It is not their form but rather their content, object or function that determines the classification of these decisions.[1145] However, each of these types of decisions have varying legislative value and legal effect and, therefore, different implications for the EU and the sovereignty of the member states. While some of the EU's decision-making measures establish clear, immediate and directly applicable legal norms—i.e. considered to be EU law—and, therefore, are subject to the ECJ's judicial control, other forms provide conditional and discretionary legal effects.[1146]

Officially, the EU's decision-making structure provides for the adoption of ***Recommendations*** or ***Opinions.***[1147] While, these instruments issued under the EC and EAEC treaties are not generally directly legally binding[1148] they can produce *indirect* legal effects.[1149] These effects depend on a fine distinction between Opinions and Recommendations.[1150]

Opinions issued under the EC, EAEC or ECSC treaties are usually but an expression of views which are meant to provide direction on a given issue and, therefore, have no binding force.[1151] While they have no legal effect, Opinions may, however, have a legal impact. For instance, Opinions issued in the context of the EU's decision-making processes have been considered to be so important that failure to obtain the EP's Opinion prior to the enactment of a legislative act has been known to result in invalidating the act.

[1144] *See* EC TREATY art. 189.

[1145] LASOK, *supra* note 1074, p. 132.

[1146] *See generally id.* at 112-138.

[1147] EC TREATY art. 189, para. 5.

[1148] LASOK, *supra* note 1074, p. 135; EC TREATY art. 189, para. 5; LOUIS, *supra* note 1077, p. 109; Hillenbrand, *supra* note 996, p. 220.

[1149] RIDEAU, *supra* note 1089, p. 121.

[1150] *See* LOUIS, *supra* note 1077, p. 109, noting that "*[i]l est délicat de distinguer entre les avis et les recommandations. Toutefois, l'on a pu dire que l'avis est plutôt l'expression d'une opinion sur une question donnée et que la recommandation est un instrument d'action indirecte visant au rapprochement des législations et ne différant de la directive que par l'absence de portée obligatoire*".

[1151] RIDEAU, *supra* note 1089, p. 121; LASOK, *supra* note 1074, p. 113.

Recommendations issued under the EC and EAEC Treaties, on the other hand, may have some type of legal effect and, therefore, a greater legal impact for they are considered by national judges when they want to clarify national or community legislative acts.[1152] Accordingly, Recommendations are deemed to be an indirect source for reconciliating national legislation.[1153] Moreover, ECSC Recommendations issued by the Commission and pertaining to the coal and steel sector do have legal effect because they are considered equivalent to 'Directives' under the EC and EAEC Treaties—i.e. they are binding as to the aims pursued but the choice of national implementation is left to the discretion of the member states.[1154] They are, therefore, legally binding and constitute a source of EU law.[1155]

Unofficially, the EU's decision-making has also taken other forms including, declarations, resolutions, notices, policy statements, memoranda, communications, deliberations, programmes and guidelines.[1156] Like 'Opinions' and some 'Recommendations', these decision-making forms are intended to be merely instruments of persuasion in the establishment and implementation of the EU's policies and they have "no binding legal effect [...unless] they meet the criteria laid down in the Treaty for binding Community acts."[1157]

The EU's ***Decisions*** (*stricto sensu*) are categorized into either "'general decisions' which are equivalent to Regulations and 'individual decisions' which are equivalent to decisions under the EEC and EAEC Treaties."[1158] As for 'general decisions' they are *immediately* and *directly* applicable on EU citizens, just as their own national laws are.[1159] Thus, when adopted within the framework of any one of the EU's founding treaties, they attribute direct rights or impose direct obligations.[1160] However, EU's 'individual decisions' are specific and, while binding in their entirety, they are binding but *selectively*—i.e. for member states, firms or individuals to whom they are addressed[1161]—

[1152] RIDEAU, *supra* note 1089, p. 121.

[1153] *See* LOUIS, *supra* note 1077, p. 109; RIDEAU, *supra* note 1089, p. 120.

[1154] *See* ECSC TREATY art. 14; LOUIS, *supra* note 1077, p. 101; LASOK, *supra* note 1074, p. 113.

[1155] *See* ECSC TREATY art. 14; EC—Institutions, *supra* note 1037, p. 11; LASOK & BRIDGE, *supra* note 386, p. 130.

[1156] *See* FOLSOM *supra* note 1077, p. 27; LASOK, *supra* note 1074, p. 136.

[1157] LASOK, *supra* note 1974, p. 136.

[1158] *Id.*

[1159] *See* Masclet, *supra* note 1051, p. 180. *See also* LASOK, *supra* note 1074, pp. 126, 132, referring to ECJ rulings which have categorized EU general decisions are "quasi-legislative acts".

[1160] *See* Hillenbrand, *supra* note 996, p. 220.

[1161] EC TREATY art. 189, para 4; LASOK, *supra* note 1074, p. 131.

and, they have only a vertical direct effect—i.e. may be invoked only by individuals against state authorities.[1162]

EU ***Directives*** provide a compulsory policy objective for specific member states.[1163] Used to obtain "approximation of national laws"[1164] they must be substantiated according to the treaty provisions by which they were adopted.[1165] Moreover because they are a harmonization instrument[1166] Directives must be implemented by member states in their entirety. However, although the end-result of an EU Directive must be the same in all member states, the particular details and types of implementation measures may vary from state to state.[1167] For instance, in one state it may require enactment of national legislation, in another it may simply require a Presidential decree, while in another it may necessitate a constitutional amendment.[1168]

However, "*[l]a directive ne crée pas, par elle même, d'obligations vis-à-vis des particuliers. Il en découle, à la fois, qu'elle ne peut pas être invoquée dans le cadre de litiges entre particuliers (effet «horizontal») et que l'Etat ne peut invoquer une directive contre un particulier (effet «vertical inversé»)*".[1169] Although, addressed to states, not to individuals,[1170] Directives can occasionally and under specific circumstances have a "vertical direct effect"—i.e. invoked by individuals against national authorities.[1171] Established by jurisprudence, these circumstances include, *inter alia*, when a Directive is deemed to have a "useful effect", when it is unconditional and sufficiently precise, when national measures have not been adopted in conformity with a Directive, when national measures have not been adopted at all, etc.[1172]

Accordingly, since Directives are either partially binding and occasionally directly binding, the sovereign will of individual member states is restricted because they are either *obligated* to amend or adopt their respective national measures in conformity with the Directives and they may even be *obligated* to give direct effect to the Directives which meet

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[1162] *See* LOUIS, *supra* note 1077, p. 143.
[1163] Läufer—Decision-making Procedures, *supra* note 1031, p. 62.
[1164] EC TREATY art. 100, para. 1; LASOK, *supra* note 1074, p. 122.
[1165] LASOK, *supra* note 1074, p. 122.
[1166] *See* LASOK, *supra* note 1074, p. 123.
[1167] Läufer—Decision-making Procedures, *supra* note 1031, p. 62; LASOK, *supra* note 1074, p. 123.
[1168] FOLSOM, *supra* note 1077, pp. 27-28. *See* LASOK, *supra* note 1074, p. 124.
[1169] MANIN, *supra* note 1076, p. 320. *See* LOUIS, *supra* note 1077, p. 147, 149.
[1170] LASOK, *supra* note 1074, p. 122.
[1171] LOUIS, *supra* note 1077, p. 147; LASOK, *supra* note 1074, p. 123.
[1172] LOUIS, *supra* note 1077, p. 143-148. *See* LASOK, *supra* note 1074, pp. 128-129.

any other jurisprudential condition. The only expression of their sovereign power is their discretion over national procedural implementation measures.[1173]

Finally, EU Council ***Regulations*** are similar to legislative measures adopted by the federal parliaments.[1174] They have automatic force of law and, unlike Directives, apply in their entirety and uniformly in all fifteen member states.[1175] Thus, Regulations are homogeneous throughout the EU territory and have immediate, direct, general, and unconditional legally binding effect on the citizens of its member states.[1176]

Once Regulations have been adopted, the EU's member states can not exercise any sovereign rights (either on substance or on procedure) on the measures which have been regulated because they require no further national implementation or other confirmation measures.[1177] Indeed, because they immediately become directly applicable and directly effective,[1178] Regulations are a source of rights and obligations which can have both vertical and horizontal effect[1179]—i.e. may be invoked in the context of vertical disputes (i.e. between individuals and public authorities) as well as in horizontal disputes (i.e. amongst individuals).[1180] In fact, because of their mandatory legally binding effect, Regulations must be justified according to the terms of the treaty by which they were adopted—i.e. they must be substantiated according to Treaty provisions and must announce the general terms and aims which are being pursued.[1181]

The directly binding effect of Regulations, the partially binding and occasionally directly binding effect of Directives and selectively directly binding effect of Decisions in the EU Council's decision-making processes reflect *a de facto* violation of the principle of SE in the EU. Because the EU's member states have transferred specific sectors of their sovereignty to the EU, they no longer "enjoy the rights inherent in full sovereignty".[1182] Thus, the violation of SE results from the EU's supranational decision-making structure

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[1173] *See* Läufer—Decision-making Procedures, *supra* note 1031, p. 62; Hillenbrand, *supra* note 996, pp. 220, 227.

[1174] Croisat & Quermonne, *supra* note 991, pp. 138-139.

[1175] Läufer—Decision-making Procedures, *supra* note 1031, p. 62.

[1176] EC TREATY art. 189, para. 2; FOLSOM, *supra* note 1077, p. 70; LASOK, *supra* note 1074, pp. 113, 117. *See* Masclet, *supra* note 1051, p. 180; LOUIS, *supra* note 1077, p. 164.

[1177] LASOK, *supra* note 1074, p. 117.

[1178] *Id.* at 117, 126.

[1179] LOUIS, *supra* note 1077, p. 141.

[1180] MANIN, *supra* note 1076, p. 310.

[1181] LASOK, *supra* note 1074, pp. 114-115.

[1182] *See Declaration on Friendly Relations*, *supra* note 290.

which has been juridically granted supremacy, in certain areas, over the sovereign authority of its member states.[1183]

c) Majoritarianism in the EU Council

In conformity with its democratic principles, and like most other IGOs, majority has long been used within the EU's decision-making processes. ***Simple majority*** was originally introduced as the general voting rule within the EU Council in the EC Treaty which stipulates that: "[s]ave as otherwise provided in this Treaty, the Council shall act by a majority of its members".[1184] Yet, most other voting terms *do* provide otherwise, as they prescribe for ***qualified majority*** or ***unanimity*** voting.[1185] In reality, therefore, simple majority is the exception, not the rule, for the adoption of legislative measures within the EU Council.[1186]

Decisions requiring the higher threshold of qualified majority are adopted by at least 71% of the votes. With its current allocation of weighted votes in the EU Council (*see supra* Diagram VIII), this threshold is set at 62/87 votes. Qualified majority, as with simple majority, has evolved and expanded along with the EU's own evolution and expansion. The first such occurrence took place with the enactment of the SEA which increased the use of qualified majority voting.[1187] This majoritarian trend was extended again when the EU Treaty was implemented.[1188] When the Treaty of Amsterdam comes into force it will once again extend the scope of application for qualified majority voting.[1189]

[1183] *Cf.* LOUIS, *supra* note 1077, p. 164, discussing the link between the direct applicability and the primacy of EU law.

[1184] EC TREATY art. 148, para. 1. *See* HARTLEY, *supra* note 992, p. 16.

[1185] FOLSOM, *supra* note 1077, p. 41; HARTLEY, *supra* note 992, p. 16.

[1186] FOLSOM, *supra* note 1077, p. 41.

[1187] *See* EC TREATY art. 149, para. 2 (as amended 1987); SEA TREATY art. 16 amended the requirement of unanimity in articles 28, 57(2), 59, 70(1), 84(2) of the EC Treaty by qualified majority; HARTLEY, *supra* note 992, pp. 19-20.

[1188] *See* CHALLENGE IN EUROPE, *supra* note 1019, p. 107; Schmuck, *supra* note 1115, p. 135; EUROPEAN COMMISSION, PROMOTING A SOCIAL EUROPE (Europe on the move series) 3 (1996) [hereinafter 'SOCIAL EUROPE']. The EU Treaty extended majoritarianism for decision-making in many social-related fields, namely: "health and safety at the workplace, working conditions, information and consultation of employees, equal employment opportunities for men and women and integration of unemployed people into working life".

[1189] *See* CHALLENGE IN EUROPE, *supra* note 1019, pp. 107, 124. Qualified majority will apply to the following cases: employment (arts. 109 & 109r); aid for imports on raw material (art. 45(3)); right of establishment (art. 56(2)); customs co-operation (art. 109n); adoption for research framework programmes (art. 130(i)(1)); countering fraud (art. 209a); statistics (art. 213a); protection of individuals in respect of personal data (art. 213b) and; Common Foreign and Security Policy (CFSP) decisions implementing common strategies (art. J13).

It is thought that majoritarianism within the EU Council has expedited the EU's decision-making processes.[1190] More importantly, however, majority voting epitomizes democratic principles. Thus, as the use of majoritarianism is increasingly becoming standard practice in the EU Council it enhances the democratic character of the EU's institutions. This, in turn, contributes to the reduction of the EU's so-called "democratic deficit". Given that democracy is now a formally enshrined principle in the EU's constituent acts, this institutional path towards democratization is significant for it reflects constitutional conformity.

Of course, by definition, the expression of majority necessarily signals that there is also a minority view. This means that every time the EU Council adopts a legislative measure by majority it does so *against the will* of some of its member states. As a result, the SE principle is *de facto* violated. This violation is not the first of its kind. As I have previously shown, the principle of SE is breached in virtually all the IGOs studied thus far. The difference here, however, is that unlike other IGOs, the EU is a supranational organization with the ability to directly impose its decisions *within* its member states. Because the EU's Decisions, Directives and Regulations are binding even if they are adopted against some of its member state's sovereign will (e.g. against 49% or 29% of the voting shares), the violation of the principle of SE has a completely different significance in the EU's decision-making processes.

[1190] Hosli, *supra* note 1139, p. 632.

DIAGRAM IX CHARTING DECISION-MAKING IN THE EU COUNCIL

MEMBERSHIP	Universal: 15 states
DECISIONS	Regulations = Directly Binding Directives = Partially Binding (i.e. in the object, not the form) and Occasionally Directly Binding Decisions (*stricto sensu*) = Selectively Directly Binding Recommendations and Opinions = Non-Binding but some legal effects
VOTING RULE	Weighted per the member state's population size
VOTING MECHANISMS AND PRACTICES	
—REGULAR CASES	Simple Majority = (50% +1) 44/87
—SPECIAL CASES	Qualified Majority = 62/87
	Unanimity = 87/87
De facto	Consensus

d) Unanimity in the EU Council

As previously noted, when the EC Treaty first came into force a large number of issues—but *not all* issues—required some sort of qualified majority in order to be adopted.[1191] The balance of the issues under consideration by the EU Council necessitated the unanimous approval of member states. This effectively assured adherence to both democratic principles and to the principle of SE because, as previously noted, while majority voting may represent democratic principles, unanimity represents the principle of

[1191] At that time, there were but twelve member states holding a total of 76 votes. Therefore, qualified majority represented 54/76. Given that 54 was the fixed number required, abstentions were considered to be negative votes. *See* HARTLEY, *supra* note 992, pp. 16-17. Germany, France, Italy and the United Kingdom

SE.[1192] In fact, a unanimous expression of states' will epitomize the principle of SE because, since all states are sovereign the expression of their will is equal to that of other states and, therefore, cannot be overridden.

Determining whether to apply qualified majority or unanimity has been the source of many voting difficulties within the EU Council. The difficulty arose because there were different voting provisions for various legislative measures within the EC Treaty.[1193] Because there was no hierarchy for these measures, it was unclear when one voting rule should take precedence over another.[1194] The EU member states established a practice where virtually all significant issues required a unanimous vote.[1195] This practice effectively symbolized that they were claiming adherence to the principle of SE. Since unanimity assured each and every member state of the EU Council, irrespective of its size and its weighted voting power, a *de facto* power to veto, each member state held the power to block the EU Council's decision-making processes. Thus, the requirement to vote unanimously had two adverse affects in the EU, it threatened either: (i) to paralyze its decision-making processes or; (ii) to water-down its legislative measures to a common denominator which would be acceptable to all.[1196] Of course, these unanimity-related problems were not new. They previously plagued other IGOs—i.e. the League. Yet, these problems persisted, and were aggravated, in the EU. Indeed, the EU's *ad hoc* and discretionary use of unanimity had undermined its legislative initiatives[1197] and, in the process, hindered European integration. For this reason, the efficacy and use of this stringent voting rule of unanimity was repeatedly challenged.[1198]

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had 10 votes each; Spain had 8 votes; Belgium, Greece, Netherlands and Portugal had 5 votes each; Denmark and Ireland had 3 votes each and Luxembourg had 2 votes.

[1192] *Cf. also* Bourlanges, *supra* note 1074, p. 41, noting that "*la règle de l'unanimité [est] nécessaire à la défense de la souveraineté des États*".

[1193] *See* FOLSOM, *supra* note 1077, pp. 44-45, for a list of some issues which necessitate unanimous voting and pp. 46-47 for some of those requiring qualified majority voting within the EC Treaty.

[1194] *See also* Croisat & Quermonne, *supra* note 991, p. 148, noting that "*l'absence de hiérarchie des normes accentue ... la confusion des rôles entre les acteurs du processus de décision*". *Cf. Declaration on the Hierarchy of Community Acts*, made in 1992 and annexed to the EU Treaty, mandating the Intergovernmental Conference to "examine to what extent it might be possible to review the classification of Community acts with a view of establishing an appropriate hierarchy between the different categories of act."

[1195] *See* EC TREATY art. 149 (as in effect in 1985).

[1196] *See* Commission Opinion: Reinforcing political union and preparing for enlargement, Intergovernmental Conference 1996, 11, 17 (1996) [hereinafter 'IGC 1996—Commission Opinion'].

[1197] *See* FOLSOM, *supra* note 1077, p. 41.

[1198] *See* LASOK & BRIDGE, *supra* note 386, p. 208. Concerns with unanimity as a decision-making rule were first expressed by the Commission in 1969.

(i) The Luxembourg Compromise

In response to these challenges regarding unanimity voting, a three stage process was established by which the EU Council "would take decisions unanimously during the first two stages and by qualified majority thereafter."[1199] In 1965, one year prior to the impending changes—expected to replace unanimity by qualified majority—France protested and refused to participate in the EU Council.[1200] As unanimity requires and represents the expression of a state's sovereign will, General Charles De Gaule declined to forsake France's sacrosanct sovereign powers in the name of European unity.[1201] By insisting on the continued use of unanimity in the EU Council, by demanding that a vote be postponed until a consensus was established which would lead to a unanimous decision, France was in fact requesting that its sovereign will be equal to that of other member states—i.e. claimed adherence to the principle of SE.

France's absence during the second semester of 1966 from the EU Council asphyxiated the decision-making process thus, creating a serious setback to European integration.[1202] In order to resolve this crisis, a meeting was held in Luxembourg in which a compromise was reached.[1203] The so-called *Luxembourg Compromise* enabled France to abandon its "empty chair" policy and return to the EU Council by retaining the requirement of unanimity on issues where a state's vitals interests were at stake.[1204]

However, there were a couple of indeterminate issues with the *Luxembourg Compromise*: (1) time and (2) interests. First, this Compromise foresaw the unanimity requirement only for a reasonable time-period, after which, the ordinary voting procedure would apply.[1205] Of course, establishing just what constitutes reasonable time is an uncertain notion. The only certainty was that this *de facto* power to veto important decision-making issues was meant to be but a temporary provision—i.e. a suspensive not a definitive veto. Second, the *Luxembourg Compromise* did not establish a hierarchy of

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[1199] HARTLEY, *supra* note 992, p. 17. *See* SCHERMERS & BLOKKER, *supra* note 1, p. 511. The process for the gradual reduction of unanimity voting was envisaged in the 1957 EC Treaty.

[1200] HARTLEY, *supra* note 992, p. 18; Weidenfeld, *supra* note 996, p. 10.

[1201] *Cf.* Keohane & Hoffmann, *supra* note 1007, p. 6, referring to Charles de Gaule's opposition to supranationality.

[1202] *See* Blumann, *supra* note 1031, p. 724.

[1203] HARTLEY, *supra* note 992, p. 18.

[1204] SCHERMERS & BLOKKER, *supra* note 1, p. 511; HARTLEY, *supra* note 992, p. 18. *See* Annex VII for a complete account of the *Arrangements Made in Luxembourg Between the Foreign Affairs of the Six*, (January 31, 1966), *reprinted in* 5 ILM 316 (1966), commonly referred to as the *Luxembourg Compromise* and also known as the *Luxembourg Accords*.

[1205] *See* Annex VII, the *Luxembourg Compromise*.

legislative acts. Therefore, determining whether a state's vital interests were at stake was to be made on a case by case basis. To avoid the difficulties in determining what was or was not of vital interest, the EU Council developed a practice of decision-making without voting—i.e. consensus.[1206]

Nonetheless, some difficulties did arise with the *ad hoc* application of the unanimity requirement within the EU Council. In one notable example, in 1982, the British attempted to apply unanimity in order to block a decision on an issue related to an agricultural price increase.[1207] This maneuver was unsuccessful because, despite British claims, the issue was not generally considered to be of vital interest to Britain.[1208] The President of the EU Council and other member states successfully pressed for, and obtained, a qualified majority vote.[1209]

As the will for further European integration progressed so did the need for a more flexible decision-making.[1210] In order to facilitate the further integration of their markets, the—then—EC member states regularly abstained from exercising their power to veto thus preventing the paralysis of its decision-making system.[1211] Opting, instead, for more flexibility in decision-making through the majoritarian voting rule,[1212] the use and effect of *Luxembourg Compromise* gradually diminished.[1213] By 1986, the SEA effectively tempered the unanimity requirement within the EU Council by amending many of its voting requirements to majority rule.[1214]

(ii) Unanimity in the Post EU Treaty Era

In 1992, the EU Treaty followed the trend toward majority voting set by the SEA and

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[1206] LOUIS, *supra* note 1077, p. 34.

[1207] HARTLEY, *supra* note 992, p. 18-19; LASOK & BRIDGE, *supra* note 386, p. 209; LOUIS, *supra* note 1077, p. 34.

[1208] HARTLEY, *supra* note 992, p. 19; LASOK & BRIDGE, *supra* note 386, p. 209.

[1209] HARTLEY, *supra* note 992, p. 19; LOUIS, *supra* note 1077, p. 34.

[1210] *See* SCHERMERS & BLOKKER, *supra* note 1, pp. 511-512.

[1211] *See* LASOK & BRIDGE, *supra* note 386, p. 209; HARTLEY, *supra* note 992, p. 46; EMILE NOËL, WORKING TOGETHER: THE INSTITUTIONS OF THE EUROPEAN COMMUNITY 25-27 (1988).

[1212] *See* SCHERMERS & BLOKKER, *supra* note 1, p. 512, discussing how the "general acceptance that majority voting was no longer taboo generated a new dynamism in decision-making inspiring delegations to greater flexibility."

[1213] Engel, *supra* note 1135, p. 57. *See* HARTLEY, *supra* note 992, p. 19.

[1214] *See* HARTLEY, *supra* note 992, pp. 19-20; LASOK & BRIDGE, *supra* note 386, p. 209; SCHERMERS & BLOKKER, *supra* note 1, p. 512; Blumann, *supra* note 1031, p. 727.

departed further from the use of unanimity.[1215] However, it did not altogether eliminate unanimity from the EU's decision-making processes. In accordance with the three pillar category established by the EU Treaty, majority remains the prevalent voting rule at the EU's supranational community decision-making level (pillar one) which deals with *economic integration* issues (i.e. customs union, single market, common agricultural policy, structural policy, economic and monetary union, etc.), while unanimity remains the primary voting rule at intergovernmental decision-making level (pillars two and three) which deal with *political integration* issues (i.e. common foreign affairs and security policies and cooperation in justice and home affairs).[1216] Albeit exceptionally, unanimity still applies for a limited number of community actions (e.g. freedom of circulation of people, tax issues, certain environmental questions, etc.).[1217] Unanimity is also exceptionally required for issues considered to be of fundamental importance such as those pertaining to immigration and security, taxation, industry, culture, regional and social funds, accession of a new member state,[1218] amendments of treaties, as well as the framework programme for research and technology development. Thus, through the continued, albeit reduced, use of unanimity, it appears that the relative application of the principle of SE has been somewhat preserved within the EU.

As I have shown throughout this study, unanimity voting is the ultimate expression of a state's sovereign will and one of the clearest manifestations of the principle of SE. The reason that the unanimity requirement persists in the EU is clear in the three pillar classification where we generally find majoritarianism in the first pillar (which deals with a supranational decision-making structure), and unanimity in the second and third pillars (where decision-making takes place through intergovernmental agreements). Although the EU member states have surrendered their sovereignty to the EU's supranational institutions and decision makers at the first pillar level, they have retained it at the second and third pillar levels. Therefore, since each state retains its sovereignty, its sovereign will is equal to that of all other member states and there is adherence to the principle of SE.

However, because of the increasing interdependency of economic and political issues, the EU cannot proceed further with economic integration without adopting a common

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[1215] *See* Hillenbrand, *supra* note 996, p. 239; Weidenfeld, *supra* note 996, p. 17.

[1216] *See* Blumann, *supra* note 1031, p. 727.

[1217] *See* Soldatos—Le débat sur le déficit démocratique, *supra* note 990, p. 147.

[1218] Barbara Lippert, *Enlargement, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 91, 93 (Werner Weidenfeld & Wolfgang Wessels eds, 1997). *See also* SOCIAL EUROPE, *supra* note 1188, p. 6. Certain social-policy issues also require unanimity. They include issues relating to "social security, the protection of workers on the termination of an employment contract or the employment conditions of nationals of a non-member State working in the EU".

foreign policy. Since close cooperation between its members is pivotal in formulating a common foreign policy, the EU's ability to establish such a policy will be continuously undermined by the unanimity requirement in its decision-making processes/rules.[1219] In other words, the necessity for Europe to speak with one voice is essential but the ability for each country to block a common foreign policy issue, through its power to veto, will threaten to handicap the EU's political unity.

Curiously, however, despite the difficulties posed by the requirement for unanimous voting and its potential for weakening European integration, or even crippling the process, unanimity is still championed within the EU. In fact, when the Treaty of Amsterdam is implemented, although the trend towards extending majority voting and decreasing unanimity will continue, unanimity will remain an important VM in the EU Council for it will still apply to well over sixty provisions.[1220]

The remarkable endurance of unanimity voting throughout the EU's on-going evolution is due to this Organization's relatively small size. With the expected enlargement of the EU, however, unanimity voting will increasingly be less functional and eventually completely dysfunctional.[1221] If this stringent voting requirement persists, it may not only handicap the EU but, like with the League of Nations, also paralyze it.[1222] I discuss the impact of the EU's enlargement and the need to reform the unanimity and other decision-making rules of the EU Council in *infra* Part V.A.5.b(i).

[1219] *See* IGC 1996—Commission Report, *supra* note 1011, p. 7.

[1220] *See* CHALLENGE IN EUROPE, *supra* note 1019, p. 107; IGC 1996—Commission Report, *supra* note 1011, pp. 78-80, for a list of provisions requiring unanimity within the EU Council's decision-making process.

[1221] *See* PHILIP MORRIS INSTITUTE—BEYOND MAASTRICHT, *supra* note 1014, p. 5.

[1222] *See* Blumann, *supra* note 1031, p. 726. *See also* p. 749 noting that "*le Conseil demeure l'organe de décision essentiel et s'il ne peut agir, c'est la Communauté, l'Union dans son ensemble qui en pâtit. Les souvenirs douloureux des années soixante et soixante-dix en portent témoignage.*" *Cf.* Noël—Les Défis Européens, *supra* note 1061, p. 10 noting, that "*l'exigence permanente d'unanimité (combinée avec des procédures tatillonnes) paralyse les décisions.*"

4. THE EUROPEAN PARLIAMENT

Located in Strasbourg,[1223] the **European Parliament** (EP)—like most conventional national parliaments—was originally intended to be a democratic assembly composed of representatives of its people.[1224] However, from the outset, members of the EP (MEPs) were *selected* rather than elected.[1225] Due to this anomaly, the EP had been criticized for its democratic deficiency.

In 1976, in pursuit of democratic accountability, members states reached an agreement on holding Parliamentary elections throughout the EC.[1226] The first elections for MEPs were held by universal suffrage in 1979.[1227] They were followed in 1984, 1989, 1994, by the second, third, and fourth elections respectively.[1228] The European peoples' expression of free will through this direct electoral process is believed to have *partly* remedied the EP's "democratic deficit" and, in consequence, to have endowed the EU with greater democratic legitimacy.[1229]

a) The European Parliament's Composition, Voting Rules and Mechanisms

The EP is composed of 626 seats representing well over 370 million people.[1230] It is currently the largest multinational assembly of its kind. Although some sort of parliamentary assemblies or congresses are common in most national institutions, such decision-making fora are virtually unheard of in international institutions for none provide

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[1223] FONTAINE—EUROPE POINTS, *supra* note 995, p. 10. Unlike other Parliamentary institutions, the EP is not located in one place. While its plenary sessions are held in Strasbourg, its 20 different Parliamentary committees meet in Brussels and its Secretariat is located in Luxembourg. *See also* CHALLENGE IN EUROPE, *supra* note 1019, p. 108, claiming that the "'road show' of the Parliament shuttling between Brussels and Strasbourg" is "symbolic of the pandering to national sovereignty at the expense of logic and economy, which tends to distance the Union and its institutions from its citizens."

[1224] *See* ECSC TREATY art. 20; EC TREATY art. 137; EURATOM TREATY art. 107. Originally the EP was known as the 'Common Assembly'.

[1225] *See* HARTLEY, *supra* note 992, p. 23.

[1226] *Id.*

[1227] *See* Schmuck, *supra* note 1115, p. 134; HARTLEY, *supra* note 992, p. 46; Croisat & Quermonne, *supra* note 991, p. 151.

[1228] *See* Michael Matern, *A Chronology of European Integration, in* EUROPE FROM A TO Z: GUIDE TO EUROPEAN INTEGRATION 254, 257-260 (Werner Weidenfeld & Wolfgang Wessels eds, 1997).

[1229] *See* FONTAINE—EUROPE POINTS, *supra* note 995, p. 10; Blumann, *supra* note 1031, pp. 728, 730.

[1230] FONTAINE—EUROPE POINTS, *supra* note 995, p. 11; GUIDE TO THE INSTITUTIONS, *supra* note 1023, p. 5.

for the election of their representatives.[1231] In fact, this parliamentary assembly was a true innovation in the EU and has not been reproduced in any other IGO. As such, the EP is not merely the *EU's only* democratically elected institution,[1232] it is also the *world's only* democratically elected international institution.

However, the EP's election takes place on a national level because there is no uniform electoral law throughout the EP.[1233] As such, the EP is ultimately composed of the sum of various different national elections which often create serious distortions in the representation of its Parliamentarians.[1234] For instance, some national electoral systems deprive entire regions from representation, and this results in serious disparities in the respective weight of the EU's Parliamentarians.[1235]

Moreover, unlike other national parliaments, in order to benefit less populous EU member states, the seats in the EP are not allocated strictly in proportion to its member states' populations.[1236] Therefore, although every European citizen is entitled to one vote, certain states have greater representation per capita than their counterparts.[1237] For instance, in proportion to its citizens, there are more MEPs from Luxembourg—i.e. 6 MEPs for a population of almost half a million—[1238] than there are from the UK—i.e. 87 MEPs for a population of almost fifty eight million.[1239] This represents an 8 to 1 ratio. Hence, although MEPs are now elected, it can be argued that the EP *remains* democratically deficient because the distribution of its seats is not consistent with the democratic principle of proportional representation. Departure from this fundamental principle has been rationalized as necessary in order to ensure that countries like Luxembourg have some type of representation within the EP.[1240] If there would be an equal allocation of seats within the EP, Luxembourg would either have no representation or the EP would be an institution of mammoth proportions. As such, it has been argued that "the existence of such disparities

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[1231] *See* Croisat & Quermonne, *supra* note 991, pp. 150-151.

[1232] FONTAINE—EUROPE POINTS, *supra* note 995, p. 10. The Parliamentary seats are distributed in the following manner: Germany = 99; France, Italy and the United Kingdom = 87/each; Spain = 64; the Netherlands = 31; Belgium, Greece and Portugal = 25/each; Sweden = 22; Austria = 21; Denmark and Finland = 16/each; Ireland = 15; and Luxembourg = 6. There are nine political parties in the EU and MEPs are seated according to their party not to their national delegations.

[1233] *See* Blumann, *supra* note 1031, p. 728; Masclet—La CIG, *supra* note 991, p. 25.

[1234] *See* Blumann, *supra* note 1031, p. 728.

[1235] *See id.*

[1236] *See* Schmuck, *supra* note 1115, p. 131; HARTLEY, *supra* note 992, p. 24; Masclet—La CIG, *supra* note 991, p. 25.

[1237] *See* HARTLEY, *supra* note 992, p. 26.

[1238] EUROPEAN COMMISSION, EXPLORING EUROPE (EUROPE ON THE MOVE) 39 (1996).

[1239] *Id.* at 63.

[1240] *See* HARTLEY, *supra* note 992, p. 26, n.74.

shows that democratic principles must still give way before the national interests of the smaller states."[1241]

As is the case with most national parliaments, there is one vote per Parliamentarian and decisions are taken by majority rule.[1242] However, unlike most national assemblies, there are different degrees by which the majoritarian rule is exercised in the EP. The *use* of these varying degrees of majoritarianism will be better illustrated in the context of the EP's participation in the EU's decision-making processes, which I discuss in the following subsection. For the time being, it is important to note that the EP's majoritarian rule is principally expressed in four ways: (1) ***simple majority***; (2) ***absolute majority***; (3) ***higher majority***; and (4) ***double majority***.[1243]

First, there is the traditional ***simple majority*** rule (by 50% +1) of *any* number of MEPs which are present and voting. This rule is usually required for budget amendments and is represented by a wide range of options, depending on the number of MEPs present in the EP. Therefore, this VM may vary from e.g. 301/600 to 151/300, or any other figure representing simple majority of the votes cast.

Second, there is the widely used ***absolute majority*** rule which requires at least 50% +1 of the *total* number of MEPs to be present and to cast their votes. Therefore, currently, there must be a minimum of 314 votes cast in favour from a total of 626 MEPs for the decision to be passed. Absolute majority is the voting rule for cases regarding the amendment or rejection of common positions as well as the first reading amendments of compulsory EU expenditures.[1244]

The third type of majority rule is represented by a ***higher majority*** of 3/5 of the votes cast. Depending on the number of MEPs present, a wide range of voting formulas could result, e.g. 300/500, 376/626, etc. This type of voting is usually required for amendments during second Parliamentary readings.[1245]

[1241] *See* HARTLEY, *supra* note 992, p. 26.
[1242] *See* Schmuck, *supra* note 1115, p. 132.
[1243] *See id.*
[1244] *See* EU TREATY arts 189b and 189c.
[1245] *See* Schmuck, *supra* note 1115, p. 132.

Finally, there is the ***double majority*** rule which is reflected by a combination of 2/3 majority of the votes cast and a majority of the total membership of the EP. This VM is required for a motion to censure the EU Commission[1246] and to reject the budget.[1247]

b) The European Parliament's Participation in the European Union's Decision-Making Processes

Initially, the EP was not only an *un*-elected assembly but was also void of the general legislative powers typically found in national parliaments.[1248] Despite its eventual elected status, the EP is still not considered to be a European legislature for it does not form or oversee a government.[1249] Instead, because there is no distinction between government and opposition, it is the entire EP (and not only the opposition, as is common in national parliaments) which oversees the EU's executive powers.[1250] In fact, until the implementation of the SEA, in 1987, and the EU Treaty, in 1993, the EC's/EU's overwhelming decision-making power rested with the EU Council and not with the EP. This apparent lack of ability to legislate or to influence the EC's/EU's legislative direction represented yet another example of the EP's democratic deficit.[1251] This deficit will however be somewhat remedied when the EP's legislative role is strengthened through the Treaty of Amsterdam (*see infra* V.A.4.b.ii).[1252]

The EC's original constitutive instruments—the EC and Euratom Treaties—gave the EP only the right to be *consulted* on, and not to decide, legislative acts.[1253] First, the Commission, by simple majority vote or by consensus, decided to initiate a legislative proposal on a given issue.[1254] The so-called ***consultation procedure*** occurred through a single reading of this proposal submitted to the EP, which then issued an opinion, in the

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[1246] EC TREATY art. 144.

[1247] *See* Schmuck, *supra* note 1115, p. 132; EC TREATY 203.

[1248] *See* HARTLEY, *supra* note 992, p. 31; Kokott, *supra* note 1068, p. 826.

[1249] *See* Schmuck, *supra* note 1115, pp. 132, 136; LASOK, *supra* note 1074, pp. 138, 218.

[1250] *See* Schmuck, *supra* note 1115, p. 136; LASOK, *supra* note 1074, p. 218.

[1251] *See* Reymond, *supra* note 840, p. 461; EUROPEAN COMMISSION, EUROPEAN UNION (Europe on the Move Series) 27 (1994) [hereinafter 'EUROPEAN COMMISSION—EUROPEAN UNION']. *See also* Kokott, *supra* note 1068, p. 826. Because the EP was without general decision-making powers it also lacked the authority to "infringe upon the exercise of national sovereignty."

[1252] *See* Blumann, *supra* note 1031, p. 739.

[1253] *See* HARTLEY, *supra* note 992, p. 30.

[1254] *See* Rometsch, *supra* note 1005, p. 112.

form of a resolution but, which had no binding force.[1255] Hence, the Council was ultimately free to adopt a proposal in complete disregard of this Parliamentary opinion.[1256] Moreover, the EP's participation in decision-making through this consultative process was compulsory only for a limited number of issues and was optional in most cases.[1257] Therefore, the adoption of *most* legislative acts remained ultimately independent from the MEPs will or, indeed, their input.[1258]

Parliamentarians' exclusion from the decision-making process is, of course, an anomaly in a democracy.[1259] However, member states refused to transfer their decision-making powers outside their own Council of ministers, and the anomaly persisted for many years. It continues to exist, albeit to a lesser degree. Recognizing that "only by increasing the powers of the European Parliament that further integration [could] be brought about",[1260] the EC proceeded to establish more democratic decision-making processes. In fact, while retaining its original and general *consultation procedure*, the EP's legislative powers have been progressively enlarged, strengthened and, accordingly, democratically enhanced.[1261] This occurred in the late 1980s and early 1990s with the establishment of the ***assent procedure***, the ***co-operation procedure*** and the ***co-decision procedure.***

The EP's powers were initially enlarged with the so-called *assent procedure*, established with the SEA.[1262] This procedure enables the EP to accept or reject future constitutional instruments as well as accession of, or association with, non-member states.[1263] It also applies to decisions regarding citizenship, structural and cohesion funds, and rules

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[1255] Läufer—Decision-making Procedures, *supra* note 1031, p. 61.

[1256] *See* SCHERMERS & BLOKKER, *supra* note 1, p. 403; Läufer—Decision-making Procedures, *supra* note 1031, p. 61.

[1257] Läufer—Decision-making Procedures, *supra* note 1031, p. 61. *See also* HARTLEY, *supra* note 992, p. 31; SCHERMERS & BLOKKER, *supra* note 1, p. 403; Cases 138 and 139/179, *Roquette Frères and Maizena v. Council*, ECR 1980, at 3360, 3424. Originally, consultation meant that the EP had to be asked for its opinion on a given proposal, but did not actually mean that it had to issue its opinion before a legislative act could be adopted. Had it have to do so, the EC's legislation could have been delayed indefinitely in the EP which would have given Parliament a *de facto* power to veto legislation. Eventually, however, the ECJ ruled that the EP's opinion must necessarily be issued before the Council rendered its decision, otherwise the decision would be considered void. Nonetheless, the ECJ ruling did not change the fact that the Council remained free to disregard the EP's opinion.

[1258] *See* HARTLEY, *supra* note 992, p. 30.

[1259] *See id.* at 36. As Hartley put it, in 1988, "[o]ne of the most serious deficits in the constitution of the Community [... was] that the Parliament ha[d] only limited powers".

[1260] *See* HARTLEY, *supra* note 992, p. 45.

[1261] *See* EUROPEAN COMMISSION—EUROPEAN UNION, *supra* note 1251, p. 28.

[1262] *See* Läufer—Decision-making Procedures, *supra* note 1031, p. 66; EUROPEAN COMMISSION—EUROPEAN UNION, *supra* note 1251, p. 28; Schmuck, *supra* note 1115, p. 133; SCHERMERS & BLOKKER, *supra* note 1, pp. 404, 491.

[1263] Hillenbrand, *supra* note 996, p. 221.

governing direct elections. In fact, without the EP's assent in these cases the EU Council is prevented from making decisions.

The other two decision-making procedures—*co-operation* and *co-decision*—responsible for the EP's enlarged powers are more complex and are thus studied in greater detail hereinafter.

DIAGRAM X CHARTING DECISION-MAKING IN THE EU PARLIAMENT

MEMBERSHIP	626 MEPs
DECISIONS	Binding: Opinions & Resolutions in Assent & Co-decision Procedures Non-Binding: Opinions & Resolutions in Co-operation Procedure
VOTING RULE	One MEP, one vote
VOTING MECHANISMS AND VOTING PRACTICES	
—REGULAR CASES	Simple Majority
—SPECIAL CASES *De jure*	Absolute Majority —i.e. 314/626 Higher Majority — i.e. 3/5 votes cast Double Majority — i.e. 2/3 votes cast + majority of membership Veto in Assent & Co-decision Procedures

(i) The Co-operation Procedure

In 1986, the SEA Treaty established the *co-operation procedure* as one of this Organization's decision-making processes.[1264] As its appellation suggests, this procedure goes beyond the requirement for 'consultation' and now necessitates 'co-operation' between the EU Council and the EP for the adoption of the EC's/EU's legislative acts. This cooperative process originally was applied for a limited number of issues regarding, primarily, the creation and operation of the single market.[1265] However, the EU Treaty extended its application to the adoption of measures in sixteen sectors of activity.[1266] When

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[1264] *See* HARTLEY, *supra* note 992, p. 32; IGC 1996—Commission Report, *supra* note 1011, p. 29; EC TREATY art. 149, para 2, as amended by SEA TREATY art. 7 and, further amended by EU TREATY art. 189c. Article 189c provides:

> "Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply:
> (a) The Council, acting by a qualified majority on a proposal from the Commission and after obtaining the opinion of the European Parliament, shall adopt a common position.
> (b) The Council's common position shall be communicated to the European Parliament. The Council and the Commission shall inform the European Parliament fully of the reasons which led the Council to adopt its common position and also of the Commission's position.
> If, within three months of such communication, the European Parliament approves this common position or has not taken a decision within that period, the Council shall definitively adopt the act in question in accordance with the common position.
> (c) The European Parliament may, within the period of three months referred to in subparagraph (b), by an absolute majority of its component members, propose amendments to the Council's common position. The European Parliament may also, by the same majority, reject the Council's common position. The result of the proceedings shall be transmitted to the Council and the Commission.
> If the European Parliament has rejected the Council's common position, unanimity shall be required for the Council to act on a second reading.
> (d) The Commission shall, within a period of one month, re-examine the proposal on the basis of which the Council adopted its common position, by taking into account the amendments proposed by the European Parliament.
> The Commission shall forward to the Council, at the same time as its re-examined proposal, the amendments of the European Parliament which it has not accepted, and shall express its opinion on them. The Council may adopt these amendments unanimously.
> (e) The Council, acting by a qualified majority, shall adopt the proposal as re-examined by the Commission.
> Unanimity shall be required for the Council to amend the proposal as re-examined by the Commission.
> (f) In the cases referred to in subparagraphs (c), (d) and (e), the Council shall be required to act within a period of three months. If no decision is taken within this period, the Commission proposal shall be deemed not to have been adopted.
> (g) The periods referred to in subparagraphs (b) and (f) may be extended by a maximum of one month by common accord between the Council and the European Parliament."

[1265] EC TREATY art. 100a (as amended by SEA TREATY art. 18).

[1266] *See* IGC 1996—Commission Report, *supra* note 1011, pp. 77, 81, for a list of the sixteen cases where the 'co-operation procedure' applies. The list includes: Non-discrimination (art. 6); Transport (arts 75(1) & 84); Social (art. 118a); Social (Protocol-14 member states art. 2(2)); Social Fund (art. 125);

the Treaty of Amsterdam is implemented the scope of this co-operation process will be drastically reduced, and will only be employed for *Economic Monetary Union* (EMU) issues.[1267]

As depicted in Diagram XI, the adoption of legislative measures through the *co-operation procedure* involves a multi-stage process. Essentially, it provides for dialogue between the EP and the EU Council. This dialogue takes place with two readings of the legislative initiative in the EP and in the EU Council—as opposed to one reading required in the consultative process.[1268]

First, as with the *consultation procedure*, the EU Commission submits a legislative proposal to the EP which, after a first reading, adopts a position on it.[1269] Unlike the consultation process, however, the EU Council does not then render a definitive decision on the legislative proposal.[1270] Instead, by a qualified majority vote, the EU Council adopts a "common position".[1271] This position along with the reasons for its adoption are then sent to the EP for a second reading.[1272]

It is during this second Parliamentary reading that the EP is able to exercise some influence in the EU's decision-making.[1273] At this second stage of the process, the EP deliberates on the common position and, within a three month period, may choose one of four options: 1) it may approve it; 2) it may reject it; 3) it may propose amendments to it or; 4) it may take no action.[1274] The adoption of the common position takes place by a simple majority vote of all Parliamentarians present at the EP but necessitates an absolute majority (i.e. at least 314/626) for the rejection or amendment of the common position.[1275]

Vocation Training (art. 127); Trans-European networks (art. 129d); Economic and social cohesion (art. 130e); Research (art. 130o); Environment (art. 130s(1) & (2) & (3)); Development co-operation (art. 130w); Multilateral surveillance (art. 130(5)); Application of prohibition of privileged access (art. 104a(2)); Application of prohibition of assuming commitments and of overdraft facilities (art. 104b(2)); Coins (art. 105a(2).

[1267] *See* CHALLENGE IN EUROPE, *supra* note 1019, pp. 106, 125; Blumann, *supra* note 1031, p. 737. *See also* p. 738. This reduction is considered a sign of progress in the EU's decision-making structure for basically two reasons. First, the decreased use of the co-operation procedure is welcomed because it is a complex decision-making procedure and, second, the co-operation procedure will be replaced by a decision-making procedure which (as I discuss in *infra* V.A.4.b.ii) confers greater powers to the EP.

[1268] Läufer—Decision-making Procedures, *supra* note 1031, p. 63; SCHERMERS & BLOKKER, *supra* note 1, p. 404.

[1269] EU TREATY art. 189c(a); SCHERMERS & BLOKKER, *supra* note 1, p. 404.

[1270] SCHERMERS & BLOKKER, *supra* note 1, p. 404.

[1271] EU TREATY art. 189c(a); Läufer—Decision-making Procedures, *supra* note 1031, pp. 63-64;

[1272] EU TREATY art. 189c(b); Läufer—Decision-making Procedures, *supra* note 1031, pp. 63-64.

[1273] *See* Hillenbrand, *supra* note 996, p. 225.

[1274] Läufer—Decision-making Procedures, *supra* note 1031, p. 64.

[1275] EU TREATY art. 189c(c).

The third stage involves the participation of the EU Council or the EU Commission. If the EP has approved the common position, or has not acted on it within the prescribed time (EP options 1 or 4), the EU Council may adopt it by a majority vote.[1276] If, on the other hand, the common position has been rejected (EP option 2), the EU Council can nonetheless adopt the common position during the second reading, but it must do so unanimously.[1277] Finally, if the EP has proposed amendments to the common position (EP option 3), the EU Commission is legally obligated to consider these amendments,[1278] and has one month to either adopt or reject them.[1279] If it does not accept the amended common position, the EU Commission must justify its rejection.[1280]

Finally, the fourth stage of the process involves the EU Council which may adopt the legislative proposal either by a qualified majority vote (62/87) or by unanimity (87/87), depending on whether the EU Commission adopted or rejected the EP's proposed amendments to the common position. If the EU Commission has adopted the EP's proposed amendments the EU Council has three months to either: (1) adopt the proposal by qualified majority,[1281] or (2) further amend the proposal by a unanimous vote.[1282] On the other hand, if the EU Commission has rejected the EP's proposed amendments, the EU Council may within the same time-frame: (1) adopt the EU Commission's proposal by a qualified majority vote,[1283] or (2) depart from it, and adopt the EP's amendments by unanimity.[1284]

The bigger role given to the EP in this elaborate cooperative process was intended to quell the cries of democratic deficiency in the EC's/EU's decision-making processes.[1285] In that sense, it has proved a valuable first step in the assessment of the EP's democratic viability.[1286] However, despite the establishment of this intricate cooperative procedure which enables the EP to reject or amend the EU Council's legislative measure, the EU's

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[1276] EU TREATY art. 189c(b) second paragraph; SCHERMERS & BLOKKER, *supra* note 1, p. 405.

[1277] EU TREATY art. 189c(c) second paragraph; SCHERMERS & BLOKKER, *supra* note 1, p. 405.

[1278] *See* HARTLEY, *supra* note 992, p. 34.

[1279] EU TREATY art. 189c(d).

[1280] EU TREATY art. 189c(d) second paragraph; *See* HARTLEY, *supra* note 992, p. 34.

[1281] EU TREATY art. 189c(e) & (f); SCHERMERS & BLOKKER, *supra* note 1, p. 405.

[1282] EU TREATY art. 189c(e) second paragraph & (f); Läufer—Decision-making Procedures, *supra* note 1031, p. 64; SCHERMERS & BLOKKER, *supra* note 1, p. 405.

[1283] EU TREATY art. 189c(e) & (f).

[1284] EU TREATY art. 189c(e) second paragraph & (f); Läufer—Decision-making Procedures, *supra* note 1031, p. 64.

[1285] *See* HARTLEY, *supra* note 992, p. 33.

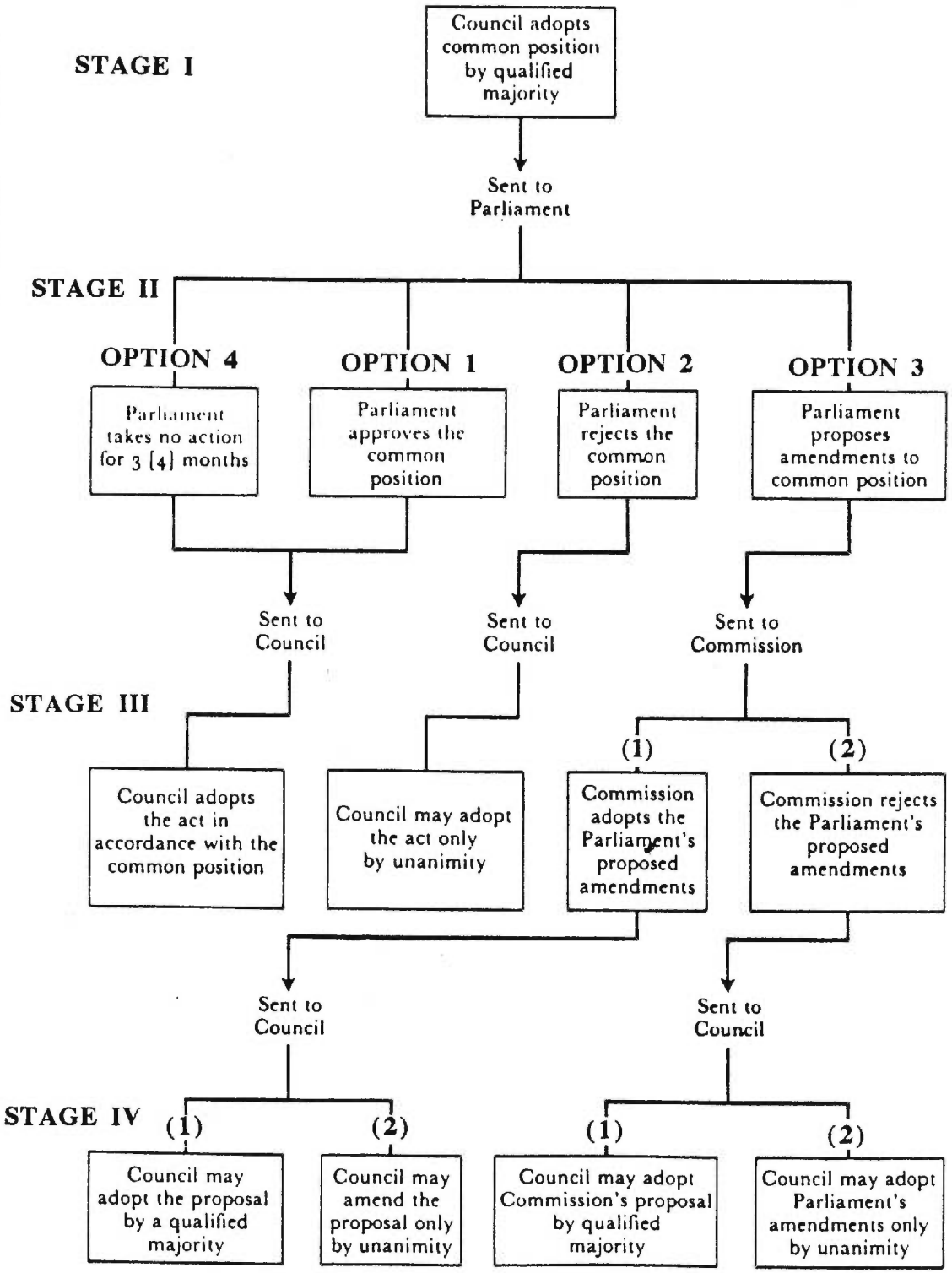
[1286] *See* EUROPEAN COMMISSION—EUROPEAN UNION, *supra* note 1251, p. 28

decision-making power ultimately remains with the EU Council which has the final say to either adopt or reject legislative initiatives through a majority or a unanimous vote respectively.[1287] In this respect, although this cooperative process goes further than the mere consultative process, in reality, it is but a symbolic change because it grants but a relatively small increase in the EP's decision-making authority, and this only on a limited number of issues.[1288]

[1287] *See* Läufer—Decision-making Procedures, *supra* note 1031, p. 64; EUROPEAN COMMISSION—EUROPEAN UNION, *supra* note 1251, p. 28; SCHERMERS & BLOKKER, *supra* note 1, p. 405.

[1288] *See* SCHERMERS & BLOKKER, *supra* note 1, p. 405.

DIAGRAM XI THE EUROPEAN UNION'S CO-OPERATION PROCEDURE[1289]



[1289] The Diagram is taken in its entirety from HARTLEY, *supra* note 992, p. 35. Indications of the various stage and option levels have been added to correspond with the current study.

(ii) The Co-decision Procedure

The 1992 enactment of the EU Treaty brought forth a new decision-making mechanism, known as the *co-decision procedure.*[1290] This latest EU decision-making process evolved

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[1290] EU TREATY art. 189b provides:

> "1. Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply.
> 2. The Commission shall submit a proposal to the European Parliament and the Council.
> The Council, acting by a qualified majority after obtaining the opinion of the European Parliament, shall adopt a common position. The common position shall be communicated to the European Parliament. The Council shall inform the European Parliament fully of the reasons which led it to adopt its common position. The Commission shall inform the European Parliament fully of its position.
> If, within three months of such communication, the European Parliament:
> (a) approves the common position, the Council shall definitively adopt the act in question in accordance with that common position;
> (b) has not taken a decision, the Council shall adopt the act in question in accordance with its common position;
> (c) indicates, by an absolute majority of its component members, that it intends to reject the common position, it shall immediately inform the Council. The Council may convene a meeting of the Conciliation Committee referred to in paragraph 4 to explain further its position. The European Parliament shall thereafter either confirm, by an absolute majority of its component members, its rejection of the common position, in which event the proposed act shall be deemed not to have been adopted, or propose amendments in accordance with subparagraph (d) of this paragraph;
> (d) proposes amendments to the common position by an absolute majority of its component members, the amended text shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.
> 3. If, within three months of the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the European Parliament, it shall amend its common position accordingly and adopt the act in question; however, the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. If the Council does not approve the act in question, the President of the Council, in agreement with the President of the European Parliament, shall forthwith convene a meeting of the Conciliation Committee.
> 4. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of representatives of the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.
> 5. If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If one of the two institutions fails to approve the proposed act, it shall be deemed not to have been adopted.
> 6. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted unless the Council, acting by a qualified majority within six weeks of expiry of the period granted to the Conciliation Committee, confirms the common position to which it agreed before the conciliation procedure was initiated, possibly with amendments proposed by the European Parliament. In this case, the act in

from the cooperative process and developed increased powers for the EP.[1291] In fact, the co-decision process goes further than mere consultation or co-operation between the EP and the EU Council. As its name suggests, these two EU bodies co-*decide* and adopt legislative measures by mutual agreement.[1292]

Established by article 189b of the EU Treaty, the *co-decision procedure* is currently applicable in fourteen sectors of activity, ranging from culture and education, to trans-European networks and environmental protection.[1293] Because it currently applies only in a limited number of areas (i.e. mostly dealing with the single market) while its powers regarding other issues (i.e. EU's common foreign and security policy as well as justice and home affairs) remain negligible,[1294] this co-decision process has not become the general rule with the EU's decision-making system.[1295] Thus, whereas in some areas the EP might exert decisive influence through the co-decision process, in other areas its input may be no more than a consultation with the EU Council. In this respect, the EP's inconsistent participation in the EU's decision-making process is considered to be problematic because its level of influence varies according to the sector of activity where the co-decision process applies, "but not according to any identifiable criteria."[1296] This has led to cries for further reforms and strengthening of the EP's decision-making powers which will assure greater

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> question shall be finally adopted unless the European Parliament, within six weeks of the date of confirmation by the Council, rejects the text by an absolute majority of its component members, in which case the proposed act shall be deemed not to have been adopted.
> 7. The periods of three months and six weeks referred to in this Article may be extended by a maximum of one month and two weeks respectively by common accord of the European Parliament and the Council. The period of three months referred to in paragraph 2 shall be automatically extended by two months where paragraph 2(c) applies.
> 8. The scope of the procedure under this Article may be widened, in accordance with the procedure provided for in Article N(2) of the Treaty on European Union, on the basis of a report to be submitted to the Council by the Commission by 1996 at the latest."

[1291] *See* Blumann, *supra* note 1031, p. 738. *See also* p. 729, noting that the Treaty of Amsterdam's extension of the co-decision process will also enable to better identify the legislative nature of community law which would result in "*une nette amélioration du système de hiérarchisation des normes [...] et les actes adoptés en codécision, bénéficiant de la double légitimation [démocratique et interétatique] pourraient alors se voir qualifiés de «lois», ce qui présenterait l'intérêt de mettre un terme à cette confusion normative*".

[1292] *See* IGC 1996—Commission Report, *supra* note 1011, p. 28.

[1293] *See* CHALLENGE IN EUROPE, *supra* note 1019, pp. 105-106; Läufer—Decision-making Procedures, *supra* note 1031, p. 64; IGC 1996—Commission Report, *supra* note 1011, pp. 77, 80-81, for a list of the fourteen cases where the 'co-decision procedure' applies. The list includes: Free movement of workers (art. 49); Right of establishment (arts. 54(2), 56(2), 57(1)&(2)); Services (art. 66); Internal Market (arts. 100a & 100b); Education (art. 126); Health (art. 129); Consumers (art. 129a); Trans-European Networks (art. 129d); Environment (art. 130s(3)); Culture (art. 128) and Research (art. 130i).

[1294] *See* Schmuck, *supra* note 1115, p. 135.

[1295] *See also id.* The author discusses the EP's preference to make the co-decision process the EU's general decision-making mechanism.

[1296] *See* Commission Report Under Article 189b(8) of the Treaty—Scope of the Codecision Procedure, (03.07.1996) SEC(96) 1225 final 7 [hereinafter 'Scope of Codecision—Commission Report'].

democracy in the EU.[1297] These cries have been somewhat addressed through the Treaty of Amsterdam which—when implemented—will make the application of the co-decision procedure expand to include most other provisions which are presently decided by the co-operation process.[1298]

As depicted in Diagram XII, the *co-decision procedure* is a complex and lengthy mechanism. Essentially, there are two readings between the EP and the EU Council, as well as a conciliation procedure. Moreover, this co-decision process provides the possibility for a third Parliamentary reading.[1299] When implemented, the Treaty of Amsterdam will simplify and expedite this process.[1300] In its present form, however, co-decision making in the EU involves a cumbersome multiple-stage process.

The first stage is identical to that found in the *co-operation procedure*. Upon a legislative proposal by the EU Commission, there is a first reading in the EP which issues an opinion, which is given to the EU Council, which then establishes a common position.[1301] In principle, if it holds the same position with the EU Commission, the EU Council forms this common position by majority vote. If, however, the initiative differs from that made by the EU Commission, the EU Council must establish the common position by unanimity.

The common position is then sent to the EP for a second reading which, within a three month period, can either opt to: (1) approve or remain inactive, (2) reject or, (3) amend the common position.[1302] If it approves the common position, or makes no comment on it, the EP must act by qualified majority. On the other hand, if the EP intends to reject the common position it must do so by an absolute majority of its MEPs (i.e. 314/626).[1303] Otherwise, by the same majority, it may propose amendments to this common initiative.[1304]

[1297] *See* Schmuck, *supra* note 1115, p. 137.

[1298] *See* Blumann, *supra* note 1031, p. 738; CHALLENGE IN EUROPE, *supra* note 1019, pp. 105-106, 125-126. The new provisions for which the co-decision procedure will apply are: Employment-incentive measures (art. 109r); Customs co-operation (art. 116); social policy (art. 118(2) third subparagraph); Social policy-Equal opportunities (art. 119); Public Health (art. 129 (4) a-b); General Principle for transparency (art. 191a); Countering fraud (art. 209a); Statistics (art. 213a); Advisory authority on data protection (213b).

[1299] Läufer—Decision-making Procedures, *supra* note 1031, p. 64. *See* Schmuck, *supra* note 1115, p. 135.

[1300] *See* CHALLENGE IN EUROPE, *supra* note 1019, pp. 105-107; Blumann, *supra* note 1031, p. 739.

[1301] EU TREATY art. 189b(2).

[1302] EU TREATY art. 189b(2)(a)&(b)&(c)&(d); SCHERMERS & BLOKKER, *supra* note 1, p. 405.

[1303] EU TREATY art. 189b(2)(c).

[1304] EU TREATY art. 189b(2)(d).

This is significant because it means that no legislative measure can be adopted against the will of the EP, which essentially gives the EP the power to veto.[1305]

The third stage involves the EU Council or the EU Commission. If the EP has accepted the common position (option 1) then the EU Council simply adopts the legislative measure. If the EP expressed its intention to reject the common position (option 2) then the EU Council summons the so-called *Conciliation Committee*. This Committee, composed of members or representatives of the EU Council and an equal number of MEPs, is then responsible for reaching an agreement on a joint legislative text.[1306] Finally, if the EP had proposed amendments (option 3) then, the EU Commission issues either a positive (option a) or a negative (option b) opinion on these amendments.

The fourth stage involves either options 2 or 3. In option 2, the EP can confirm its initial rejection of the common position, which is then deemed to be officially rejected, by absolute majority. It may also decide to amend the common position, at which point the procedure would follow the process foreseen by option 3. In option 3, if the EU Commission has delivered a positive opinion (option a) then the EU Council can either approve or reject the amendments. If it opts to approve them it must do so within three months and by a qualified majority vote, at which point the common position will be amended and adopted accordingly.[1307] On the other hand, if the EU Council chooses to reject the EP's amendments a Conciliation Committee will be convened.[1308] With respect to the same option 3, if the EU Commission has issued a negative opinion (option b) then the EU Council has one of two choices. It can either approve the EP's amendments unanimously and, therefore, adopt the legislative measure or it can reject the amendments and send the issue to the Conciliation Committee.[1309]

Finally, the fifth stage of the co-decision process concerns only option 3 and the Conciliation Committee's findings of either (i) agreement or, (ii) disagreement. If, within a six-week period, this Committee reaches agreement on a joint text (option i),[1310] then, the EU Council, acting by qualified majority (i.e. 62/87 votes), and the EP, acting by an absolute majority (i.e. 314/626 MEPs), have another six-week period within which to

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[1305] Hillenbrand, *supra* note 996, p. 223; SCHERMERS & BLOKKER, *supra* note 1, p. 405. *See* Croisat & Quermonne, *supra* note 991, p. 151; Masclet—La CIG, *supra* note 991, p. 26.

[1306] EU TREATY art. 189b(4); SCHERMERS & BLOKKER, *supra* note 1, p. 405.

[1307] EU TREATY art. 189b(3).

[1308] *See* Läufer—Decision-making Procedures, *supra* note 1031, p. 64.

[1309] EU TREATY art. 189b(3) *in fine*.

[1310] EU TREATY art. 189b(5).

adopt the joint text.[1311] If, within this period, either of these two institutions fails to adopt the joint proposal, then the legislative measure under consideration is deemed to have been rejected.[1312] On the other hand, if the Conciliation Committee disagrees and does not approve a joint text (option ii), the proposed act will be deemed to have been rejected.[1313] However, the EU Council may, within another six-week period and by qualified majority, confirm the common position, perhaps even with the EP's amendments.[1314] Thus, the legislative act will be adopted, unless, however, within another six-week period and by absolute majority vote, the EP rejects the said legislation.[1315] Therefore, despite the conciliation procedure, the EP has the final say in the co-decision-making process.[1316]

It is the Conciliation Committee in this co-decision process which effectively bestows greater decision-making powers to the EP. These increased powers, exercised when there is no agreement between the EP and the EU Council, grant the EP the ultimate power to reject the issue under consideration. Thus, since the EU Treaty came into force in 1993, and for the first time in its history, the EP is empowered with drafting, amending and enacting legislative measures. As a result of this co-decision process, the EP today has almost the same decision-making powers as the EU Council[1317] and, therefore, greater influence in the EU's decision-making processes.[1318]

As noted earlier, the Treaty of Amsterdam will simplify this complex co-decision process. The amendments will essentially involve that, upon the first Parliamentary reading, (i) if there is no amendment proposed, the EU Council may adopt the legislative measure, or (ii) if there are amendments the EU Council may adopt the measure if it adopts all proposed amendments.[1319] At the second Parliamentary reading, the EP may directly reject the common position of the EU Council without it provoking the Conciliation Committee.[1320] Finally, the Treaty of Amsterdam will abolish the co-decision's third Parliamentary reading.[1321]

[1311] *Id.*

[1312] EU TREATY art. 189b(5) *in fine.*

[1313] EU TREATY art. 189b(6).

[1314] *Id.*

[1315] EU TREATY art. 189b(6) *in fine.*

[1316] Läufer—Decision-making Procedures, *supra* note 1031, p. 64; FONTAINE—EUROPE POINTS, *supra* note 995, p. 10.

[1317] *See* Schmuck, *supra* note 1115, p. 135.

[1318] *See* IGC 1996—Commission Report, *supra* note 1011, p. 28.

[1319] Blumann, *supra* note 1031, p. 739; TREATY OF AMSTERDAM art. 251.

[1320] *Id.*

[1321] Blumann, *supra* note 1031, p. 739.

DIAGRAM XII — THE EUROPEAN UNION'S CO-DECISION PROCEDURE[1322]

[1322] The Diagram is taken in its entirety from EUROPEAN COMMISSION—EUROPEAN UNION, *supra* note 1251, pp. 24-25. Indications of the various stage and option levels have been added to correspond with the current study.

5. *The Functional Legitimacy of the Principles of Sovereign Equality and Democracy in the European Union's Decision-making Processes*

As with other IGOs in the 1990s, questions have been raised concerning the legitimacy of the EU's decision-making processes.[1323] Unlike other IGOs however, concerns over decision-making processes in the EU have arisen primarily with regard to its multiple, complex and lengthy supranational processes. Ironically, the EU's attempts to legitimize its decision-making processes—via democratic (i.e. an elected EP and joint institutional decision-making) and SE principles (i.e. universal representation and unanimity)—has led to the creation of a convoluted and laborious system. This has in turn raised concerns about its efficiency and, in consequence, has cast doubt on its legitimacy.

Although both SE and democracy may be functional and/or legitimate in many contexts, they are neither in the EU. Congruence with the criteria for determining a rule's legitimacy with regard to both principles of democracy and of SE—i.e. (1) determinacy, (2) symbolic validation, (3) coherence, and (4) adherence—are at best illusions within the EU. The same can be said for the EU's decision-making components—i.e. (1) the type of voting rule ('one state, one vote' or weighted voting), (2) the type of VM (i.e. unanimity or majority), (3) the type of representation (plenary or restricted), and (4) the type of decision (i.e. binding or non-binding). I discuss these findings in *infra* Part V.A.5.a.

Any enlargement of the EU's membership will require alterations in its decision-making processes for they are currently far too onerous to be sustained in the context of an enlarged membership.[1324] Furthermore, it is doubtful whether any existing elements of the principle of SE within the EU (i.e. universal representation and unanimous voting) can be functionally and/or legitimately sustained in the contest of a bigger organization. And, while some of its democratic components (i.e. majoritarianism) may remain functional and legitimate in an enlarged EU, it is also doubtful whether an enlarged Union can remain on the path it has already taken towards further democratization (e.g. more directly elected institutions with greater decision-making powers). I address the future role for SE and democracy in the EU's decision-making processes in *infra* Part V.A.5.b.

[1323] Robert Ladrech, *Parliamentary Democracy and Political Discourse in EC Institutional Change*, 17 J. Europ. Integr. 53 (1993).

[1324] *See* IGC 1996—Commission Report, *supra* note 1011, pp. 6-8.

a) Sovereign Equality and Democracy in the European Union

It has been correctly stated that "historically, the influence of single states within the [...EU] has dropped both 'vertically' and 'horizontally': both the individual share in the total number of votes and the proportion of decisions to be taken unanimously have decreased."[1325] Both of these decreases have contributed to the EU's democratization. Concurrently, however, they have also been responsible for its increasing deviation from the principle of SE. Indeed, the principles of SE and democracy play competing roles within the EU, as they do within most other IGOs. For instance, as the use of unanimity (in line with SE principles) has progressively decreased in the EU Council, the use of majoritarianism (in line with more democratic values) has increased. Moreover, because these principles function only partly (*infra* Part V.A.5.a.(i)), and conform only partially to the criteria for legitimacy (*infra* Part V.A.5.a.(ii)) in the EU's decision-making structure, they are neither functional nor legitimate in this supranational organization.

(i) The Mirage of Sovereign Equality in the European Union's Institutions

The principle of SE is but a mirage in the EU's decision-making processes because it is functionally unattainable and legitimately illusory. There are two central reasons for SE's non-functionality and two more for its non-legitimacy.

First, the principle of SE appears to function in the EU Council because (i) it is a plenary body and, (ii) it may vote unanimously. Both of these factors are indicative of SE values. Concurrently, however, the same institution (i) weighs its votes, (ii) increasingly allows for majoritarianism in its decision-making processes and, therefore, (iii) may bind its members against their will. Second, the principle of SE is never applied in the EP where we find (i) unequal representation of states and, as a result, (ii) unequal votes between states (i.e. one vote per MEP, not one vote per state), and where (iii) majoritarianism rules. All of these factors clearly defy SE principles.

SE is also not a legitimate principle in the EU because the organization's institutions and decision-making processes do not fully comply with any of the four required criteria for legitimacy: (1) *determinacy*, (2) *symbolic validation*, (3) *coherence* and (4) *adherence*. With

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[1325] Hosli, *supra* note 1139, p. 634.

regard to the first and fourth criteria, the principle of SE is not a determinate notion in the EU for it is an undefined notion and does not adhere to any of the EU's constituent acts. The second and third criteria find part compliance because SE is both selectively symbolized and applied in the EU. The EU's decision-making processes symbolically validate the principle of SE through the (i) universal representation of its member states in all of its decision-making bodies and (ii) unanimity voting in the EU Council. However, this symbolism is breached through (i) the weighted voting system in the EU Council, (ii) the use of majoritarianism both in the EU Council and in the EP and, (iii) the inconsistent application of unanimity in the EU Council.

(ii) The Illusion of Democratic Governance in the European Union's Institutions

The presence of some democratic principles in the EU's decision-making institutions give us the illusion of the existence of a legitimate and functional form of democratic governance. In reality, however, the pursuit of democracy in the EU is misleading because this concept has never been (i) completely legitimate or (ii) fully functional in this Organization's institutional framework.

The legitimacy of the EU's decision-making processes, like that of other IGOs, does not depend on democracy. While democracy may engender legitimacy, legitimacy is not contingent on democracy. The legitimacy of democratic decision-making rules depends on the rules' clarity, its symbolic representation, its consistency and its adherence to a hierarchical order. In this sense, the legitimacy of the democratic rules within the EU's decision-making processes is mitigated because those rules conform only to two of the four criteria—i.e. symbolic validation and adherence. But, as I explain hereinafter, even within this semi-conformity there is only part compliance to democratic principles.

Since most of the EU decision-making institutions are non-elected, the ***symbolic*** presence of representative democracy would appear to be somewhat obscured. However, the increasing use of majoritarianism rule in the organization's decision-making processes and the fact that its Parliament is an elected body, brings forth the symbolic representation of democracy. This is further enhanced by the reinforcement of the EP's legislative powers and the preservation of equilibrium between the EP, the EU Council and the EU

Commission,[1326] and, very importantly, by the substantive and integral involvement of the EP in the EU's co-operation and co-decision processes[1327]—which is believed, in turn, to increase the legitimacy of the Organization's decision-making processes[1328] and resulting decisions.

The ***adherence*** criterion for the legitimacy of democratic rule is also satisfied in the EU because it is now enshrined, in general terms, in the SEA[1329] and, in more specific terms, in relation to the EU's institutions in the EU Treaty.[1330] Indeed, in so far as the EU "Treaty set out to confer greater legitimacy to the institutional framework of the Union",[1331] as some have claimed, it has accomplished this goal, because, since the democratic principle complies to a higher constitutional order of norms,[1332] it gains legitimacy in the EU.

As for the ***determinacy*** criterion, while democracy is generally a clear notion regarding electoral and majority decision-making processes within states, its meaning is relatively obscure in the context of international institutions. Specifically, in the EU, apart from the reference to the desire "to enhance further democratic and efficient functioning of [...its] institutions"[1333] there is no other indication of *how* democracy is to be implemented in its framework. Does it simply involve "more inclusive and participatory" decision-making processes, as the Commission on Global Governance seems to suggest[1334] or, does it necessarily involve elected representatives and decision-makers, with majoritarian voting, as those referring to the so-called "democratic deficit" suggest? Or, alternately, is there yet another formula for democratic governance in the EU?

The ***coherence*** criterion for the legitimacy of the democratic rule has also not been satisfied in the EU. Although democratic principles—initially very limited[1335]—became more prevalent in the process of greater integration via the directly elected EP and the greater use of majoritarian rule, they continue to be inconsistently and only partially applied within the Union—e.g. EU Commission and the EU Council are not EU elected

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[1326] *See* IGC 1996—Commission Report, *supra* note 1011, p. 27.

[1327] *See* Schmuck, *supra* note 1115, p. 134; Janning, *supra* note 1028, p. 179.

[1328] Läufer—Decision-making Procedures, *supra* note 1031, p. 66.

[1329] *See* SEA TREATY preamble, para. 4.

[1330] *See* EU TREATY preamble, para 5.

[1331] *See* IGC 1996—Commission Report, *supra* note 1011, p. 27.

[1332] *See* Diagram III: Hierarchy of Basic International Norms. N.B. In this context, the higher order refers to the generally recognized hierarchy of basic international norms, because, officially, there is no recognized hierarchy or rules within the EU.

[1333] EU TREATY preamble, para. 5.

[1334] COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 5.

institutions and, also, the EU Council does not always adopt its decisions by majority. In strict interpretative terms, therefore, this inconsistent application of democratic components brings into question the legitimacy of the decision-making processes and resulting decisions of the EU's non-elected institutions.

Legitimacy could be rescued if the inconsistent application of democratic components can be satisfactorily justified.[1336] It cannot be justified in terms of feasibility for it is theoretically feasible for the EU to elect directly all its legislative and executive decision-making bodies—i.e. the EU Council, the EP and the EU Commission—and to use exclusively majoritarianism in its decision-making processes. What has prevented this from happening is the political will of the Organization's member states. Direct elections would mean greater powers for these supranational institutions and, therefore, compromising of the EU member state's sovereignty. This, of course, has been judged not to be politically functional as there is insufficient political will to make additional concessions of member states' sovereignty. The lack of political will, however, cannot be considered a sufficient justification for not satisfying the coherence criterion for the legitimacy theory *vis-à-vis* the democratic rule.

Finally, the EU's relative democratic legitimacy has been achieved at the expense of convoluted decision-making processes which not only function inefficiently, but which cannot be sustained in an enlarged Union.[1337] This inefficiency results from the co-operation and co-decision procedures currently in place. Although these processes have contributed considerably to the greater democratization of the EU,[1338] the price paid in terms of complexity and length of decision-making has been very high indeed[1339]—e.g. the average length of the co-decision process is 18 to 24 months.[1340]

Several proposals to reform the EU's decision-making processes have been suggested which, when implemented, will realize more functional operational procedures. These

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[1335] *See* HARTLEY, *supra* note 992, p. 45.

[1336] *See* FRANCK—FAIRNESS, *supra* note 10, p. 41; FRANCK—POWER OF LEGITIMACY, *supra* note 123, pp. 153, 163, noting how providing sufficient explanations for a rule's inconsistencies may preserve its legitimacy.

[1337] *See* IGC 1996—Commission Report, *supra* note 1011, p. 6; Läufer—Decision-making Procedures, *supra* note 1031, p. 66.

[1338] *See* HARTLEY, *supra* note 992, p. 32; IGC 1996—Commission Report, *supra* note 1011, p. 69; Weidenfeld, *supra* note 996, p. 17.

[1339] *See also* Schmuck *supra* note 1115, p. 135, discussing the "extremely complicated" co-decision process.

[1340] *See* Scope of Codecision—Commission Report, *supra* note 1011, p. 4.

include the simplification of the co-decision process,[1341] the imposition of time limits on the different readings of the measures under consideration, [1342] the virtual abolition of the co-operation procedure and the abolition of most of the other twenty different decision-making procedures so that only three remain: 1) Consultation; 2) Assent and; 3) Co-decision.[1343] These reforms have been inscribed in the Treaty of Amsterdam. As such, when this latest constituent act will be implemented, the co-operation procedure will be virtually eliminated. However, the convoluted co-decision process will remain and, indeed, its scope will be extended to include the adoption of all legislative measures currently under the co-operation process. This onerous process will remain central in the EU's decision-making system, presumably, in the name of preserving this Organization's democratic legitimacy.[1344] The cost paid for its preservation will continue to be functionally burdensome decision-making processes.

b) Decision-Making Reforms Driven by the European Union's Enlargement

The geographic proximity of its member states has been a determining factor in virtually every development in the EU. I have shown that this regional element is at the root of most of the distinctive characteristics of this Organization. Indeed, regionalism has not only shaped the EU's objectives (i.e. single market, economic and monetary union, etc.) and influenced the establishment of its principles (i.e. supremacy, direct effect, subsidiarity, etc.) within its successive founding treaties, but has also been responsible for the unique form of the EU's institutions (i.e. EU Council, EU Commission, EP, etc.) and its innovative decision-making processes (i.e. co-operation and co-decision procedures, etc.).

However, given the inevitable prospective enlargement of the EU,[1345] the key feature of regionalism is destined to undergo major transformation.[1346] This results from three

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[1341] *See* IGC 1996—Commission Opinion, *supra* note 1196, p. 13; Läufer—Decision-making Procedures, *supra* note 1031, p. 66.

[1342] *See* IGC 1996—Commission Opinion, *supra* note 1196, p. 13.

[1343] *See id.* 13.

[1344] *See* Scope of Codecision—Commission Report, *supra* note 1011, pp. 4, 8; IGC 1996—Commission Opinion, *supra* note 1196, p. 13.

[1345] *See* IGC 1996—Commission Opinion, *supra* note 1196, p. 7; Manin, *supra* note 1110, p. 31. *See generally* Christian Philip, *Un nouveau défi pour l'Union européenne: l'élargissement, in* L'UNION EUROPÉENNE DANS LE CONTEXTE DE LA CONFÉRENCE INTERGOUVERNEMENTALE de 1996 47 (Panayotis Soldatos ed., 1997).

[1346] *Cf.* PHILIP MORRIS INSTITUTE—BEYOND MAASTRICHT, *supra* note 1014, p. 26. Luigi Guidobono Cavachini, Ambassador of Italy to France, questions how the EU system created for 6, 9 or 12 states can

factors. First, the EU's constitutive instruments provide every European state the possibility for membership.[1347] Second, the European governments have affirmed the EU's enlargement to be both a "political necessity and a historic opportunity".[1348] Third, following the end of the Cold War, several Central and Eastern European countries—i.e. Hungary, Poland, the Czech Republic, Bulgaria, Romania, Slovakia, Slovenia, Latvia, Estonia and Lithuania—envision membership in the EU as a means of marking their passage to democracy and a market economy.[1349] It is expected that—with the accession of these new democracies, joined by Malta, Cyprus and Turkey—as many as twenty-five states may become members of the EU at the beginning of the twenty-first century,[1350] and that a further EU expansion may reach as many as thirty member states.[1351]

In anticipation of the EU's enlargement, the 1996/97 IGC aimed to secure the appropriate institutional conditions within the EU before it allowed more states to accede.[1352] When the conference completed its work it found that, in order for the EU to function with (i) an increased number and (ii) further diversified players, structural reforms of its institutional system are needed.[1353] This means that expansion of the EU will necessarily entail a re-examination of the composition and structure of its institutions[1354] which will ultimately lead to a transformation that will affect the efficiency of its decision-making processes.[1355] It cannot, for example, be doubted that the weighted voting system and unanimity requirement, conceived for six homogenous states and, which currently exist among fifteen member states in the EU Council will be challenged, and probably successfully, in an enlarged organization of twenty or thirty member states. Moreover, a EU representing 500 million people is unlikely to see increases—e.g. in the number of

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function with 15, 20 or 30 states and suggests that the European architecture needs to strengthen its institutions.

[1347] EC TREATY art. 237 as replaced by an almost identical provision in EU TREATY art. O; EURATOM art. 205.

[1348] Lippert, *supra* note 1218, p. 91. This stance was made public at the Madrid European Council held in 1995.

[1349] *See* Lippert, *supra* note 1218, pp. 91-92.

[1350] *See* Matern, *supra* note 1228, pp. 259-262; Christian Philip, *Les impératifs et le défi des prochains élargissements*, *in* L'UNION EUROPÉENNE DE L'AN 2000: DÉFIS ET PERSPECTIVES 47, 48-49 (Christian Philip & Panayotis Soldatos eds, 1997) [hereinafter 'Philip—Prochains élargissements']; Lippert, *supra* note 1218, p. 91. The following states have formally applied to join the EU: Turkey in 1987; Cyprus and Malta in 1990; Hungary and Poland in 1994; Romania, Slovakia, Latvia, Estonia, Lithuania and Bulgaria in 1995; the Czech Republic and Slovenia in 1996; the Baltic states in 1997. Switzerland initially applied to join the EU in 1992 but is no longer a candidate.

[1351] *See* Weidenfeld, *supra* note 996, p. 19.

[1352] Lippert, *supra* note 1218, pp. 91-92. *See* Masclet—CIG, *supra* note 991, pp. 20-21.

[1353] *See* Blumann, *supra* note 1031, pp. 722-723; IGC 1996—Commission Opinion, *supra* note 1196, p. 8; Weidenfeld, *supra* note 996, p. 19; Wessels & Diedrichs, *supra* note 1012, p. 141.

[1354] *See* Philip—Prochains élargissements, *supra* note 1350, p. 50.

[1355] *See* IGC 1996—Commission Report, *supra* note 1011, p. 4.

MEPs or in the EU Council's weighted voting—which correspond to its current proportional representation of population. The impact of enlargement on the (i) EU Council and on the (ii) EP is addressed hereinafter.

(i) The Impact of Enlargement on the EU Council

As noted earlier, as the EU heads towards less regionalism—albeit, not quite universalism—it has been generally recognized that reforms to its current onerous institutional structures are necessary in order to ensure decision-making efficiency.[1356] This decreased regionalism is expected to present at least four structural and decision-making challenges to the EU Council regarding: 1) its universal representation, 2) its weighted voting rule and its distribution formula, 3) the level and use of majority voting, and 4) the viability of the unanimity voting requirement.[1357]

The challenge of having universal representation in the EU Council is that a large number of participants has the potential to diminish its decision-making efficiency. This risk is compounded depending on the type of voting mechanism and the type of voting rule used. For instance, it is inconceivable to enable the EU Council to have universal composition of thirty members if unanimity or the current distribution of weighted votes were to apply, for it would be a recipe for paralysis.[1358] However, if unanimity is eliminated, or substantially limited, and votes are re-weighted, it could be both a functional and a legitimate proposition to maintain the EU Council as a plenary body, particularly if this institution remains the key decision-maker of the EU with power to enact legislation with directly binding effect on its member states.[1359]

The second challenge which will be encountered will be whether weighted voting will continue to apply within the EU Council or whether the EU will opt for the 'one state, one vote' rule. Although the EU Council directly represents states[1360] (and not people, as is the case with the EP) its expansion is unlikely to see the implementation of the 'one state, one

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[1356] *See generally* IGC 1996—Commission Opinion, *supra* note 1196; IGC 1996—Commission Report, *supra* note 1011.

[1357] *See* EUROPEAN COMMISSION, OPENNESS AND TRANSPARENCY IN THE EU INSTITUTIONS 23 (1995).

[1358] *See* Masclet—La CIG, *supra* note 991, p. 22; Bourlanges, *supra* note 1074, p. 38; PHILIP MORRIS INSTITUTE—BEYOND MAASTRICHT, *supra* note 1014, p. 5, cautioning that "voting by unanimity is likely to prove impossible within 25 or 30 nations."

[1359] *See also* Masclet—La CIG, *supra* note 991, pp. 22-23.

[1360] *See* Blumann, *supra* note 1031, p. 728.

vote' rule.[1361] In this sense, SE will likely continue to be, rightly, disregarded in the EU.[1362]

Therefore, the weighted voting rule is likely to be preserved in an expanded EU Council. However, maintaining the weighted voting rule does not necessarily mean maintaining the current distribution formula (*supra* Diagram VIII).[1363] Instead, the re-distribution or re-weighting of votes is meant to reflect the membership of every new state.[1364] After all, the current distribution of votes was presumably established to avoid a kind of "hegemony" by the larger member states (i.e. Germany, France and Italy), over the three smaller states (Belgium, Luxembourg and The Netherlands) when the EC was first established in 1957.[1365] More than forty years later, a redistribution is considered necessary in order to enhance the current voting power of larger states and prevent—the reverse—dominance by smaller states.[1366] For instance, in an enlarged EU Council, the current weighted voting rules would create an imbalance of voting power in favour of the smaller member states and, therefore, diminish the influence of the larger member states.[1367] Thus, the larger member states are likely to see their voting power substantially reduced which could theoretically result in them being consistency outvoted by the bloc voting of smaller states.[1368]

The re-distribution of votes has been an unresolved point of contention during the 1996/97 IGC.[1369] Given that most prospective members of the EU are small and medium-size states, the prospect of numerical dominance by the such states is obviously politically

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[1361] *See* IGC 1996—Commission Opinion, *supra* note 1196, p. 20.

[1362] *See also* Blumann, *supra* note 1031, p. 728, noting that "*le principe d'égalité ne peut avoir en droit communautaire la place qu'il occupe en droit international*". Of course, Blumann fails to recognize, as postulated in this study of IGOs, that the principle of SE is neither functional nor legitimate in the overwhelming part of contemporary international law—i.e. international institutional law.

[1363] *See* Masclet—La CIG, *supra* note 991, p. 23.

[1364] *See also* Barber, *supra* note 1033, discussing the redistribution of weighted votes in the EU so as to favour states with large populations.

[1365] Noël—Les Défis Européens, *supra* note 1061, p. 7. *See also* Masclet—La CIG, *supra* note 991, p. 22, noting that that current weighted voting system was established to provide the small states with a larger influence than the proportional demographic representation system would have entitled them.

[1366] Jopp, *supra* note 1014, p. 164; Noël—Les Défis Européens, *supra* note 1061, p. 7. *See* CHALLENGE IN EUROPE, *supra* note 1019, p. 105.

[1367] *See* Blumann, *supra* note 1031, p. 727; Masclet—La CIG, *supra* note 991, pp. 22-23; Hosli, *supra* note 1139, p. 631. *See also* p. 634. Hosli states that "[h]istorically, the influence of single members in the EC Council of Ministers in terms of absolute and relative voting weights has continually decreased: enlargements have caused a rise in the total number of votes while the relative leverage of the individual member states has declined."

[1368] *See* Weidenfeld, *supra* note 996, p. 19; Hosli, *supra* note 1139, p. 634.

[1369] *See* Helmut Kortenberg, *La négociation du Traité: Une vue cavalière*, 4 REV. TRIM. DR. EUR. 709, 718 (1997).

unacceptable to the larger states.[1370] One option for the re-distribution is based strictly on proportional representation to population.[1371] However small and medium-size states, fearing that such a re-distribution will relegate them to insignificant players in the EU, counter that a weighted voting system is not meant to be by proportional demographic representation as is the case in the EP.[1372] Another option, proposed by France, is a double majority system based on the majority of the states and the majority of the population.[1373] Of course, this would effectively mean abandoning the weighted voting rule.[1374] During the latest IGC, it was agreed to postpone the challenge of the EU Council's redistribution of votes until the EU's actual expansion takes place.[1375]

The third challenge regarding EU's majoritarian decision-making mechanism is likely to continue to be embraced for it epitomizes democratic principles. Indeed, the Treaty of Amsterdam brings little change to EU's majority voting rule.[1376] However, in an enlarged EU, most EU reforms need to consider further increased use of majority rule so as to replace the cases which currently require unanimity.[1377] Although failing the standard of

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[1370] *See* Blumann, *supra* note 1031, p. 728.

[1371] *See* Masclet—La CIG, *supra* note 991, p. 23.

[1372] *See* Blumann, *supra* note 1031, p. 728.

[1373] *Id.*; IGC 1996—Commission Opinion, *supra* note 1196, p. 20. *See also* Masclet—La CIG, *supra* note 991, p. 23.

[1374] Masclet—La CIG, *supra* note 991, p. 23.

[1375] *See* Blumann, *supra* note 1031, p. 731. Blumann also notes that during the 1996/1997 IGC, negotiations for the EU Council's redistribution of votes was linked in a sort of package deal with the EU Commissions' re-composition whereby the latter institution would be composed of one Commissioner for every state "*qui, paradoxalement, redevenait un lieu de Droit international classique" où le principe d'égalité des États règne en maître.*"

See also Protocoles annexés au traité sur l'union européenne et aux traités instituant la Communauté européenne, la Communauté européenne du charbon et de l'acier et la Communauté européenne de l'énergie atomique, Protocole sur les institutions dans la perspective de l'élargissement de l'Union européenne, art. 1:

> "*À la date d'entrée en vigueur du premier élargissement de l'Union, [...] la Commission se compose d'un national de chacun des États membres, à condition qu'à cette date la pondération des voix au sein du Conseil ait été modifiée, soir par une nouvelle pondération des voix, soit par une double majorité, d'une manière acceptable pour tous les États membres, compte tenu de tous les éléments pertinents, notamment d'une compensation pour les États membres qui renoncent à la possibilité de désigner un deuxième membre de la Commission.*"

and art. 2 which provides that:

> "*Un an au moins avant que l'Union européenne ne compte plus de vingt États membres, une conférence des représentantes des gouvernements de États membres est convoquée pour procéder à un réexamen complet des dispositions des traités relatives à la composition et au fonctionnement des institutions.*"

[1376] *See* Blumann, *supra* note 1031, pp. 742-743.

[1377] *See* Masclet—La CIG, *supra* note 991, p. 22, advocating that "*le vote à la majorité devienne la règle générale*"; Italy—Position of the Italian Government on the IGC, *supra* note 1061, p. 6, noting the Italian stance for "generalising [sic] the majority vote within the EU"; Bourlanges, *supra* note 1074, p. 39. *See also* Blumann, *supra* note 1031, p. 742. During the 1996/97 IGC, France's stance regarding the expansion of the qualified majority rule was conditional on the issue of redistribution of votes within the EU Council.

SE, majority rule has the democratic elements sought in the EU and, because it is the more flexible and functional route toward European integration, it must be the dominant VM in an expanded Europe.

As for the type of majoritarianism, the use of qualified majority has been retained and even slightly increased through the Treaty of Amsterdam.[1378] However, although qualified majority remains generally acceptable as the main decision-making rule,[1379] it has also been suggested that this voting rule be modified in an enlarged EU. Specifically, there have been proposals regarding the possibility of instituting greater use of *double majority* voting.[1380] As previously noted, this type of voting would require (i) the majority of the member states (ii) holding the majority of the population to adopt legislative measures within the EU Council.[1381] The first part of this equation would adhere to the principle of SE while the second would adhere to the democratic principle. Overall, however, since double majority would reflect a more democratically representative process it is argued that it would necessarily enhance the legitimacy of the EU's decision-making processes.[1382] Moreover, for sensitive areas, the EU Commission has suggested that unanimity be replaced by a *super-qualified majority* which would be a voting rule which would represent a higher majority than the threshold of 71% (62/87 votes) currently required in the EU Council.[1383]

Any challenge to the current level of qualified majority is likely to face vigorous resistance, principally for three key reasons. First, discussion regarding increasing the threshold of 71% for the qualified majority rule is controversial and will not be a favoured route.[1384] Second, past enlargements retained the same threshold for qualified majority voting in the EU Council.[1385] Third, a 71% majority reflects an average between the lowest form of democratic rule—i.e. simple majority (50% +1)—and the ultimate form of SE rule—i.e. unanimity (100%). It is thus a compromise route which functionally represents

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[1378] *See* Blumann, *supra* note 1031, pp. 742-743.

[1379] IGC 1996—Commission Opinion, *supra* note 1196, pp. 11, 17, 21. Opting for qualified majority and doing away with unanimity voting has been an idea that has been supported by the EU Commission.

[1380] *See* IGC 1996—Commission Opinion, *supra* note 1196, p. 20. *See also* Interview with Ambassador John Beck, Head of the Delegation of the European Commission in Canada, in Montréal, (Dec. 4, 1996), noting the proposals for double majority voting as a method by which large states (i.e. UK, France, Germany and Italy) could have their *national interests protected* since they would be assured that their votes would not be blocked by a larger group of smaller EU states.

[1381] *See* Blumann, *supra* note 1031, p. 728; IGC 1996—Commission Opinion, *supra* note 1196, p. 20. *See also* Masclet—La CIG, *supra* note 991, p. 23; Philip—Prochains élargissements, *supra* note 1350, p. 52.

[1382] *See* Blumann, *supra* note 1031, p. 728.

[1383] IGC 1996—Commission Opinion, *supra* note 1196, p. 21.

[1384] *See id.* at 20.

[1385] *See* Hosli, *supra* note 1139, p. 638.

the preponderant will of the EU's member states and one which, therefore, should continue.

Given that "the difficulty of arriving at unanimous agreement rises exponentially as the number of members increases", it is feared that European integration could stagnate if the unanimity rule remains.[1386] For example, in a EU composed of twenty or twenty-five members, it would be difficult to amend the EU Treaties which would require, as is currently the case, unanimous support. Unanimity in the EU Council will eventually need to be eschewed, if not eliminated altogether. This, however, is controversial for unanimity is intricately tied to the principle of SE which, although not officially enshrined in the EU constituent acts, has found sporadic presence throughout the EU's evolution.

Some fear that the "abandonment of the unanimity rule ... could result in compromising the conditions essential for the exercise of national sovereignty".[1387] On the other hand, it is quite telling that "Sociologists consider decision-making by unanimity as characteristic of primitive societies."[1388] Indeed, it can not be ignored that in the contemporary context of global governance, in which IGOs are dominant actors, sovereignty and its offspring, SE, take rank *after* the common purpose and function of the IGO. States which pool, share, or otherwise alienate their sovereignty in IGOs cannot concurrently seek application of the principle of SE in its institutional decision-making processes. It is the price which must be paid for being an integral part of an international and an interdependent community of nations.

Given that the principle of SE has proven to be non-functional in all universal IGOs, and has been but a mirage in small organizations or in small institutions within large organizations, it is unlikely that an enlarged EU will be able to adhere to the principle with regard to unanimity voting. The continuance of the unanimity rule within an enlarged EU will inevitably paralyze the decision-making processes of this Organization[1389] and, ultimately, threaten its existence. In this sense, we must look at, and learn from, historic failures—i.e. League of Nations—so as to avoid implementing decision-making mechanisms which can cause history to repeat itself.

[1386] IGC 1996—Commission Opinion, *supra* note 1196, p. 21.

[1387] Kokott, *supra* note 1068, p. 828.

[1388] SCHERMERS & BLOKKER, *supra* note 1, p. 513.

[1389] *See* Noël—Les Défis Européens, *supra* note 1061, pp. 5, 10; Bourlanges, *supra* note 1074, p. 39. *Cf. e.g.* Presse Associée, *Londres bloque une douzaine de décisions de l'Union européenne*, LA PRESSE, May 29, 1996, at B8.

(ii) The Impact of Enlargement on the European Parliament

The impending enlargement of the EU will have a direct impact on, *inter alia*, the EP's structure with regard to the number of MEPs which will be needed to accommodate new member states and on the type of decision-making role which this institution can continue to play in an expanded organization.

The EP currently has an average ratio of roughly one MEP representing 600,000 people.[1390] The enlargement of the EU will inevitably change this ratio so as to reflect the increase in the population of the Union. Three routes have been considered for this change, each of which may affect significant difference in the EU's representative democracy. More importantly, each route will impact differently on the EP's decision-making role.

The first option considered has been to increase the number of its MEPs and maintain the same ratio of representation. Given the number of European states currently interested in joining the Union, in theory, one option could be that the EP may potentially double the number of its MEPs to as many as 1000 or 1200. Such a mammoth institution will undoubtedly slow the EU's decision-making processes and reduce its efficiency.[1391] Unless, of course, additional fixed limits are imposed on both the co-operation and co-decision processes. However, fixed term limits would render substantive dialogue and debate in the EP more difficult and the EP's decision-making role could then be relegated to no more than a symbolic rubber stamp of legislative issues, similar to the original consultation process.

The second route considered has been to maintain the number of MEPs to its current level of 626. Depending on the number of member states and the overall population of the EU, this could result in increasing the ratio of parliamentary representation to as many as one million or more people per MEP. This would mean that MEPs would have constituencies so immense and diverse that it would make the 'will of the people' difficult to gauge and, therefore, difficult to represent.

The third option is a comprise route of an increase in both the number of MEPs and an increase in the ratio of their constituencies which effectively means limiting the number of parliamentarians. In an enlarged EU, this option would result in a reduction to the number

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[1390] Schmuck, *supra* note 1115, p. 136.

[1391] *See* Masclet, *supra* note 1051, p. 25.

of the current parliamentarians originating from its member states.[1392] This third route has been retained by the Treaty of Amsterdam and, the proposal to limit the number of parliamentary seats to 700 will thus be implemented.[1393] This represents approximately 800,000 electors for every MEP.[1394] Accordingly, as with the second option, this means that the MEPs will inevitably face serious challenges in gauging the sentiment of their large constituents.

As European integration progressed, we have seen that the EP has evolved from an non-elected body to an elected one with increased decision-making powers. The impending enlargement of the Union, has brought forth more calls for the EP to be further reformed and "strengthened".[1395] But strengthening the EP, as with other EU institutions, means different things to different parties because "[w]hen it comes to questions concerning the major institutional reforms, there is a rift within the European Union. ... At one extreme, there is the U.K., urging a minimum of reforms and holding an anti-federal position. At the other extreme, Germany is calling for large-scale reforms leading down the federalist road."[1396] Whichever direction is ultimately taken—whether it be the EP's additional or increased decision-making powers or even shared co-decision-making powers with national parliaments[1397]—what must be kept in mind throughout the lively discourse which these institutional reforms will undoubtedly generate is that the EU's decision-making processes must, above all, be functional and legitimate. And, because functional legitimacy is not exclusively dependent on the presence of either SE or democratic principles in the EP's decision-making, these principles are certain to be further challenged in an enlarged EU.

[1392] *See id.*

[1393] *See* TREATY OF AMSTERDAM art. 189, para. 2 (formerly EU TREATY art. 137); CHALLENGE IN EUROPE, *supra* note 1019, p. 108; IGC 1996—Commission Opinion, *supra* note 1196, p. 19. *Cf.* Italy—Position of the Italian Government on the IGC, *supra* note 1061, 7. The Italian Government favoured limiting the number of MEPs to between 650 and 700; PHILIP MORRIS INSTITUTE—BEYOND MAASTRICHT, *supra* note 1014, p. 24. Other proposals involved limiting the number of MEPs to 1000.

[1394] *See* Masclet, *supra* note 1051, p. 25.

[1395] *Cf. e.g.* PHILIP MORRIS INSTITUTE—BEYOND MAASTRICHT, *supra* note 1014, pp. 27-28. Peter Jankowitsch, Austria's Permanent Representative to the OECD, suggests that legitimacy in the EU could come by "strengthening the powers of the Parliament" and ... [by direct democracy through] European Referendums". However, this suggestion fails to provide concrete plans about how to realize this Parliamentary strength and fails to contemplate the logistics, frequency, costs and, thus, the efficiency of direct democracy through referendums.

[1396] PHILIP MORRIS INSTITUTE—BEYOND MAASTRICHT, *supra* note 1014, p. 23. Comments were made by Philippe Manin, Professor of Community Law at the University of Paris I. *See also* Barber, *supra* note 1033, p. 23, relating the "two competing visions of Europe" held by German Chancellor Khol and former UK Prime Minister John Major.

[1397] *See id.* at 28, where Emile Noël, Secretary-General of the European Commission from 1967 to 1987, discusses this joint national and supranational decision-making process between the EP and national parliaments.

B. THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

> "[T]he United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace.
>
> "It would be neither fitting nor efficacious for [...the US] Government to undertake to draw up unilaterally a programme designed to place Europe on its feet economically. This is the business of the Europeans. The initiative, I think, must come from Europe."
>
> George C. Marshall[1398]

1. THE STRUCTURE OF THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

a) Origins and Evolution

The **Organisation for European Economic Co-operation** (OEEC) was established in the aftermath of W.W.II with a mandate of assisting in the reconstruction of Europe by administering the American financial assistance plan, commonly known as the Marshall Plan.[1399] By 1960, Europe was rebuilt and the OEEC's mandate was, therefore, completed. But recognizing a continued need for economic co-operation in an increasingly

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[1398] George C. Marshall, *Speech: Our Policy is Directed Against Hunger, Poverty, Desperation and Chaos* (Harvard University, Cambridge, Massachusetts), (July 5, 1947) *in* THE PENGUIN BOOK OF TWENTIETH CENTURY SPEECHES 232, 233 (Brian MacArthur ed., 1993). The European relief plan was named after, then US Secretary of State, General Marshall who, announced the financial aid program in his post W.W.II speech at Harvard University on July 5, 1947, and launched what is widely considered to have been one of the most generous financial assistance plans in history. In this now famous speech, General Marshall also proclaimed that US "policy is directed not against any country or doctrine but against hunger, poverty, desperation and chaos. Its purpose should be the revival of a working economy in a world so as to permit the emergence of political and social conditions in which free institutions can exist".

[1399] *See* LASOK & BRIDGE, *supra* note 386, pp. 7-8; BENNETT, *supra* note 41, pp. 240, 243; BOWETT, *supra* note 13, p. 189. *See generally* CONVENTION FOR EUROPEAN ECONOMIC CO-OPERATION, OEEC, Paris, (April 16, 1948); Daniel Barbezat, *Le Plan Marshall et les origines de l'OECE, in* À LA DÉCOUVERTE DE L'OECE 35-45 (Collection Historique de l'OCDE, Richard T. Griffiths ed., 1997).

interdependent world, the European countries along with the United States and Canada decided to transform the OEEC into the **Organisation for Economic Co-operation and Development** (OECD).[1400]

As the OECD succeeded the OEEC, the latter's constituent instrument was replaced by the OECD Convention[1401] which redefined the mandate of this reconstituted organization. Unlike its forerunner whose aims were regional—i.e. restoration of the European economy—the OECD's aims became global.[1402] Transformed into a medium of co-operation between its member states, the OECD sought to promote economic growth and development world-wide.[1403] More specifically, its three basic objectives are:

> "(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the world economy;
> (b) to contribute to the sound economic expansion in Member as well as non-member countries in the process of economic development; and
> (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations."[1404]

Due to this mandate, the OECD is generally regarded as an economic IGO[1405] which is involved with economic-related issues (e.g. development assistance, trade, international investment and multinational enterprises, capital movement of invisible transactions, financial markets, insurance, fiscal affairs, competition law and policy, consumer policy,

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[1400] *See* SCHERMERS & BLOKKER, *supra* note 1, p. 1016; LASOK & BRIDGE, *supra* note 386, p. 8; Richard T. Griffiths, *'Une initiative créatrice' La fin de l'OECE et la naissance de l'OCDE, in* A LA DÉCOUVERTE DE L'OECE 253-270 (Collection Historique de l'OCDE, Richard T. Griffiths ed., 1997). *See generally Protocol on the Revision of the Convention for European Economic Co-operation*, OEEC, Paris, (April 16, 1948), which set out to redefine the OEEC and reconstitute it into the OECD.

See also OECD, THE OECD IN BRIEF, 5 (OECD Publications and Information Centre) [hereinafter 'OECD IN BRIEF']. The twenty founder members of the OECD included Austria, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

[1401] *See* CONVENTION ON THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, Paris, OECD (Dec. 14. 1960) [hereinafter 'OECD CONVENTION'].

[1402] BOWETT, *supra* note 13, p. 190. *See* SCHERMERS & BLOKKER, *supra* note 1, p. 1626.

[1403] BENNETT, *supra* note 41, p. 243; BOWETT, *supra* note 13, p. 190; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 1996 ANNUAL REPORT 1 (1997) [hereinafter '1996 OECD ANNUAL REPORT'].

[1404] OECD CONVENTION art. 1.

[1405] *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 1997 ANNUAL REPORT 2 (1998) [hereinafter '1997 OECD ANNUAL REPORT']. In the preface to this report, the Secretary-General, Donald J. Johnston, describes the OECD as "a global economic intergovernmental organisation" and remarks that this IGO's "unique mission in this new world is one that still flows well from the language of Article 1 of the OECD Convention".

etc.).[1406] In addition, however, given this era of globalization—made possible, *inter alia*, by the liberalization of trade and investment and the increasing interdependence of nation-states—the OECD's mandate has *de facto* expanded to include not only economic-related issues but also a wide range of other issues (e.g. tourism, maritime transport, energy, industry, steel, scientific and technological, information, computer and communications, education, manpower and social affairs, public management, environment, agriculture, fisheries, commodities, etc.).[1407]

Facing the challenges of an interdependent world head on, the OECD has been progressively reorienting itself since the nineteen-eighties.[1408] It has done so by increasingly focusing its objectives on promoting globalization and developing principles so as to assist governments to meet the socio-economic challenges faced by this global interdependency.[1409] OECD's re-orientation was formalized in 1996 when it officially began an extensive process to reform its mandate as well as its institutional framework.[1410]

Unlike other economic and/or financial-related IGOs which fulfill their mandates by providing loans, investments, guarantees or other financial services to their member states, the OECD provides no such assistance.[1411] Instead, it acts as a think tank and carries out its broad mandate through research, studies and analysis of its member states' policies in agricultural, environmental, educational, social, trade, foreign investment and other fields.[1412] More importantly, the OECD provides invaluable statistics and economic forecasts enabling its members to formulate and coordinate their national policies in this

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[1406] *See* OECD IN BRIEF, *supra* note 1400. *See generally* 1997 OECD ANNUAL REPORT, *supra* note 1405; 1996 OECD ANNUAL REPORT, *supra* note 1403.

[1407] *See* OECD IN BRIEF, *supra* note 1400, pp. 6-7.

[1408] *See* 1996 OECD ANNUAL REPORT, *supra* note 1403, pp. 2, 18. The re-orientation of the OECD has taken place without a formal amendment to its constituent act.

[1409] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 152; 1996 OECD ANNUAL REPORT, *supra* note 1403, pp. 2, 18; 1997 OECD Annual Report, *supra* note 1405, p. 10.

[1410] *See* 1997 OECD ANNUAL REPORT, *supra* note 1405, p. 1 of 13 in section entitled "A Global Organisation in Change", noting that "[s]ince 1996, at the request of Ministers from its Member countries, the Organisation has been engaged in a vast reform process, which entails a redefinition of its objectives, and a renovation of its structures and operations."

[1411] Although the OECD provides no direct financial assistance, it is indirectly involved with financial aid efforts. This usually occurs through one of its subsidiary organs, the Development Assistance Committee (DAC), which works in conjunction with other organizations—i.e. UN—to provide some effort to support sustainable development. *See* QUOC DINH ET AL., *supra* note 2, p. 1013.

[1412] *See* 1996 OECD ANNUAL REPORT, *supra* note 1403, p. 19. *See also* p. 56. The OECD produces a large number of annual publications representing a wealth of economic-related data and assessments, including statistical and harmonized data; 1997 OECD ANNUAL REPORT, *supra* note 1405, p. 21 of 22 of the section entitled "The Legacy of George Marshall", noting that the OECD Paris meeting "to commemorate the fiftieth anniversary of George Marshall's speech, emphasised the modernity of the OECD's mission and the value to the international community of such a vehicle for co-operation [and...] it is precisely the world's growing complexity that makes this tool of economic and social analysis even more indispensable."

globalized market[1413] It is also an on-going forum for the negotiation of international conferences which often culminate in international agreements and/or conventions (e.g. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Convention on Harmful Tax Competition, etc.).[1414]

b) Governmental and Non-Universal Organizational Framework

The OECD is officially a inter-*governmental* organization.[1415] As such, its members are comprised exclusively of states.[1416] Nonetheless, the OECD is one of the few IGOs which provides a participatory role for non-state actors.[1417] In theory, upon invitation by the Council, non-member entities—i.e. multinationals, professional organizations and NGOs—may not only observe but may also intervene in the OECD.[1418] In practice, two NGOs play this role at the OECD: (1) the Business and Industry Advisory Committee (BIAC) and (2) the Trade Union Advisory Committee (TUAC).[1419] Albeit it allows non-state participation, unlike other IGOs—i.e. the ILO—the OECD does not however extend voting rights to its NGOs.

In theory, the OECD is a *global* governmental organization whose membership may include member states from all world regions.[1420] However, the OECD is at times typified as a *regional* organization.[1421] The discrepancy in its classification has both (i) *historic* as well as (ii) *geographic* explanations with strong European roots. Historically, the OECD's

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[1413] *See* Hillenbrand, *supra* note 996, p. 241; 1996 OECD ANNUAL REPORT, *supra* note 1403, pp. 2, 14.

[1414] *See generally* 1997 OECD ANNUAL REPORT, *supra* note 1405.

[1415] 1996 OECD ANNUAL REPORT, *supra* note 1403, p. 1; 1997 OECD ANNUAL REPORT, *supra* note 1405, p. 2.

[1416] OECD CONVENTION preamble.

[1417] OECD CONVENTION art. 12. *See* SCHERMERS & BLOKKER, *supra* note 1, pp. 117, 1136-1137. Moreover, the OECD has been open to non-member states with which it has cultivated relations throughout its existence. For instance, prior to gaining official membership, both Australia and New Zealand were non-member participants in OECD committees. Also, before its dissolution, the former Yugoslavia held partial membership within the OECD. *See also* 1996 OECD ANNUAL REPORT, *supra* note 1403, pp. 19, 61, discussing many other current links between the OECD and non-member states—i.e. with Latin America Eastern Europe and Asia.

[1418] *See* QUOC DINH ET AL., *supra* note 2, p. 690.

[1419] *See* 1997 OECD ANNUAL REPORT, *supra* note 1405, p. 5 of 13 in section entitled "A Global Organization of Change", noting that the "OECD's formal relations with the business community and organised labour are conducted with and through the [...] BIAC and the [...] TUAC."

[1420] *See* OECD CONVENTION art. 11, para. 2; SEIDL-HOHENVELDERN, *supra* note 252, p. 98; 1997 ANNUAL REPORT, *supra* note 1405, p. 2.

[1421] PLANO & OLTON, *supra* note 29, pp. 320; CARREAU ET AL., *supra* note 793, p. 372, BOWETT, *supra* note 13, pp. 189-190; ARCHER, *supra* note 13, p. 50; QUOC DINH ET AL., *supra* note 2, p. 1049.

precursor, the OEEC was a more regional organization. Not only was its mandate localized in Europe—i.e. to rebuild the war-shattered economies of Europe—but the quasi-totality of its membership consisted of European states.[1422] When its successor, the OECD, was transformed into an organization with global objectives its membership remained overwhelmingly European. Indeed, all but six of its twenty-nine members are European states.[1423] Accordingly, its membership's geographic proximity contributes to the OECD's common—albeit erroneous—classification as a regional organization.[1424]

Moreover, the OECD is often associated with regional—as opposed to global—organizations because of its restricted composition. Its membership is essentially restricted by two criteria. First, membership is limited to states sharing the same ideological objectives. Specifically, the OECD Convention provides "that the economically more advanced nations should co-operate in assisting [...] countries in [the] process of economic development".[1425] In essence, this has been interpreted to mean that only countries with free market economies and democratic forms of government can accede to the OECD.[1426] Second, membership to the OECD takes place by invitation.[1427] Since the overwhelming number of the world's nations are not developed market economies, they have not been invited to join the Organization. Because of its somewhat exclusive membership, the OECD has at times been referred to as an elitist "rich man's club".[1428] Indeed, the OECD's membership is relatively small. By comparison with the almost two hundred sovereign states in existence world-wide, the OECD is currently comprised of only twenty-nine members, all of which are industrialized and democratic states.[1429]

[1422] US and Canada were the only members of the OEEC which were not in the European vicinity. Both of these states provided the financial contribution for the restoration of Western Europe while the remaining member states were predominantly the recipients of this financial assistance.

[1423] Australia, Canada, Japan, Mexico, New Zealand, and the United States are the only OECD members outside the European vicinity. *See* Annex VIII for a complete list of all twenty-nine OECD member states and year of their membership.

[1424] *Cf.* ARCHER, *supra* note 13, p. 50, noting that "[a]ny international organization with a limited number of members most of which are seen to be geographically proximate and/or culturally, economically and politically similar, has traditionally attracted the epithet 'regional'".

[1425] OECD CONVENTION preamble.

[1426] *See generally* 1996 OECD ANNUAL REPORT, *supra* note 1403; OECD, *Becoming an OECD Member*, *in* ABOUT OECD (http://www.oecd.org/about/becoming.htm 31/01/98) [hereinafter '*Becoming an OECD Member*'].

[1427] OECD CONVENTION art. 16.

[1428] *Rich man's club*, THE ECONOMIST, Jan. 30, 1988, p. 57; *OECD* (pamphlet) OECD Press Division, p. 3. *See also* HARLAN CLEVELAND, BIRTH OF A NEW WORLD: AN OPEN MOMENT FOR INTERNATIONAL LEADERSHIP, 50-51, 149 (1993), referring to the OECD as the "rich nations' club".

[1429] *See* Annex VIII; BENNETT, *supra* note 41, p. 274. Together, the relatively small number of member states of the OECD are responsible for the large majority—i.e. 75%—of the world's economic output.

With its headquarters in Paris,[1430] the OECD's structure comprises two main organs: 1) the **Council** and 2) the **Secretariat**.[1431] Served by the Secretariat, the Council is the supreme authority and main decision-making body in the OECD[1432] and, therefore, the focus of the current study.

[1430] OECD CONVENTION art. 18; BENNETT, *supra* note 41, p. 243.

[1431] BOWETT, *supra* note 13, p. 190; GANDOLFI, *supra* note 613, p. 240; OECD CONVENTION arts 7, 9, 10. In addition to these two principal organs, the OECD is also comprised of an 'Executive Committee' which supports the Council by preparing its agenda and whose decisions may be revised or negated by the Council.

See also OECD, *How the OECD is Organised, in* ABOUT OECD 1 (http://www.oecd.org./about/organise.htm 31/01/98) [hereinafter '*How the OECD is Organised*']; BENNETT, *supra* note 41, p. 243-244; OECD IN BRIEF, *supra* note 1400, pp. 6-7. The OECD also has approximately 200 specialized committees, working groups and other subsidiary groups which review economic progress and conduct studies in a wide range of areas—i.e. the environment, development, public management, trade, fiscal matters, science, energy, technology, industry, social policy, agriculture, regions, cities and country side, etc.

[1432] *See How the OECD is Organised, supra* note 1431, p. 1; OECD CONVENTION art. 7 which provides that the "Council composed of all the Members shall be the body from which all acts of the Organisation derive."

2. *Constitutional Foundations: Sovereign Equality's De Jure Absence But De facto Presence*

Unlike other institutions studied in Part IV of this study, the OECD is neither a UN Specialized Agency nor a Bretton Woods institution. Moreover, its decision-making processes differ substantially from most other institutions created in the post W.W.II era. One of the most striking differences is the role which the principle of SE plays within the OECD's decision-making processes.

The international law principle of SE is not explicitly foreseen in the OECD's constituent act. This *de jure* absence of SE is similar to most other economic and/or financial IGOs which also exclude this principle from their basic instruments. The crucial difference, however, is that the principle of SE is *de facto* more present within the OECD's, than within most other IGOs', decision-making processes. Everything from its Council's composition (universal) to its voting mechanism (i.e. 'one state, one vote'), as well as the value of its decisions (binding or non-binding) and its voting method (i.e. unanimity and consensus), reflect a *de facto* conformity to the principle of SE. The impact of SE's presence in the OECD Council's decision-making processes is examined hereinafter.

a) The Council's Universal Composition

Each of the 29 OECD member states holds a seat in Council which entitles it to equal participation in the decision-making organ.[1433] Each Council seat may be held either by a member state's minister or by a permanent ambassadorial representative.[1434] Accordingly, although the OECD is—a global but—not a universal IGO, its Council has a universal composition. This universal, or otherwise plenary, composition deviates from the traditional composition of most other economic-related IGOs' decision-making organs which generally do not grant a seat in their supreme decision-making bodies to all its members. Indeed, as previously noted, most other financial organizations provide for

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[1433] OECD Convention art. 7.

[1434] 1996 OECD Annual Report, *supra* note 1403, p. 10. The Council's regular meetings are held bi-monthly by the member states' ambassadors to the OECD. In addition, there is an annual Council meeting

shared representation of their member states within their key decision-making bodies—e.g. in IGOs like the IMF and MIGA several member states usually appoint or elect a Director who represents and votes each state's prescribed voting rights on a given decision.

Although SE is not explicitly foreseen within the OECD's constituent act, this principle is presumably responsible for the universal representation existing within its Council.[1435] The obvious reason SE finds application within the OECD's key decision-making organ is this Organization's somewhat limited membership. Attributing one seat to each member is clearly a functional proposition when the organization's membership is regionalized or, otherwise, relatively small—i.e. twenty nine member states. Adhering to the principle of SE through universal representation would not be a functional proposition in the decision-making organ of an IGO with a larger membership because it would be more difficult for it to function efficiently. For instance, we have seen that, generally, other IGOs' main and binding decision-making bodies are non-universal—i.e. UN SC. When there is universal membership in large decision-making bodies, the decisions adopted by those bodies have no legally binding effect—i.e. UN GA.

b) Equal Voting Power Within the Council: One State, One Vote

The most significant difference between the decision-making process of the OECD and that of other economic-related IGOs is the voting rule employed. As noted earlier, political and other technical IGOs typically employ an equal voting rule (usually based on 'one state, one vote'), while economic/financial IGOs generally resort to weighted voting (usually based on a state's financial contribution). The OECD is an exception to this common practice because it has adopted the 'one state, one vote' rule.[1436] As such, although each member state contributes financially to the OECD based on a formula related to its economic strength,[1437] national contributions do not reflect its voting power within this Organization. For example, a relatively small economy, like Portugal, whose contributions are negligible by comparison to those of a larger economy, like the US, has the same

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held at the ministerial level where member states' finance, trade or foreign ministers congregate to establish and support common OECD policies.

[1435] BOWETT, *supra* note 13, p. 190; OECD CONVENTION art. 7.

[1436] OECD CONVENTION art. 6, para. 2.

[1437] *Cf.* 1997 OECD ANNUAL REPORT, *supra* note 1403, p. 4 of 13 of the section entitled "A Global Organisation in Change", noting that "[t]he OECD budget is funded by its 29 Member countries on the basis of an agreed scale of contributions. The scale is calculated essentially in terms of the capacity of Members to contribute as determined by reference to their "taxable" income. No country pays less than 0.1% of the budget; no country pays more than 25% of the budget."

voting power—i.e. one vote—and, therefore, the same decision-making influence in the OECD Council as every other OECD member state.

The fact that the OECD deviates from the classic type of international financial IGOs, and opts for a VM utilized by most political and other functional IGOs, presumably indicates that the principle of SE is central to this Organization. As previously noted, because the 'one state, one vote' rule is generally considered to conform to the principle of SE it grants all states—irrespective of their size, population, political, economic or military strength—an equal voice in the Organization's decision-making processes. Given SE's *de jure* absence from the OECD Convention, the apparent *de facto* adherence to this international law doctrine is remarkable.

Equally remarkable is the fact that in other IGOs equal voting power does not necessarily mean equal decision-making power, while in the OECD it does. For example, in the UN, one vote per state in the GA does not mean that all member states have equal decision-making authority since its decisions are non-binding, while the decisions adopted by the SC which has a restricted two-tier membership composition can be legally binding.[1438] However, due to the OECD's institutional composition, equal voting in this Organization *does* mean equal decision-making influence. And so, the decision-making power of the economically strong and prosperous American state is symmetric to that of the financially weaker Mexican state.

c) Binding and Non-Binding Decision-Making

Given that the principle of SE safeguards a state from being bound without its consent, the OECD, as most other IGOs, requires explicit constitutional authority in order to bind its members legally. However, the OECD Convention provides no such authority to the Organisation. Nor does it provide any supranational powers like the EU.[1439] In theory,

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[1438] *See supra* Part III.A.3.

[1439] BOWETT, *supra* note 13, pp. 190-191. As Bowett puts it, "there was, and still is, nothing of a 'supra-national' element and action rests with the Members on a voluntary basis" adding that "[t]he fact that no Member can be bound *against* his will deprives the Council of any 'supra-national' character". Jean-Claude Paye, *(Introduction) in* OECD 3 (Prospectus, Sept. 1985). In the introductory passage to this OECD brochure, the former Secretary-General of the OECD confirms that the "OECD is not a supranational organisation". *But see* 1996 OECD ANNUAL REPORT, *supra* note 1403, p. 2. In the preface to his first annual report, OECD's Secretary-General, Donald J. Johnston, erroneously intimates that the OECD is a "supranational" entity by noting that "national governments have never needed objective and independent supranational structures as much as they do in the integrated, complex world of today. The Organisation for Economic Co-operation and Development can play this important role."

therefore, because the OECD's decision-making is non-binding on its member states, and compliance with its resolutions is strictly on a voluntary basis,[1440] each member state's sovereignty is secured.[1441] In fact, because the OECD drafts resolutions to which its members may or may not adhere, its decision-making processes resemble that of conventions[1442]—i.e. whereby states may opt in or out of the conventions through a ratification process.[1443]

The OECD Convention does, however, provide the *possibility* for some of the Council's decisions to have binding effect. In this respect, OECD resolutions are usually qualified in two principal forms: *Decisions* or *Recommendations*.[1444] This classification is important because each category of OECD resolutions may produce divergent legal effects and, thus, impact differently on the principle of SE.

Decisions (*stricto sensu*) usually involve issues for which member states are called upon to undertake international—as opposed to national—obligations.[1445] As such, they have the potential of being legally binding[1446] and the OECD can exert great influence so as to obligate its member states.[1447] However, these Decisions are not applicable to abstaining member states[1448] which are automatically considered to have opted out. Furthermore, the said abstaining states are not even required to provide notification of their inability to comply, as is the case with other IGOs like the ILO.[1449] This ability to opt out (further explored *infra* V.B.3.c) is linked to the principle of SE, which ensures that no member state may be bound without or against its will.[1450]

Resolutions which involve changes to member states' domestic legislation are usually

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[1440] SCHERMERS & BLOKKER, *supra* note 1, p. 780; BOWETT, *supra* note 13, pp. 190-191. *See also* Paye, *supra* note 1439, p. 3, noting that the OECD's "power lies in its capacity for intellectual persuasion."; 1997 OECD ANNUAL REPORT, *supra* note 1405, p. 2, noting that the "OECD is a global intergovernmental economic organisation that promotes and relies on dialogue and peer pressure between public officials to improve public policy through international co-operation."

[1441] *See* LASOK & BRIDGE, *supra* note 386, p. 8.

[1442] SCHERMERS & BLOKKER, *supra* note 1, pp. 780-781.

[1443] *See generally Vienna Convention on the Law of Treaties*.

[1444] OECD CONVENTION art. 5. "In order to achieve its aims, the Organisation may: (a) take decisions which, except as otherwise provided, shall be binding on all Members; (b) make recommendations to Members". *Cf. Becoming an OECD Member*, *supra* note 1426, p. 2, noting that about "30 decisions and more than 110 recommendations are in effect today."

[1445] *See* SCHERMERS & BLOKKER, *supra* note 1, p. 781.

[1446] OECD CONVENTION art. 5, para. a.

[1447] *See* BOWETT, *supra* note 13, p. 197.

[1448] ARCHER, *supra* note 13, p. 140; *Becoming an OECD Member*, *supra* note 1426.

[1449] *See supra* Part III.B.2.b.

[1450] *See* FELICE MORGENSTERN, LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS 91 (1986).

qualified as ***Recommendations*** and are considered non-binding.[1451] As such, compliance to these is not imposed but, rather, is viewed strictly on a voluntary basis.[1452] Given that such OECD resolutions can not be forced on its member states, the states are deemed to preserve their SE.

[1451] OECD CONVENTION art. 5, para. b; SCHERMERS & BLOKKER, *supra* note 1, p. 781. *See also Becoming an OECD Member*, *supra* note 1426, p. 2 noting that "despite its non-binding status, recommendations can also have an important practical impact on national policy and legislation."

[1452] BOWETT, *supra* note 13, pp. 190-191.

3. *The Role of Unanimity and Consensus in the Organisation for Economic Co-operation and Development*

As previously discussed, in the first part of this century *unanimity* was the voting rule in several IGOs. This rule, however, proved to be impractical[1453] and the post W.W.II era saw a shift to *majority* voting.[1454] More recently, the trend has been for IGOs to avoid formal voting when making a decision and instead use *consensus* voting.[1455] The OECD's decision-making, however, has deviated from these voting trends.

a) Innovative and Outmoded Voting Processes: *De jure* Consensus and Unanimity

Most IGOs require some sort of majoritarianism—i.e. simple or qualified majority—in their decision-making processes. The OECD, however, differs.[1456] Instead, its Convention provides that:

> "Unless the Organisation otherwise agrees ***unanimously*** for special cases, decisions shall be taken and recommendations shall be made by ***mutual agreement*** of all the Members" (emphasis added).[1457]

At the time of the OECD's creation, these rules reflected voting processes which were respectively innovative (*de jure* 'mutual agreement', otherwise, known as 'consensus')[1458]

[1453] ARCHER, *supra* note 13, p. 140. *See also* Part II.B.3.c(i). Several international law scholars have attributed the failure of the League of Nations—in part—on the constraints imposed upon this IGO by the stringent voting rule of unanimity.

[1454] The post W.W.II trend towards majoritarianism—including various types of majority—is reflected in the VMs of virtually all IGOs and is, in fact, proclaimed in article 9.2 of the *Vienna Convention on the Law of Treaties* (May 23, 1969) U.N. Doc. A/Conf. 39/27 which foresees that "[t]he Adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same they shall decide to apply a different rule".

[1455] *See* Annex I: Charting Decision-Making in International Governmental Organizations.

[1456] *Cf.* SCHERMERS & BLOKKER, *supra* note 1, p. 513, noting that "[i]n most national and other communities, decision-making by unanimity has preceded majority decision-making."

[1457] OECD CONVENTION art. 6, para. 1.

[1458] The synonymy between 'mutual agreement' and 'consensus' is discussed in the following sub-section, *see infra* V.B.3.b.

and outmoded (unanimity). In fact, this dichotomous characterization of its VMs remains true to this day.

Recognizing the widespread trend of decision-making by consensus practiced within a large number of IGOs, the OECD's innovative founders decided to transform the *de facto* ***practice*** of consensus (i.e. VP) into a *de jure* ***rule*** (i.e. VM). They did so by incorporating 'mutual agreement' as the decision-making rule for ***regular cases*** into the OECD Convention. Henceforth, the previously informal custom of consensus in most IGOs evolved into the OECD's formal and main decision-making rule.[1459]

Concurrently, however, the OECD's founders structured this Organization's decision-making processes with an outdated voting method of unanimity for ***special cases***. Unanimity is not only diametrically opposed to the OECD's own general voting rule of consensus but also differs substantially from the *de jure* trend towards majoritarianism and the *de facto* trend towards consensus found in most other twentieth-century IGOs. Indeed, the OECD is one of the rare IGO's which continues to formally employ unanimity as its voting rule.[1460]

Interestingly, decision-making both by consensus and by unanimity are compatible with the principle of SE, as they enable states to be bound only at their will. In this respect, despite its formal absence from the OECD Convention, the spirit of SE seems to resonate within this Organization's decision-making processes.

b) Misinterpretation of Consensus and Misuse of Unanimity

Although the OECD Convention provides for its voting ***rule*** to be by 'mutual agreement' and the ***exception*** to this rule to be 'unanimity', in practice, (although no ballots are actually cast) all decision-making occurs by unanimity, failing which there is an impasse.[1461] The reason behind this blatant violation of the OECD's constituent act is the misinterpretation of the term 'mutual agreement' and the misuse of 'unanimity'.

[1459] Most of OECD's publications refer to its "process of consensus building". *See* 1996 OECD ANNUAL REPORT, *supra* note 1403, p. 17.

[1460] *See* SCHERMERS & BLOKKER, *supra* note 1, p. 516. Decision-making by unanimity exists in NATO, Benelux, EFTA, OPEC, Council of Europe, ESA and the European Union.

[1461] *See* Kimon Valaskakis, *Responding to Change Through Better Decision-Making at OECD* 8 (Council Working Party on the Decision-Making Process, Feb. 16, 1998) [hereinafter 'Valaskakis—Better Decision-Making at OECD'], noting that "no matter how trivial the question [under consideration in the

Clearly, the founders of this Organization did not intend to have unanimity as a main voting rule. If they had, Article 6.1 of the OECD Convention would have excluded all references to 'special cases' and 'mutual agreement'. Unfortunately, neither of these terms have been properly qualified. However, the confusion seems to result from the wording 'mutual agreement'.

The OECD founders could not have intended for 'mutual agreement'[1462] to mean that all member states must agree, without exception, without a negative vote or without an abstention for this, in effect, is synonymous with 'unanimity'. If they had, then article 6.1 of the OECD Convention would have read as follows:

> "Unless the Organisation otherwise agrees ***unanimously*** for special cases, decisions shall be taken and recommendations shall be made by ***unanimity*** of all the Members" (emphasis and changes added).

This hypothetical voting provision is not only redundant but, more importantly, it is nonsensical. Hence, the only logical interpretation for the meaning of the term 'mutual agreement' is 'consensus'. Indeed, according to it constitutional foundations, the OECD is generally considered to be a consensus-based IGO.[1463] Yet the OECD itself interprets "consensus" as "unanimity without a formal vote".[1464]

The terms 'consensus' and 'unanimity' are often erroneously interchanged.[1465] Unanimity—*volonté de tous*—necessarily implies consensus—*volonté générale*—but consensus does not necessarily mean there is unanimity. This is an important distinction but one which is frequently confused. Unfortunately, it appears that the OECD has fallen victim to this confusion. Indeed, the OECD's decision-making practice, as well as its own

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OECD Council] the practice has been to require full consensus." The term "consensus" used throughout this discussion paper and draft proposal is employed to signal "unanimity without formal voting".

[1462] The word 'mutual' could be eliminated altogether due to its redundancy because an 'agreement' by definition is mutual requiring some sort of reciprocity or accord by more than one party. Furthermore, the term 'mutual' is really a misnomer because—formally—it means that there are only two parties. It is only in its colloquial meaning that 'mutual' is applicable to two or more parties. Of course, even at the outset, the OECD had more than two founding member states, therefore, the most appropriate terminology to express reciprocity in this context—at least from a formalistic standpoint—would be the term 'common'. *See* definitions of 'mutual' and 'agreements' in FUNK & WANGLES STANDARD COLLEGE DICTIONARY, *supra* note 835.

[1463] *See* ROBERT W. COX, PRODUCTION, POWER AND WORLD ORDER: SOCIAL FORCES IN THE MAKING OF HISTORY 282 (1987) [hereinafter 'COX—PRODUCTION, POWER AND WORLD ORDER'].

[1464] *See supra* note 1461.

[1465] FUNK & WAGNALLS STANDARD COLLEGE DICTIONARY, *supra*, note 835, p. 288; MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 836, p. 246.

informative prospectus, erroneously confuse these two distinct decision-making methods.[1466]

Remarkably, most international law literature has ignored this voting anomaly in the OECD. While it is inconceivable that the legal community has also confused the issue—regarding decision-making by consensus versus unanimity—the reality is that there are no sound legal foundations to support the use of unanimity without formal voting, currently employed as the general and exclusive voting rule in the OECD. It appears that most publicists have chosen to merely *report* the practice of unanimity without substantiating or challenging its legal basis.

c) The Value of Abstentions in Decision-Making Processes

In general, because "[n]o coherent body of law can develop within an international organization if all its rules do not bind the same members", as a rule, when a member state of an IGO abstains from voting it does not effect the value of the decision.[1467] In other words, once the decision is adopted, abstentions are irrelevant because all member states, including those that voted against and those which abstained, are bound by it.[1468] Because adopted decisions may thus be legally imposed against the will of the abstaining member states, the principle of SE is breached.[1469]

In the OECD, however, the general rule regarding abstentions is inapplicable to this IGO's *de jure* (on special cases) and *de facto* (on all cases) unanimity requirement. First, abstentions do not prevent the OECD from unanimously adopting a resolution.[1470] More importantly, however, the OECD member states which abstain from voting are *not bound* by the resolution.[1471] Moreover, because there is no quorum requirement for OECD's decision-making, absentee member states are regarded as abstaining. As such, they too are not bound by the outcome of its decision-making processes.

[1466] *See* OECD, 7-8 (OECD Prospectus, Sept. 1985), where under the heading "The Consensus Approach" it is stated that, in the OECD, "Generally, actions are taken unanimously by consensus".

[1467] SCHERMERS & BLOKKER, *supra* note 1, p. 536.

[1468] *Id.*

[1469] QUOC DINH ET AL, *supra* note 2, p. 602.

[1470] OECD CONVENTION art. 6, para 2. This *mechanism* is similar to the *practice* established for abstentions in the UN SC. *See* QUOC DINH ET AL, *supra* note 2, p. 288, 602; *supra* Part. III.A.3.c(iii).

[1471] SCHERMERS & BLOKKER, *supra* note 1, p. 536; OECD CONVENTION art. 6, para 2; QUOC DINH ET AL, *supra* note 2, p. 602; *Becoming an OECD Member*, *supra* note 1426, p. 2.

(i) The OECD's Abstention Rule: Contributing to Confusion Between Unanimity and Consensus

Not only does the OECD constitutional provision *vis-à-vis* abstentions differs substantially from those found in most other IGOs but, more importantly, it contributes to the confusion between 'unanimity' and 'consensus' in its decision-making processes. Article 6.2 of the OECD Convention currently foresees that:

> "... If a Member abstains from voting on a decision or recommendation, such abstention shall not invalidate the decision or recommendation, which shall be applicable to the other Members but ***not to the abstaining*** Member" (emphasis added).

It is easy to see how this provision, read in conjunction with article 6.1 of the OECD Convention (quoted above), leads one to conclude—albeit, erroneously—that the OECD requires unanimity as its general, rather than its exceptional, VM. Although article 6.1 of the OECD Convention distinguishes between *special* and *non special* cases (whereby the first requires unanimity and the latter merely consensus) there is no such distinction in article 6.2. This implies that the rule on abstentions applies on *all decisions*, whether they be *substantial* or *procedural* issues. Indeed, the wording of article 6.2 suggests that even minor procedural issues will be inapplicable to an abstaining member state. This suggests that even if the abstaining member state (which may have abstained for various political or economic reasons) wishes to have the OECD decision apply to it, technically, it can not choose to do so.

(ii) The OECD's Abstention Rule in Relation to Other IGOs

Abstentions are relatively insignificant in IGOs which have a majoritarianism voting process because decisions can nonetheless be adopted if the required majority is met. However, in IGOs which require unanimity in their decision-making processes abstentions have the potential of paralyzing because they may constitute a veto. In this context, the OECD Convention's provisions regarding abstentions have both (i) interesting similarities, and as (ii) peculiar differences with those of other IGOs.

First, both the OECD and the UN SC are similar in so far as abstentions by their member states do not invalidate or block their decision-making processes. In fact, this OECD VM *vis-à-vis* abstentions is—not only implicitly but also explicitly—foreseen in its Convention. Implicitly, the OECD Convention provides no quorum for its Council's decision-making processes and, moreover, article 6.2 explicitly provides for abstentions to be disregarded. As such, its (*de jure* and *de facto*) requirement to decide by unanimity is feasible.

While the same position on abstentions holds true in the UN, the rule regarding abstentions is not a VM (as in the OECD, for it is not foreseen in the UN Charter) but, rather, it is a VP. While article 27(2) of the UN Charter requires the affirmative votes of all five permanent members when voting on a substantive issue, the practice established—via the doctrine of implied powers and an ICJ ruling—has enabled a liberal interpretation of this provision[1472] As such, abstentions by the permanent members of the SC do not constitute a veto but, rather, are simply disregarded.

On the other hand, however, the effect on the abstaining states differs significantly between the OECD and the UN. While in the OECD an abstaining member state is not bound by a resolution adopted without its vote,[1473] the opposite holds true in the UN SC where *all* member states—even those which abstained and those which are not members of the SC—are considered to be bound by the decision.

The varying effects and values of abstentions within IGOs impacts on the principle of SE. While I have shown that this principle is not observed within the UN which enshrines SE in its constituent act, surprisingly, it is somewhat preserved in the OECD which does not have SE as one of its constitutional values. Because the OECD's resolutions do not bind the states which have abstained from voting, abstaining states' sovereign will and the principle of SE are deemed to be respected in the OECD.

[1472] As previously discussed, because it is virtually impossible to explicitly enumerate a comprehensive list of a powers in an IGO's constituent act, the doctrine of implied powers attributes implicitly the legal basis for an organization's activities. *See supra* Part III.A.3.c(iii) of this study, where I have shown how this doctrine has established a practice which has provided flexibility to an otherwise rigid VM within the UN SC.

[1473] OECD CONVENTION art. 6, para 2.

DIAGRAM XIII CHARTING DECISION-MAKING IN THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

OECD COUNCIL

MEMBERSHIP	Plenary = 29 States
DECISIONS	Decisions (*stricto sensu*) = Potentially Binding if no abstention Recommendations = Non-Binding
VOTING RULE	One state, one vote
VOTING MECHANISMS AND PRACTICES —REGULAR CASES	
De jure (VM)	Consensus
De facto (VP)	Unanimity (non-voting)
—SPECIAL CASES	
De jure & *De facto* (VM & VP)	Unanimity

4. THE FUNCTIONAL LEGITIMACY OF SOVEREIGN EQUALITY IN THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

a) The Remarkable Function and Cost of Sovereign Equality in the Council's Decision-Making Processes

The principle of SE has been at the root of bilateral and multilateral relations between states since the genesis of the nation-state. Indeed, outside the confines of an organizational structure, SE has been a functional concept for it has been the appropriate counterweight to hegemony. From all the IGOs studies thus far, however, SE has proven to be *most* functional *only* within the OECD decision-making processes. As I have shown, SE is reflected in the OECD's key decision-making organ, i.e. the Council through (i) its universal composition, (ii) its one vote per state rule, (iii) its non-binding resolutions, and (iv) its requirement for consensus (VM) and unanimity (VM & VP). Accordingly, the presence and function of the principle of SE in the OECD Council is remarkable for at least two reasons.

First, as noted earlier, although the OECD Convention makes no provision for respecting SE, it does *de facto* do so in its decision-making processes. This is in contrast to other IGOs which do, either explicitly or implicitly, provide for the principle of SE in their constituent acts[1474] but do not adhere to it in their decision-making processes—e.g. SE is explicitly foreseen in the UN Charter but remains non-functional in the UN's decision-making processes;[1475] similarly, although the ILO, the IMF and MIGA provide indirectly for the principle of SE through their respective status as UN Specialized Agencies,[1476] none of them respect the principle in their decision-making processes.[1477]

Second, the main difference, between IGOs where SE does not generally function and the OECD where it does, is the size of the organization. In 1960, when the OECD was created its membership included only twenty member states. Due to its relatively small size, both universal composition of its Council as well as voting by unanimity were practically

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[1474] UN CHARTER art. 1, para 2, art. 2, para. 1, art. 55 and art. 78.

[1475] *See* Part III.A.4.a(i) for a discussion on the non-functional myth of SE in the UN.

[1476] UN CHARTER arts 55, 78.

[1477] *See supra* Parts III.B and IV.A.

feasible. Thus, in the context of its decision-making processes, its *de facto* adherence to the principle of SE was functional.

By 1998, the OECD's composition had increased to twenty-nine member states. While it remains a functional IGO, the strain of the additional members has burdened its decision-making processes. Reaching unanimity has been more difficult with the larger number of OECD member states, all of which are members of its Council.

OECD's modest size appears to be responsible for SE's functionality within this Organization. However, as many more states are expected to join this IGO by the turn of the century, and beyond, the cost of adhering to SE and requiring unanimity will be high. Indeed, it is unlikely that the OECD Council's universal composition and its unanimity requirement can continue to function with a much larger membership without its decision-making process being regularly deadlocked.

b) The Legitimacy of Sovereign Equality in the Council's Decision-Making Processes

In general, the OECD's fifty year old performance has been well-received by the international community because its structure, and decision-making processes emanating therefrom, have been perceived as legitimate. Indeed, for the most part, all four legitimacy criteria—(1) *determinacy*, (2) *symbolic validation,* (3) *coherence* and (4) *adherence*—are present in its decision-making processes.

First, although the principle SE is not expressly foreseen in the OECD's constituent act, the expression of this principle in virtually all of the OECD's voting-related mechanisms and practices fulfills the ***determinacy*** criterion. The Council's universal composition and the requirement of one vote per state are clear rules which leave little room for misinterpretation. The binding and non-binding nature of its decisions is also clearly stated within the OECD Convention and, in general, their legal value is clearly interpreted by OECD members.

The requirement of voting by consensus or by unanimity is, however, less clear. Although, in principle, both consensus and unanimity are determinate notions,—i.e. *volonté générale* versus *volonté de tous*—in the OECD's practice this has not been the case. Indeed, by requiring unanimity without formal voting throughout its entire decision-making

processes (on both substantive and procedural issues) the OECD has misconstrued the meaning of consensus. The confusion between consensus and unanimity has thus made these concepts relatively indeterminate within the Organization. However, since both of these mechanisms safeguard a state's sovereign will, the principle of SE remains uncompromised.

Second, the criterion of ***symbolic validation*** is present throughout most of the OECD's decision-making processes. The participation of each member state in the Council as well as the one vote granted to each state epitomize the principle of SE. The same is true of non-binding resolutions employed in conjunction with the requirement of consensus and unanimity. Both voting-related rules symbolically signal that only states which explicitly provide their consent will be bound by the Organization's decision-making processes. Hence, because no OECD decision can be imposed on any members without or against its will, SE is deemed to be respected.

Third, given that the Council is not only the OECD's general congress but also its sole key decision-making organ, the criterion of ***coherence*** is difficult to assess for it cannot be compared with other organs. It can, however, be said that the principle of SE is consistently applied in all of the Council's VMs and VPs. In fact, in so far as its decision-making activities always entail (i) the same number of participants, (ii) the same number of votes, (iii) non-voting unanimity or consensus, and (iv) decisions of non-binding force, it can be argued that the Council's decision-making processes display a high degree of consistency.

It can be said that the Council consistently applies SE principles throughout its decision-making processes. In fact, in so far as all of its decision-making activities are always conducted by: (i) the same number of participants; (ii) the same number of votes; (iii) unanimous non-voting or consensus and; (iv) they are non-binding, it can be argued that the Council's decision-making processes display a high degree of consistency.

Finally, the ***adherence*** criterion is also fulfilled in the OECD because, although the principle of SE is not expressly envisaged in its constituent act, virtually all of its decision-related rules with SE values—i.e. one seat per member state, one vote per state, binding and non-binding resolutions, consensus and unanimity—emanate from its Convention. In fact, the only rule which does not explicitly result from a higher authority is the OECD *practice* of requiring unanimity (without a formal vote) throughout all of its decision-

making processes, regardless of whether an issue is considered to be important or trivial.[1478]

c) Globalization and Enlargement: Challenges and Opportunities for Decision-Making Reforms in the Council

Like other IGOs, the OECD is grappling with the "problem of conciliating the sovereign equality of countries, with efficient and equitable decision making systems in order to respond to the challenges of a rapidly changing world."[1479] Recognizing the need to meet the challenges presented by globalization and to adapt accordingly, the OECD sought in the mid-1990s not only to formally renew itself by redefining its objectives but also to restructure its institutional framework.[1480] This felt need for renewal has been made even more poignant by the fact that many of the newly emerging market-based economies have expressed their desire and intention to join the Organization.[1481] As a result, the OECD has specifically undertaken to re-think and to adjust its decision-making processes so that they function efficiently in the context of a globalized world and its own prospective enlargement.[1482]

In 1996, the OECD established an *Informal Discussion Group on Decision-Making* in order to assess the opportunity for enhancing its decision-making efficiency.[1483] This group

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[1478] *See* Valaskakis—Better Decision-Making at OECD, *supra* note 1461, pp. 2, 4.

[1479] Kimon Valaskakis, *A Gentleman's Agreement on Decision Making at the OECD* 14 (Council Working Party on the Decision-Making Process, May 29, 1998) [hereinafter 'Valaskakis—Gentleman's Agreement on Decision-making at the OECD'].

[1480] *See* 1997 OECD ANNUAL REPORT, *supra* note 1405, p. 1 of 13 of the section entitled "A Global Organisation in Change"; 1996 OECD ANNUAL REPORT, *supra* note 1403, pp. 19, 26-27. *See also* p. 33. In its annual report the OECD postulates that its functions must involve the so-called "triangular paradigm of 'economic growth, social stability and good management of public affairs'".

[1481] *See* 1996 OECD ANNUAL REPORT, *supra* note 1403, pp. 9, 12, 61; Kimon Valaskakis, *Optimising Discussion and Decision Rules at OECD*, 7 (Report of the Informal Group on Decision-Making at the OECD, Chairman's Report Draft II June 15, 1996) [hereinafter Valaskakis—Optimising Discussion and Decision Rules at OECD]. In 1996, several Baltic Rim countries—i.e. Lithuania, Latvia and Estonia—as well as the Russian Federation and the Slovak Republic expressed an interest in joining the OECD. As other strong economies emerge in Asia, Latin America, Central and Eastern Europe, further requests for admission to the OECD are expected in the future. *See also* OECD, *Relations With Non-Member Countries*, *in* ABOUT OECD (http://www.oecd.org/about/non-memb.htm, 31/01/98), indicating that about "30 non-Member countries have expressed an interest in working with or joining the OECD".

[1482] *See* 1996 OECD ANNUAL REPORT, *supra* note 1403, pp. 27, 36, 61. *Cf.* Valaskakis—Better Decision-Making at OECD, *supra* note 1461, p. 4, stating that "the road to reform at OECD—any reform—requires an improvement in decision-making which is seen as a *sine qua non*".

[1483] *See* Valaskakis—Optimising Discussion and Decision Rules at OECD, *supra* note 1481, p. 3.

produced three reports in 1996, 1997 and 1998 respectively.[1484] The first report "recommended a limited voting formula for a short list of items" while the second report "focused not on voting but on a better way to achieve consensus."[1485] By 1998, this informal group was transformed into a formal committee, known as the *Council Working Party on the Decision-Making Process* and—with a mandate to study the previously tabled reports and present its findings to the Council[1486]—produced a draft final report entitled "A Gentleman's Agreement on Decision Making at the OECD".[1487] The Council, as the ultimate decision-making body, will consider this final report and decide (according to its current decision-making practice—i.e. by unanimous agreement)[1488] whether to adopt and implement the proposed decision-making reforms.

Reforming the OECD's decision-making processes will undoubtedly affect the application of the principle of SE which has, in contrast to other IGOs, enjoyed remarkable functional legitimacy in this Organization. Globalization and enlargement present serious challenges to the status of the principle of SE in the Council's decision-making processes. However, they also offer important opportunities, namely to recognize and respond to the importance of functional and legitimate decision-making processes in the context of global governance, to acknowledge that the principle of SE cannot continue to function legitimately in the OECD and, therefore, to accept the necessity of abrogating SE elements from the Organization's decision-making processes.

(i) The Promising Future of Universality in the Council

It is exceptional that the main decision-making in the OECD, as in the EU, takes place in plenary organs. It is not by chance that both of these organizations have relatively small memberships—i.e. 29 states in the OECD and 15 states in the EU. Although universal participation conforms to the principle of SE, we have seen that larger IGOs generally

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[1484] *See* Valaskakis—Better Decision-Making at OECD, *supra* note 1461; Valaskakis—Optimising Discussion and Decision Rules at OECD, *supra* note 1481; Valaskakis—A Gentleman's Agreement on Decision Making at the OECD, *supra* note 1479.

[1485] *See* Valaskakis—Better Decision-Making at OECD, *supra* note 1461, p. 2.

[1486] *See id.* at 2-3.

[1487] *See generally* Valaskakis—A Gentleman's Agreement on Decision-making at the OECD, *supra* note 1479. *See also* p. 12 for a synopsis of the Gentleman's Agreement which provides for 1) better working methods; 2) the notion of "Strong Support"; 3) invitations to join the emerging consensus in the face of "Strong Support"; 4) retention of a written formal veto to be used sparingly; and 5) a test period of two years.

[1488] *See id.* at 11.

restrict membership to their key decision-making organs because this principle cannot function effectively in a large organ.

As the OECD expands, it is inconceivable for its Council to keep expanding proportionally for this will obviously increase the difficulty of holding meaningful debates.[1489] As Valaskakis (1998) rightly notes, "[t]he imperatives of group dynamics are such that communication flow beyond a certain number is inefficient."[1490] If the Council is to maintain universal representation in conjunction with its current voting rules ('one state, one vote', unanimity and consensus), the efficiency of the OECD's decision-making will inevitably suffer. For example, it will obviously be more difficult, if not impossible, to reach unanimity with a plenary body of 40 or more states.[1491]

Remarkably, however, the OECD-produced studies regarding decision-making reforms have shied away from amendments regarding the issue of the Council's universality.[1492] The fact that the OECD is not ready to compromise the symbolism of full participation in its sole decision-making organ bespeaks of the will to preserve the principle of SE. However, an affront to the principle of SE has been proposed on other decision-making-related issues. I address these hereinafter.

(ii) The Doubtful Future of the 'One State, One Vote' Rule in the Council

Although the OECD has not been inclined to renounce *full* participation (universality), in its Council it has indicated its willingness to renounce *equal* participation ('one state, one vote'). A proposal to introduce a weighted voting system based on member states' financial contributions to the OECD appears to be acceptable to a large number of its member

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[1489] *See* Valaskakis—Optimising Discussion and Decision Rules at OECD, *supra* note 1481, p. 8. Valaskakis—Better Decision-Making at OECD, *supra* note 1461, p. 6, questioning "whether a meaningful dialogue is possible beyond a certain number of participants."

[1490] Valaskakis—Gentleman's Agreement on Decision-making at the OECD, *supra* note 1479, p. 6.

[1491] *See* 1996 OECD ANNUAL REPORT, *supra* note 1403, pp. 9, 12, 61; Valaskakis—Optimising Discussion and Decision Rules at OECD, *supra* note 1481, p. 7.

[1492] There is however a proposal for a "Consultation Phase" which resembles that of the *de facto* "mini-Council" of the UN SC (*see supra* Part III.A.4b(i)). In the OECD, the proposal involves the establishment of smaller Councils which would conduct informal *deliberations* on issues which would then formally be *decided* by the entire membership of the OECD. There is no indication however as to what criteria would be employed for these smaller discussion groups—i.e. how and which member states would be included or excluded. *See* Valaskakis—Better Decision-Making at OECD, *supra* note 1461, pp. 4-5.

states.[1493] Moreover, the proposals have gone beyond the usual budgetary criteria for the distribution of votes and have taken inspiration from the EU where votes are distributed according to the size of its member states' populations. For instance, one OECD suggestion includes a double weighted voting system based on both (i) 80% of the states budget contributions and (ii) 80% of the member states.[1494] If adopted, this unequal voting power in the OECD would deviate from the traditional voting system found in most political IGOs like the UN, NATO and ILO, and would parallel the voting system of financial IGOs like the IMF, MIGA and, more closely, that of the GEF. Of course, as previously noted, the weighted voting rule reflects a departure from the principle of SE. However, since the 29 states which are members of the OECD are also members of the IMF, MIGA, and the GEF[1495] and, since they have accepted a weighted voting system in these financial IGOs, there is no legitimate reason that weighted voting would be unacceptable to them in the OECD.

(iii) The Prospect for Compulsory Binding Decisions in the Council

Given the practice of unanimous decision-making in the OECD (i.e. all member states' assent is required in order to adopt a decision), it should logically follow that binding decisions are the norm in this Organization. Remarkably, however, this is not the case. As previously noted, the Council's decisions are either non-binding or optionally binding. Presumably, this respects the principle of SE for it safeguards a state from being bound against its will. Yet, this safeguard is redundant because, since the OECD's decision-making takes place unanimously, it necessarily entails the will of all member states.

Discussion regarding the legal value of the OECD's decisions has generally been mute in both its formal and informal committees studying decision-making reforms.[1496] The cost of non-binding decisions is that no coherent body of law has been established in the OECD.[1497] If this Organization is to play a greater role in the direction of globalization of

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[1493] *See* Valaskakis—Better Decision-Making at OECD, *supra* note 1461, p. 8.

[1494] *See* Valaskakis—Optimising Discussion and Decision Rules at OECD, *supra* note 1481, pp. 6-7.

[1495] *See* Annexes V, VI and VIII for a membership list of the IMF, MIGA and the OECD.

[1496] *See generally* Valaskakis—Optimising Discussion and Decision Rules at OECD, *supra* note 1481; Valaskakis—Better Decision-Making at OECD, *supra* note 1461.

[1497] *Cf.* SCHERMERS & BLOKKER, *supra* note 1, p. 536.

the world's economies[1498] the legal value of its decisions must be enhanced. Binding decision-making is an important means by which the OECD can be an important actor in global governance. Indeed, since an increasing number of organizations emit rules with binding legal effect, the OECD may risk being relegated to the role of an insignificant player on the world stage if its decisions continue to have no obligatory legal value.[1499] Otherwise, what is the advantage of attempting to adopt a convention under the auspices of the OECD—e.g. Multilateral Investment Agreement—as opposed to adopting it under an *ad hoc* forum?[1500]

(iv) Contemplating the Abolition of De jure and De facto Unanimity in the Council

The OECD has faced numerous decision-making difficulties as a result of its *de jure* unanimity and its *de facto* use of non-voting unanimity[1501] —a practice known in the OECD culture as "consensus". These difficulties have, for the most part, involved lengthy processes and/or "bad compromises" in search of the "lowest common denominators [needed] to achieve" a unanimous decision.[1502] With the imminent enlargement of the OECD, its decision-making difficulties will inevitably be multiplied as unanimity will become a greater obstacle.[1503] This eventuality has been widely recognized and the unanimity rule and practice has increasingly been called into question.[1504] The *status quo* is no longer a viable option. If the OECD's institutional and voting reforms do not address the need to change this "primitive",[1505] and "outdated"[1506] and, most importantly, non-

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[1498] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 152; 1996 OECD ANNUAL REPORT, *supra* note 1403, pp. 2, 18.

[1499] *Cf.* Valaskakis—Better Decision-Making at OECD, *supra* note 1461, p. 4, warning that "the dubious quality of some of the decisions may lead to a growing marginalization of OECD [...] in favor of other organisations".

[1500] *Cf.* SCHERMERS & BLOKKER, *supra* note 1, pp. 780-781, comparing the OECD's current decision-making processes to those of conventions.

[1501] *See also* Valaskakis—Better Decision-Making at OECD, *supra* note 1461, p. 3, noting that [t]he case for a reform of decision-making is based on the simple proposition that *the present system is not working well.* New pressures on consensus building [i.e. non-voting unanimity] are, in the view of many, creating a new situation very different from the past which make the process laborious cumbersome and slow." (emphasis in original).

[1502] *See id.* at 4.

[1503] *See id.* at 3.

[1504] *See* 1996 OECD ANNUAL REPORT, *supra* note 1403, p. 61.

[1505] *See* SCHERMERS & BLOKKER, *supra* note 1, p. 513.

[1506] *See* Annex I: Charting Decision-Making in International Governmental Organizations for the development of voting in IGOs. During the latter part of the twentieth century, IGOs have generally shied away from both *de jure* and *de facto* unanimity in their decision-making processes.

functional practice of deciding unanimously, then the Organization may very well find itself in the same position as the ill-fated League—i.e. paralysis due to its unanimity requirement.[1507] With the changed conditions of today, the time is opportune for the OECD to depart from the unanimity rule and adjust its decision-making processes so as to conform to the twentieth century voting trends of either (i) *de jure* majoritarianism or (ii) *de facto* consensus (i.e. *volonté générale*).

Opting for a majoritarian voting rule is a departure from SE. As I have shown, majority —whether it be simple, two-thirds or otherwise qualified—is, almost without exception, the favoured decision-making path of the overwhelming number of twentieth century IGOs.[1508] Replacing unanimity with majority would allow flexibility in the Council's decision-making structure and enhance the development of OECD norms. In recognition of these advantages, the reports issued by the OECD committees studying decision-making reforms seem to indicate that the majoritarian route would be acceptable to its member states.[1509]

The problem, however, is that the OECD member states are unwilling to part completely with unanimity. They reason this unwillingness under the guise of safeguarding their vital national interests.[1510] In certain respects, this appears to be similar to the EU's *Luxembourg Compromise.*[1511] However, given the OECD's current decision-making system, the issue of vital national interest is really a non-issue. The reason for this is that the OECD, unlike the EU, is not a supranational organization whose decisions have direct effect and applicability on its member states. Furthermore, an OECD member state, unlike an EU member state, can choose to abstain from—and thereby opt out without blocking—a given decision so as to avoid any course of action which it deems to affect its national interests.

In addition to the option of adopting majoritarianism, the OECD may also reduce the use of the high threshold requiring unanimous voting, and eliminate the potential for stalemate in its decision-making process by opting for true consensus (as opposed to its current non-voting unanimity). This will conform to the letter and the spirit of the OECD Convention and can be accomplished simply by a re-interpretation of its constituent act so that "mutual

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[1507] *See* SHAW, *supra* note 5, p. 748; Plofchan, *supra* note 282 p. 225; MITRANY—WORKING PEACE, *supra* note 87 p. 5, attributing the League's failure largely to the voting requirement of unanimity.

[1508] *See* Annex I: Charting Decision-Making in International Governmental Organizations.

[1509] *See generally* Valaskakis—Optimising Discussion and Decision Rules at OECD, *supra* note 1481; Valaskakis—Better Decision-Making at OECD, *supra* note 1461.

[1510] Valaskakis—Better Decision-Making at OECD, *supra* note 1461, p. 9.

[1511] *See supra* Part V.A.3.d(i).

agreement" will allow for dissenting views.[1512] In doing so, the OECD's decision-making will also adapt to the *de facto* world-wide twentieth century trend of consensus in IGOs—e.g. currently practiced in, *inter alia*, the ILO, UN, IMF, MIGA, EU, etc.[1513]—and will assure efficiency in the Council by sheltering the OECD from excessive politicization. More importantly, however, consensus will allow flexibility and enhance the Council's decision-making processes thus, enabling the OECD to play a more effective role in global governance.

[1512] There is no need to formally amend the wording of article 6 of the OECD Convention—which would be difficult to obtain since, according to its current VP, it would require unanimity.

[1513] *See* Annex I: Charting Decision-Making in International Governmental Organizations.

VI. CONCLUDING ON THE PRIMACY OF A FUNCTIONAL AND A LEGITIMATE LEGAL ORDER FOR GLOBAL GOVERNANCE

> "[I]nternational law is full of content, some of which might be better changed, but all of which has real consequences for real people."
>
> Phillip R. Trimble [1514]

This essay has emphasized the importance of a functional and a legitimate decision-making process for global governance and advocated the abolition of the principle of SE from international institutional law. Moreover it has rejected the introduction of new principles in international law—i.e. democratic governance—on the basis that they will render IGOs' decision-making processes less functional.

Throughout this essay, I have asserted and shown that the principle of SE is generally non-functional in the decision-making processes of IGOs in relation to (i) the voting rule employed, (ii) the membership composition, (iii) the value of decisions, and (iv) the VMs or VPs used. Concurrently, SE does not meet the criteria for legitimacy—(i) determinacy, (ii) symbolic validation, (iii) coherence, and (iv) adherence—in most IGOs' decision-making processes.

In the following concluding remarks, I reiterate in profile the state of decision-making in IGOs. (VI.A). I first consider the role of SE in the decision-making processes of the six IGOs examined in this study (VI.A.1). In particular, I discuss the breach of SE in universal IGOs (VI.A.1.a) and I consider SE's relative and/or haphazard use in non-universal IGOs (VI.A.1.b). I then address the prospects for the concept of democracy in international institutional law (VI.A.2). Specifically, I reflect on the dispensability of global democratic governance (VI.A.2.a) and on the pyrrhic victory of democratizing IGOs (VI.A.2.b).

[1514] Trimble, *supra* note 327, p. 832.

I conclude with the implications of the abolition of SE and the pursuit of a functional and legitimate decision-making in global governance (VI.B). Assessing the findings of incompatible peremptory norms, I contemplate breaking the images and mirages of SE in IGOs (VI.B.1). In particular, I reflect on the erosion of the doctrine of SE in international institutional law (VI.B.1.a) and I consider rethinking and repositioning SE in global governance (VI.B.1.b). Finally, I reflect on the golden opportunity for change in IGOs (VI.B.2). Specifically, I advocate containing the idealism of the doctrine of SE in the international legal culture (VI.B.2.a) and I stress the importance of ushering in the new millennium by embracing functional and legitimate norms as *jus cogens* in global governance (VI.B.2.b).

A. PROFILING THE STATE OF DECISION-MAKING IN INTERNATIONAL GOVERNMENTAL ORGANIZATIONS

> "La complexité des questions sociétales (croissance économique, création d'emplois, développement technologique, stabilité monétaire, problématiques commerciales, équilibres socio-économiques, etc.) ainsi que les impératifs de rapidité dans la prise des décisions afférentes ont contribué à l'établissement d'une technostructure qui s'en charge et qui transforme l'intervention législative des parlements nationaux en processus de «ratification» et leur contrôle souvent en une pure formalité."
>
> Panayotis Soldatos[1515]

Transformation of the World Community

As previously noted, our growing interdependence resulted in the phenomenal growth of IGOs at the beginning of the twentieth century and, particularly, in the post W.W.II era. This created a globalized society and occasioned a progressive expansion of the role of IGOs. Increasingly regulating many of our daily activities and contributing more-and-more to the development of international law, IGOs have today become the dominant actors in global governance.[1516]

The profound transformations of the international community were compounded after the decolonization movement in the 1960s and again at the end of the Cold War and the collapse of the former Eastern Bloc in the 1990s by the spurting of many new states on the world stage. In both periods of expansion, the accession of the newly created states to IGOs challenged the inequality amongst states and renewed claims for the principle of SE.[1517]

In the 1990s, the emerging profile of some of the newly created states, coupled with their political realignments, affected decision-making in the international community and,

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[1515] *See* Soldatos—Le débat sur le déficit démocratique, *supra* note 990, p. 143.

[1516] *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, pp. 2-7.

[1517] *See* TUCKER, *supra* note 47, p. 34; COMMISSION ON GLOBAL GOVERNANCE, *supra* note 19, p. 66.

inevitably, began to transform the entire international legal order.[1518] Furthermore, these changes have often resulted in IGOs experiencing functional and legitimate stress through inefficiency, lengthy or otherwise cumbersome decision-making structures and processes.

Due to our globalized world, decision-making is increasingly being made at the international level[1519] and these international decisions are then increasingly being implemented by domestic legislation world-wide.[1520] This, in effect, has important implications for the concept of sovereignty[1521] and, thus, the concept of SE in international law. Indeed, it has resulted in the common exercise or transfer of sovereignty, which has produced a relative devolution of sovereign power, from states to international institutions.[1522] Central to this transformed structure of the world community have been the

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[1518] *See* Danilenko, *supra* note 53, p. 353. *See also* p. 357 noting that "[i]n a period of rapid change and uncertainty about political alliances, the requisite procedural readjustments may create problems for the global decision-making process in the years to come".

[1519] *See* Panayotis Soldatos, *Réflexions sur le devenir de l'État-nation: phénomènes de crise et de rationalisation, in* L'ÉTAT-NATION AU TOURNANT DU SIÈCLE: LES ENSEIGNEMENTS DE L'EXPÉRIENCE CANADIENNE ET EUROPÉENNE 17, 22 (Panayotis Soldatos & Jean-Claude Masclet eds, 1997), [hereinafter 'Soldatos—Le devenir de l'État-nation'], noting that *[...l'importance des vastes marchés, etc., ne permettent pas facilement, surtout au niveau des États les moins puissants, de légiférer de façon souveraine." See also* pp. 23-23 noting that "*la démocratie parlementaire se dilue, de plus en plus, dans un système économique dont les centres de décision s'éloignent progressivement du pouvoir politique et même, pour bien des cas, du système national, déménagent souvent à l'étranger, là où les attire la concentration des forces économiques.*" In the context of what he calls "the functional-structural crisis of the nation-state" in our interdependent world, Soldatos also comments on the state's increasing incapacity to unilaterally adopt legislative measures by stating that (p. 22):

> "*Une importante manifestation de perforation de la démocratie parlementaire est celle liée à l'interdépendance internationale, aux aspects multiples et complexes. En effet, les parlements nationaux, quoique munis de droits souverains de décision à l'intérieur des frontières nationales, s'en servent, aujourd'hui, avec une parcimonie croissante, voire dans bien des cas s'en dessaisissent: qu'il s'agisse, par exemple, du domaine de la défense ou de ceux de l'énergie, de la monnaie, de l'environnement, ils constatent leur incapacité fonctionnelle d'adopter des législations nationales (unilatérales).*

[1520] *Cf.* Laurent Marville, *Speech: L'Euro: Implications économiques et juridiques et perspectives d'avenir* (Goodman Phillips & Vineberg Conference, Montréal) (May 20, 1998) indicating that, currently, over 75% of the legislative initiatives in the French Parliament consist of implementing IGOs—and, specifically, EU—decisions rather than adopting new legislative initiatives; Croisat & Quermonne, *supra* note 991, p. 138, noting that "*le droit communautaire est en expansion rapide si l'on considère les chiffres [...le bilan] autorise Jacques Delors à déclarer qu'un pourcentage de 80% de la législation économique et sociale européenne relèverait à terme d'actes communautaires!*".

[1521] *Cf.* Soldatos—Le débat sur le déficit démocratique, *supra* note 990, pp. 143-144, noting that "*les parlements nationaux, quoique munis de droits souverains de décision à l'intérieur des frontières, s'en servent, aujourd'hui, avec une parcimonie croissante, voire, dans bien des cas, ils s'en dessaisissent*".

[1522] *See e.g.* Rideau, *supra* note 1071, p. 155, discussing the devolution of power from EU member states to EU institutions. *See also* Soldatos—Le devenir de l'État-nation, *supra* note 1519, p. 18, noting that:

> "*[D]ans ce dernier quart de siècle, caractérisé par un processus d'accélération de l'histoire et de mutations sociétales internes et internationales profondes, l'État-nation traverse une sérieuse crise structurelle fonctionnelle à triple facette: il subit une profonde* ***érosion de son tissu de souveraineté****; il est frappé d'une* ***incapacité fonctionnelle*** *accentuée; il connaît un* ***déficit de légitimité****, à la fois tant au niveau de ses structures que sur le plan de ses fonctions.*"
> *[...C]ette crise de l'État-nation débouche sur un faisceau de phénomènes dont*

theories of functionalism and legitimacy.

Functionalism

The classic theory of Functionalism, first elaborated by Mitrany, "tried to build bridges across doctrinal or institutional differences between groups so that they might join together for dealing with common problems."[1523] This doctrine of international co-operation came to dominate international institutional law and international relations in the twentieth century and has been instrumental in the creation and proliferation of international organizations.

An integral concept of the Functionalist theory is that the *form* should *follow* the *function* of an organization.[1524] In the context of international institutional law, this means that the increasingly important role played by IGOs in global governance requires that the form of co-operation conform to each organization's respective functions. Thus, the principles, norms, rules, or other concepts that form a given IGO's decision-making structures must also reflect the purpose of that organization. It follows, then, that we cannot have a principle, such as SE, in the structure of an IGO if it obstructs its function.

Legitimacy

The continued viability of the international legal system no longer depends exclusively on the voluntarism of states.[1525] Instead, it is "the legitimacy of rules and institutions [which] exerts a compliance pull on those addressed".[1526] This means that states' voluntary allegiance to international community rules hinges on states' perception of the legitimacy of the decision-making processes by which such rules are enacted. This is most evidenced in

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les principaux sont: un processus de ***démantèlement des frontières économiques nationales; des segmentations-fragmentations-démembrements*** *de territoire;* ***des réductions de rôles,*** *notamment en matière de régulation sous-économique;* ***des transferts ou des mises en commun de droits souverains*** *à des institutions internationales et supranationales; des* ***«débordements» fonctionnels*** *à caractère socio-économique par des forces transnationales."* (emphasis in original).

[1523] MITRANY—FUNCTIONAL THEORY, *supra* note 73, p. 37.

[1524] *See* Mitrany—Prospect of Integration, *supra* note 95, pp. 70-72; MITRANY—FUNCTIONAL THEORY, *supra* note 73 p. 249; FELD & JORDAN, *supra* note 67, p. 115; FRIEDMAN—AMERICAN LAW, *supra* note 95, p. 19.

[1525] *See* Danilenko, *supra* note 53, p. 359 noting that there "is growing recognition that the world has to modify the traditional doctrine that international legal rules can be created only by the consent of sovereign states". *Cf.* Christopher W. Morris, *On contractarian constitutional democracy, in* THE IDEA OF DEMOCRACY 335, 343 (David Copp, Jean Hampton and John E. Roemer, eds, 1993), suggesting "that finding the source of legitimacy in the will of the people, especially if their will is to be the sole source of justice, is reactionary."

[1526] FRANCK—POWER OF LEGITIMACY, *supra* note 123, p 112.

IGOs where concerted action or decision-making requires legitimacy in order to force all states to comply with rules or decisions which some may oppose.

Since the process of decision-making is the means by which international rules are legitimized, illegitimate principles, norms and other such rules in IGOs may breed non compliance by nation-states and compromise the international system as a whole. As such, international institutions ought not to have rules which are (i) indeterminate, (ii) incoherent, (iii) can not be adhered to, and (iv) cannot be symbolically validated for they will deplete their legitimacy in international law. IGOs' decision-making processes must strive to be legitimate within the confines of their mandate and pursuant to their constituent act, rather than conform to anachronistic norms—i.e. SE.

1. *Considering the Role of Sovereign Equality in the Decision-Making Processes of the Six International Governmental Organizations Studied*

Despite its pre-eminence in international law, the concept of SE remains poorly reflected in international *institutional* law. In fact, although it is widely supported in the writings of international jurists, SE has found little application in the contemporary reality of global governance. Moreover, erroneous statements continue to be made regarding states eager to join IGOs as a sign of their equal sovereign status.[1527] The irony is that, although nations seek and often make considerable sacrifices in order to attain their sovereignty, once they acquire it they *trade it in*—albeit partially—in exchange for membership to IGOs.

As previously noted, the doctrine of SE has been a foundational tenet of the modern law of nations and this principle is included, either directly or indirectly, in the constituent acts of several IGOs. The indeterminacy of this principle was initially thought to provide elasticity and flexibility in IGOs. Over time, however, this purported elasticity has been subjected to such excessive manipulation—i.e. the elastic has been pulled over and over again, and in various directions—that the principle is now irreparably compromised in international institutional law. Indeed, as the findings of this study strongly suggest, the haphazard use, misuse and abuse of SE in international institutions has created a fog of confusion.

My selective examination of the six IGOs in this study, for the most part, provides a representative view of the decision-making processes of many other organizations. All four decision-making characteristics examined—(i) voting rules, (ii) membership composition, (iii) the value of decisions, and (iv) VMs and VPs—are influenced by the IGO's adherence, or lack thereof, to the principle of SE.

Throughout this study I have shown that the principle of SE has been neither functional nor legitimate in the decision-making structures of both universal political IGOs—i.e. the UN or the ILO—and universal financial IGOs—i.e. IMF and MIGA. The principle has

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[1527] *See* Sack, *supra* note 16, pp. 1232-1233. Mr. Sack, of the EC Commission, erroneously believes that "even micro-states like San Marino, Monaco and Andora ... have been eager to join the UN and other international organizations to show their sovereign equality under international law".

found a similar fate in non-universal IGOs such as the EU and has been but relatively functional and legitimate in the decision-making processes of the OECD. In the following subsections I briefly recapitulate some of the key decision-making elements which render the principle of SE non-functional and illegitimate in universal political and financial IGOs and overview certain decision-making elements common to non-universal IGOs which, in contrast, find somewhat greater adherence to the fundamental premises of this principle.

a) The Breach of Sovereign Equality in Universal Political and Financial International Governmental Organizations

I have shown that, as a general rule, universal political IGOs (examined in Part III) employ equal voting power, while universal financial IGOs (examined in Part IV) employ unequal voting power. Whereas equal voting power—expressed either as 'one state, one vote,' (e.g. UN) or 'one state, four votes' (e.g. ILO)—is presumably meant to adhere to the principle of SE, unequal voting power—expressed as 'weighted voting' (e.g. IMF, and MIGA)—deviates from this principle.

The principle of SE is further violated in both political and financial IGOs as (i) most of these organizations have restricted the membership composition of their key decision-making bodies (e.g. the UN SC, IMF Board of Directors) and (ii) the VMs and VPs utilized in these bodies are incongruent with the premises of SE. For instance, in the context of a plenary decision-making body unanimity and its correlate the power to veto respect the sovereign will of all member states and are thus deemed to preserve the principle of SE. However, in most contemporary political and financial IGOs, unanimity and the power to veto, although only exceptional VMs and/or VPs, when employed in restricted decision-making organs they violate the principle of SE (e.g. in the UN SC and the IMF Board of Directors).

In the course of the twentieth century, most universal IGOs—e.g. the ILO, IMF, MIGA and, for the most part, the UN—have progressively moved toward majoritarian decision-making processes. Majoritarianism, however, has been embraced not necessarily because of its democratic connotations, but rather in the interest of more functional and efficient decision-making processes. Inadvertently though, majority rule also breaches the principle of SE as a decision taken by less than a unanimous vote necessarily means that it is taken against the sovereign will of certain states. This would have been disturbingly problematic had not legitimacy been replacing voluntarism as a fundamental premise in international

law. This increasingly prevalent trend has in fact prevented the invalidation of decisions taken by majority rule and the loss of binding force which these may have.

b) Sovereign Equality's Relative and/or Haphazard Use in Non-Universal International Governmental Organizations

The principle of SE has, in relative terms, been more respected in the non-universal IGOs, examined in Part V, than in universal IGOs, examined in Parts III and IV. For instance, the decision-making structures, processes, rules, mechanisms of the OECD have shown SE to be somewhat functional and legitimate—as is represented by the Council's universal composition, its one vote per state rule, its non-binding resolutions, and its requirement for consensus and unanimity.

Also by comparison, SE has shown to be more respected in the EU through its plenary decision-making bodies and it unanimity voting as opposed to universal IGOs whose decision-making elements lack these characteristics. In absolute terms, however, SE remains but a mirage in the decision-making system of the EU as it is a principle which is functionally unattainable—as it weighs its votes, increasingly allows for majoritarianism and may bind its members against their will—and legitimately illusory—for it does not comply with any of the four criteria for legitimacy.

Moreover, as these IGOs gear toward expansion, it is unlikely that the current relative application of the principle of SE can be sustained in their decision-making structures. If decision-making processes are to remain functional in an enlarged EU and OECD, the principle of universal/plenary composition in the main decision-making bodies of these organizations must inevitably be abandoned and their composition must be, in some manner, restricted. Although functionally necessary, this restriction will indubitably violate the principle of SE.

Similarly, the enlargement of the EU and the OECD will also require the abolition of one of the last bastions of the principle of SE—the unanimity rule. Thus far, non-universal IGOs like the OECD have successfully withstood the twentieth century trend of majoritarianism and have employed unanimity in their decision-making processes. Concurrently, IGOs like the EU have maintained the unanimity rule in their decision-making processes—a rule which, by virtue of it being applied in conjunction with their plenary decision-making organs, has helped preserve the principle of SE. However, as the

EU and OECD expand, it will be impossible to retain the unanimity rule. In all likelihood, these organizations must inevitably abolish this rule and—in consequence and, as is the case with universal IGOs—compromise their respect of the principle of SE.

2. *Promoting Democracy Within Nation-States, and Not Within International Governmental Organizations*

The virtues of democracy are many (e.g. *inter alia* universal suffrage, election of parliament and civil rights, etc.)[1528] and they are not in dispute. Recognizing these virtues, the international legal community has been increasingly promoting the concept of international democracy and the democratization of IGOs.[1529]

It could very well be argued that advocates for the democratization of international institutions are really crypto-world federalists for they are trying to impose a federal state's values on a non-state structure. It is one thing to have democracy within nation-states and quite another to have this principle apply in IGOs. Not all principles can be functionally and legitimately transplanted. Just as certain international institutional principles cannot be applied within nation-states,[1530] so too certain national principles cannot be transposed or applied in international institutions.

a) The Dispensability of Global Democratic Governance

In his advocacy for democratic global governance, Franck (1992) posits two important arguments. First, he contends that democracy in the context of international law is *a* process of legitimation.[1531] Although, I do not contest Franck's viewpoint, I do believe that democracy is not the *only* such process. In fact, any concept which meets Franck's four

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[1528] *See generally* John Stephens, *Capitalist development of democracy: empirical research on the social origins of democracy, in* THE IDEA OF DEMOCRACY 409-446 (David Copp, Jean Hampton and John E. Roemer, eds, 1993), who defines these three elements as component parts of democracy. *See* WALKER *supra* note 3, p. 350; CRAWFORD—DEMOCRACY IN INTERNATIONAL LAW, *supra* note 357, pp. 4-5, 7. *See also* Cerna, *supra* note 366, p. 328, noting that for developed states "[a] state can only be considered democratic if it has a functioning legislature capable of drafting, adopting, and implementing laws."

[1529] *See generally*, Franck—Democratic Governance, *supra* note 365; CRAWFORD—DEMOCRACY IN INTERNATIONAL LAW, *supra* note 357.

[1530] *See* Roucounas, *supra* note 371, p. 26, holding that "*le fonctionnement des organisations internationales met chaque jour en évidence une série de structures rénovatrices du droit international, structures qui ne peuvent se concevoir dans le cadre simplifié des relations d'Etat à Etat.*"

[1531] *See* Franck—Democratic Governance, *supra* note 365, p. 50. *See also* Robert Howse and Alissa Malkin, *Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession*, 76 CAN. BAR. REV. 186, 189 (1997), noting "the tendency to conceive democracy as *a* form of legitimation" in international law (emphasis added).

criteria of legitimacy—i.e. (i) determinacy, (ii) symbolic validation, (iii) coherence, and (iv) adherence—can be used as a process to legitimize international norms.

Second, Franck argues that "[t]he right to democracy can readily be shown to be an important subsidiary of the community's most important norm: the right to peace".[1532] While I do not dispute this position, either, I do believe that democracy is not merely a *subsidiary* right to peace but also *subordinate* to peace for there can be no peace without the existence of (1) a functional international community, and (2) a legitimate decision-making system. This means that democracy must be subordinate to the right for a functional community whose decisions emanate from legitimate processes. Simply put, in the context of IGOs, democratic entitlement—like the entitlement to SE—is dispensable and must take second place to both functionalism and legitimacy.

b) The Pyrrhic Victory of Democratizing International Governmental Organizations

Universal IGOs are too fragile to withstand the rigour of democratic rule. The problems which must be surmounted are both fundamental and enormous. For example, democratic rule would require, at the very basic, elections, the most elementary premise of democracy, "...without which it is all but impossible to imagine a functioning democratic political system."[1533] This would entail the establishment of an international electoral system with globally accessible and universally acceptable electoral rules. But there is a plethora of electoral systems and selecting an appropriate electoral system is not a simple technical matter. The electoral system has "...huge consequences for the operation of the political system"[1534] and, therefore, selecting an appropriate system would pose a considerable political challenge.

Corollary to the above would be a very serious problem which is not infrequently observed at the national level and which arises from the enormous election-related costs—

[1532] Franck—Democratic Governance, *supra* note 365, p. 87.

[1533] Lawrence Leduc, *Elections and Democratic Governance, in* COMPARING DEMOCRACIES: ELECTIONS AND VOTING IN GLOBAL PERSPECTIVE 343, 362 (Lawrence Leduc, Richard G. Niemi and Pippa Norris eds, 1996).

[1534] *See* André Blais and Louis Massicotte, *Electoral Systems, in* COMPARING DEMOCRACIES: ELECTIONS AND VOTING IN GLOBAL PERSPECTIVE 49, 50 (Lawrence LeDuc, Richard G. Niemi and Pippa Norris eds, 1996). *See also* pp. 50-79 for a discussion on the diverse range of electoral systems which currently exist world-wide (e.g. Plurality Systems, Majority Systems, Mixed Systems, etc.) and the different political consequences of these systems.

i.e. candidates resorting to questionable funding sources in order to secure the necessary means for an electoral win.[1535] Magnified on an international scale, election-related costs and their associated problems could most certainly reach phenomenal proportions.

In addition, the logistics of democratic governance on a universal IGO scale would be overwhelming.[1536] For example, at what intervals would elections be held? Would they take place every four or five years? Would IGO representatives be a-national, as in the EP, or would they be composed along state lines? What type of democratic majoritarianism would be employed? Would simple majority suffice or would another type of qualified majority be required? On what bases would representatives be elected—i.e. by what percentage of the population, and by which geographic regions? If the criteria were to be population alone—as is often the case at the national level in democratic states—IGOs would be dominated by representatives from developing countries—e.g. China, India, Indonesia, etc. This, of course, is unlikely to be acceptable to developed states whose economic strength supports or, indeed, sustains many of these developing states.[1537]

Corollary to the logistics, and in line with Functionalist logic, is the very important question of power relations.[1538] The reality of power relations in the context of global co-operation makes it desirable, if not necessary, that decision-making and voting rights in international institutions be balanced with the interests of individual member states. For

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[1535] *See also* Rose-Ackerman, *supra* note 359, p. 86. In a 1996 A.S.I.L panel discussion on Kleptocracy and Democracy, Professor Rose-Ackerman discusses the high costs of elections and the associated risks of corruption by noting that "[e]lections themselves are costly, so candidates need to accumulate funds to finance their campaigns or buy the votes of their constituents through personal favors. These financial pressures give politicians an incentive to accept payoffs ... Politicians everywhere are subject to these pressures".

[1536] *Cf.* Soldatos—Le débat sur le déficit démocratique, *supra* note 990, p. 145. Discussing some of the challenges to democratic rule Soldatos notes that:

> *"La haute technicité des questions sociétales modernes, l'élévation considérable des coûts de participation au processus de sélection du personnel politique (candidatures aux postes politiques élus), le contrôle qu'exercent les partis sur le processus électoral, le prisme déformant de la médiation des moyens d'informations de masses et l'espacement des périodes électorales (par exemple, tous les quatre, cinq ou sept ans) hypothèquent la démocratie représentative et atrophient l'impact du suffrage universel direct".*

[1537] *But cf.* BARRETT AND NEWCOMBE, *supra* note 791, p. 5. Discussing equal and unequal voting in international law, the authors note that the rule of 'one state, one vote' employed in some IGOs which means that "each citizen of a more populous state [... has] less representation than the citizen of small state [...is] abhorrent to the theorist of democracy". Nonetheless, this seemingly offensive voting rule has been accepted by the overwhelming number of states and has prevailed in, *inter alia*, the world's foremost political IGO—i.e. the UN.

[1538] *See* Johnston—Functionalism in International Law, *supra* note 77, p. 56, noting that "Functionalists see no difficulty in accepting the 'political foundations' of international law, since in context there is usually a clear distinction between legal, political an other considerations that may be addressed at the point of claim, response, decision or choice." *See also* GOLD—THE RULE OF LAW IN THE IMF, *supra* note 725, p. 1, acknowledging that "[e]ven the contrasts in power among states induce respect for the law as a means to avoid the appearance of coercion of the less powerful by the more powerful."

instance, the current custom of allowing for the wide application of the 'one state, one vote' rule provides the smaller, and usually, the weaker states a significant and formerly unknown to them "role in shaping—or reshaping—the order of international society they did not formerly possess, in that it imposes upon the powerful the need to obtain legitimization of their interests ... through international forums in which the consent of majorities is accepted procedure."[1539] This places unacceptable and previously non-existent constraints on the world's most powerful states in bargaining with smaller countries. Such disregard of the reality of power relations jeopardizes the efficiency of IGOs' decision-making processes. In this respect, I share the views of Kranz (1994) that "*[t]out processus décisionnel reste inefficace lorsqu'il ignore le besoin d'un équilibre d'intérêts des partenaires*".[1540] More importantly, we risk facing a dead end if we ignore world power relations.[1541]

A multiple number of other issues would also need to be determined and prioritized for the democratization of international institutions. For example, would elections be held for all of the many hundreds of IGOs in existence? If not, how would we choose which IGOs would be democratized and which would be left out? It would be a logistical nightmare if we were to even contemplate that all citizens of all states vote in elections for the literally hundreds of IGOs in existence today.

The ideological, political, financial, logistical and other potential problems involved in democratizing IGOs would result in a pyrrhic victory. The possibility of not only establishing democratic governance in IGOs but also in sustaining such a political system is logistically unfeasible. And even if it were feasible, any potential gain of democratization would be achieved at an excessively high cost to the point of negating or outweighing expected benefits.

If we were to recognize and accept that democracy is not a panacea for all ill,[1542] then perhaps we can realize that it is arguably more important to strengthen democracy *within*

[1539] TUCKER, *supra* note 47, p. 72.

[1540] KRANZ, *supra* note 850, p. 17. *See also* Zamora, *supra* note 33, p. 608, noting that "[a]n international economic organization that does not reflect actual economic forces, in its operations as well as in its decisionmaking processes, has little promise as an active, effective agency."

[1541] *See* KRANZ, *supra* note 850, p. 17. As Kranz aptly stated, the "*rapport des forces économiques dans le monde étant ce qu'il est, on aboutirait à une impasse si l'on revendiquait l'application uniforme de la règle «un État - une voix» ou de majorités irréalistes*".

[1542] *Cf.* WALKER, *supra* note 3, p. 350, noting that:

> "The major defects of democracy are the incapacity of the majority of citizens to understand the extremely difficult and complicated issues of social and economic policy involved in modern government, the constant danger of their being deluded by popular leaders to support courses which are attractive and

states rather than establish democracy *between* states.[1543] Democracy, or people power, is best applied in relation to people—i.e. within nation-states and not within IGOs. Our priority should not be to directly elect IGOs, especially global IGOs, for this would simply not be a functional proposition.[1544] A properly functioning democratic state is a better insurance and a more functional proposition for the existence of democratic representation in IGOs than the establishment of a global system of democratic governance. Accordingly, instead of searching for new places to democratize, it is more important to reinforce existing democratic states and to promote and ensure the move toward democratic societies.[1545]

Finally, it is important to recognize that democracy is not a perfect political system. This is more than evident at the national level where even purportedly democratic governments often act un-democratically. For example, it is not uncommon for democratically elected governments to force Parliamentarians to vote en bloc in accordance with party lines.[1546] It

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easy, the low intelligence of the great mass of voters and their liability to be influenced by motives of greed, jealousy, and selfishness."

[1543] *Cf.* Soldatos-Le débat sur le déficit démocratique, *supra* note 1519, p. 145, holding that we must "*tenir compte du caractère sui generis du système communautaire et ne pas s'entêter à évaluer son degré démocratique par la seule comparaison avec l'orthodoxie démocratique d'un État-nation, ou ce qui est plutôt le cas, d'un État-nation de type parlementaire.*"

[1544] *Cf.* John Rawls, *The Domain of the Political and Overlapping Consensus, in* THE IDEA OF DEMOCRACY 245, 255 (David Copp, Jean Hampton and John E. Roemer eds, 1993) noting "that a political conception must be practicable, that is, must fall under the art of the possible."

[1545] *Cf.* Fareed Zakaria, *Sometimes, democracy can be dangerous*, (Reprint from N.Y. TIMES) THE GAZETTE, Nov. 30, 1997 at D3. Mr. Zakaria, Managing editor of Foreign Affairs magazine, argues that "in the face of a spreading virus of illiberalism, the most useful role that the international community can play is—instead of searching for new lands to democratize—to consolidate democracy where it has taken root and to encourage the gradual development of constitutional liberalism across the globe." Mr. Zakaria adds that "[d]emocracy without constitutional liberalism is not simply inadequate, but dangerous, bringing with it the erosion of liberty, the abuse of power, ethnic divisions and even war."

[1546] A case in point is the contested decision-making process of the forced vote held at the presumably democratic Duma (Russian Parliament) to elect the 35 year old candidate, Serguei Kirienko, as Russia's Prime Minister. Hand-picked by Russian President, Boris Yeltsin, Kirienko's candidacy was controversial and highly contested by the Communists who held the majority of seats in the Duma. Two votes were held and, both times, the Duma failed to ratify Kirienko's candidacy. Defying the will of the majority of Russian Parliamentarians, the Russian President called for a third vote by warning the Duma that, failing ratification, he would dissolve Parliament and call for new elections—as is allowed by the Russian Constitution. Fearing the loss of their seats, the Russian Parliamentarians succumbed to the pressure. On the third vote, they were left with little choice but to elect Kirienko as Russia's Prime Minister. *See* Véronique Soulé, *Kirienko se voit refuser l'investiture comme premier ministre: Camouflet à Boris Eltsine*, LE DEVOIR, April 11, 1998, at A6; Associated Press, *Russie: Kirienko défait*, LA PRESSE, April 18, 1998, at A27; Françoise Michel, *Kirienko sera premier ministre quoi que fassent les communistes*, LA PRESSE, April 24, 1998, at B4.

Although the so-called democratic institutions in Russia leave much to be desired, there are other well established democracies whose institutional decision-making processes have also been denounced for being anti-democratic. For instance, a recent example is the Canadian Parliament's vote on a controversial compensation package for victims of Hepatitis C, contracted by contaminated blood supplied by a government-run agency—the Red Cross. On April 28, 1998, via its parliamentary practice of party discipline, the presumably democratic government of Canada (governed by the Liberal Party of Canada) pressured, if not forced, all of its Parliamentarians to vote unanimously against an extended compensation package proposed by the opposition. The political parties in opposition charged that the decision-making process was anti-democratic. They criticized the Liberal government not only for obligating its members of

is all too frequently forgotten that "getting elected is only a starting point for democratic governance".[1547] Given that "no government of a complex society is likely to be coherently democratic",[1548] we cannot expect that a complex international society can adequately adhere to democratic ideals.

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parliament to vote against their conscience, but also for pressuring/forcing them to vote against the will of their electors (which, according to the polls, did not support the proposed compensation package). This forced vote was so contested throughout Canada, that it led to some provincial governments attempting to "right the wrong" of the federal government's so-called anti-democratic decision-making process by taking independent and unilateral measures for compensating victims of Hepatitis C. *See* Michel Venne, *Le mépris des institutions*, LE DEVOIR, April 30, 1998, at A6, noting that by dictating a forced vote, "*Jean Chrétien aurait voulu affaiblir l'institution démocratique que constitue le Parlement fédéral*" resulting in a "*mépris des institutions, c'est un mépris des citoyens qui y mettent leur confiance.*"; Gilles Toupin, *Députés libéraux-155 Victimes de l'hépatite C-0: Les libéraux votent en bloc contre l'amendement du Reform*, LA PRESSE, April 29, 1998, at A1; Chantal Hébert, *Le pourquoi de l'artellerie lourde*, LA PRESSE, April 29, 1998, at B1; Manon Cornellier, *Chrétien gagne son pari: Les députés libéraux entrent dans le rang: Ottawa n'indemnisera pas toutes les victimes de l'hépatite C*, LE DEVOIR, April 29, 1998, at A1.

See also Soldatos—Le débat sur le déficit démocratique, *supra* note 990, p. 143, discussing parliamentary democracies he notes that:

> "*À la faveur de systèmes électoraux de type majoritaire, de règles et de pratiques parlementaires de discipline de parti et de processus de rétrécissement de l'éventail idéologique des forces politiques, des partis politiques majoritaires et cohésifs peuvent exercer une «tyrannie» sur les parlements nationaux, monopolisant l'initiative législative et contrôlant le processus et le contenu de l'oeuvre législative.*"

[1547] Leduc, *supra* note 1533, p. 344.

[1548] Russel Hardin, *Public Choice Versus Democracy, in* THE IDEA OF DEMOCRACY, 157 169 (David Copp, Jean Hampton and John E. Roemer, eds, 1993).

B. THE IMPLICATIONS OF THE ABOLITION OF SOVEREIGN EQUALITY FROM INTERNATIONAL GOVERNMENTAL ORGANIZATIONS AND THE PURSUIT OF FUNCTIONAL AND LEGITIMATE DECISION-MAKING IN GLOBAL GOVERNANCE

> "Generally speaking, the leading ideas in a society tend to become embodied in its institutions and so identified with them that one cannot describe the thinking of its leaders without also revealing the propensity of the institutions which provide a context for their actions."
>
> Pierre Elliott Trudeau[1549]

Given that international institutions are increasingly the dominant decision-makers in the new world order of global governance, it is imperative that they reflect norms which represent contemporary societal circumstances. And just as international law must reflect current societal realities, so must the evolution of the global legal system be congruent with the evolution of international law.

The leading ideas of international law in twentieth century society have increasingly deviated from sovereignty and voluntarism and have focused towards functionalism and legitimacy. The examination of the misuse, abuse and precarious use of the principle of SE in the decision-making processes of six IGOs has shown this principle is now irredeemably eroded in the context of IGOs. This situation is indeed striking given that SE has always been sanctified by both the diplomatic community and eminent international jurists. Even more striking is the relevant disinterest which the international legal community has shown in delimiting the application of SE so as to rescue it from functional extinction.

As we head towards the twenty-first century it is opportune to reconsider the anachronistic norm of SE and eliminate it from international institutional law. It is also timely to embrace the primacy of functionalism and legitimacy for they are the international norms which continue to dominate international society and which best conform to the new reality of a global governance.

[1549] Pierre Elliott Trudeau, *The Asbestos Strike, in* AGAINST THE CURRENT: SELECTED WRITINGS 1939-1996 42-66, 42-43 (Gérard Pelletier ed., George Tombs trans., 1996).

1. Assessing the Findings of Incompatible Peremptory Norms and Breaking the Images and Mirages of Sovereign Equality

> "It is wrong to hold on to obsolete dogmas that leave out of consideration the changes that have taken place in this world, because this obstructs the realization of the universal legal order."
>
> P.H. Kooijmans[1550]

As the exploration of decision-making in IGOs in this study has shown, the new societal reality of functional organizations has challenged the concept of sovereignty and has made functionalism and SE rival concepts. More than that, it has shown that it is now sovereign *inequality* and not sovereign *equality* that dominates in international institutions. The ideal has proven to be unrealizable in the context of contemporary realities.

It could, of course, be argued that the dichotomy between what is desirable and what is practicably realizable is an essential human condition. However, as Dickinson rightfully stated, "[i]t seems ... futile to separate theory from practice, for unless the theory bears some relation to the practice it becomes superfluous."[1551] Indeed, it comes as no great revelation that legal theory is not always compatible with political reality.[1552] However, in international law—more so than in domestic law—there is a substantial difference between accepted theories and common practice.

If SE was to endure in today's order of global governance, its idealism would have to be translated pragmatically in international institutional law.[1553] This would mean that it would have to be a functional and a legitimate principle that could apply in plenary organs which are solely responsible for the decision-making processes in universal international

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[1550] Kooijmans, *supra* note 12, p. 42.

[1551] Dickinson, *supra* note 239, p. 151-152. *Cf. also* Pierre Elliott Trudeau, *supra* note 1549, pp. 42-43, noting the dichotomy between the ideal and the real, Trudeau notes that "[i]n Quebec, ... during the first half of the twentieth century our social thinking was so idealistic, so a priori, so divorced from reality, in sum so futile, that it was hardly ever able to find expression in living and dynamic institutions."

[1552] Lasok & Bridge, *supra* note 386, p. 374.

[1553] The very best of international lawyers have been praised for both their ideals and their practice. *Cf. generally* Oscar Schacter, *Philip Jessup's Life and Ideas*, 80 Am. J. Int'l L. 878 (1986), discussing that

organizations.[1554] Such a structure, however, does not currently exist in any IGO.

An analogous dichotomy between the ideal and the real world holds true for global democratic governance. Democratic values enshrined in legal instruments must be realizable. An ideal democratic world would require not only that central governments, but all levels and branches of government (i.e. legislative, executive and judiciary) be democratic and directly answerable to the people. In the real world, however, the complexities of global governance necessitate that functionalism and legitimacy be the ultimate bases of our institutional framework.

a) Reflecting on the Erosion of the Doctrine of Sovereign Equality in International Institutional Law

With our increasing interdependence, the ensuing rise and proliferation of functional organizations have not only played a dominant role in global governance but have also limited—and forever altered—the concept of state sovereignty. It can thus be said that globalization no longer allows states to legislate in a sovereign way.[1555] Indeed, the "collaboration among states with regard to specific objectives [has been...] a means of gradually eroding the authority of nation-states in favor of world institutions".[1556]

Although the architects of the doctrine of SE never intended for this principle to be applied to IGOs, as IGOs emerged scholars introduced, and diplomats attempted to apply, the concept of SE in the decision-making structures of these organizations. What followed was not only the expected erosion of states' sovereignty in the context of IGOs but, more crucially, the erosion of the principle of SE in general.

This essay has elaborated both the effects and the limits of the role of SE in IGOs. It has shown that the principle of SE has been unable to find expression in the various applied decision-making strata of both financial and political universal IGOs and, as a result, it

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Jessup's life and works—as an eminent legal scholar, diplomat and judge—was imbued with idealism *and* pragmatism.

[1554] *See* QUOC DINH ET AL., *supra* note 2, pp. 595-596.

[1555] *See* Soldatos—Le débat sur le déficit démocratique, *supra* note 990, p. 144, noting that "*l'internationalisation du capital, les «joint ventures», la coopération internationale, les transferts technologiques, l'importance des vastes marchés, etc., ne permettent pas facilement, surtout au niveau des États les moins puissants, de légiférer de façon souveraine.*"

[1556] Robert W. Cox and Harold K. Jacobson, *The Framework of Inquiry, in* THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATIONS 22 (Robert W. Cox et al. eds, 1973).

remains precariously non-functional and illegitimate in these contexts. This is not to say, of course, that the force of this principle has altogether dissipated in international law. However, it has been eroded to such a significant degree within the context of the most central contemporary actors in international law—i.e. IGOs—that it has become absolutely necessary to reconsider its purpose and its scope.

If the erosion of the principle of SE within international institutional law is permitted to continue, then the legitimacy of the entire international legal system may very well be adversely and irreparably affected—a situation which would jeopardize international co-operation and become a serious obstacle to further globalization. I, therefore, share Tucker's (1977) view that "[a] more egalitarian international society, though one that continues to lack the institutions characteristic of civil society, also promises to be a more disorderly one than the international society we have generally experienced in the past".[1557] The most viable solution to the problem, therefore, would be the elimination of the principle of SE from international institutional law.

b) Rethinking and Repositioning Sovereign Equality in Global Governance

Because the advocacy for equality and democracy is strongly embedded in the minds of jurists during their academic and professional training and, indeed, becomes second nature to them, it would appear to be unorthodox to argue against these ideals. However, reality must be both recognized and addressed. The principle of SE has not withstood transplantation. As the findings of the current essay clearly show, the image of SE is but a mirage in the context of IGOs. It therefore, follows that a thorough rethinking of the principle is not only in order but is overdue. Specifically, we must determine whether and how the principle of SE can be set apart from the international legal system in the context of decision-making of IGOs.

Although the principle of SE may be a *sine qua non* in international law in order to counter hegemony, it is certainly not essential in international institutional law because the objective of states' participation in IGOs is to work for and towards a common purpose. Given the increasing prominence of global decision-making, the misapplication or non-application of SE, i.e. the *status quo*, is no longer a viable option. If the doctrine of SE is

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[1557] TUCKER, *supra* note 47, p. 170.

to survive in any context, then states must concede to the impossibility of realizing this ideal in the context of IGOs. Those wishing to cling on to the *status quo* will indubitably reject the critical repudiation of this doctrine. Resistance to change, any change, is, after all, an unavoidable human characteristic. However, there are grounds for optimism. I am optimistic that the current essay is an introductory step which can lead to reformulate the doctrine of SE by re-positioning it in the new international institutional legal order.[1558]

Repositioning legal norms—even fundamental ones—does not require abandoning or weakening the norm altogether. On the contrary, it is a necessary exercise for the preservation of the sanctity of a given rule. Repositioning by delimiting fundamental norms is, in fact, often applied in domestic law. For instance, in domestic law the protection of a community's rights (e.g. against hate crimes) often takes precedence over an individual's rights[1559] (e.g. to freely express such hatred). Similarly, in international law, individual state's rights to SE must be sacrificed for the good of the community. The welfare of the international community—i.e. the functional legitimacy of global governance—must always take precedence over the welfare of individual states—i.e. their right to the ideal of SE.

Eulogizing the Life and Times of the Myth of Sovereign Equality

It would be unfortunate if the doctrine of SE were to be reduced to that of a pseudo-principle because of its non-viability in IGOs. As long as there are states and bilateral/multilateral relations,—outside the scope of organizations—this principle has an important role and must remain sacrosanct. Indeed, in contemporary inter-state relations where a *de jure* hierarchy of states would be unacceptable, SE has thus far proven to be a viable option against hegemony.

However, legal science must now march to a beat of a different drummer—that of global governance. In the dynamics of this new world, the myth of SE may still continue to live on in the spirit of international law but, given that it has been shattered in international institutional law it must now be put to rest in this context.

[1558] *See supra* Diagrams I and II for a comparative illustration of the current and proposed stance of SE in the international community.

[1559] *See e.g.* Fox & Nolte, *supra* note 363, p. 30, noting that three Canadian Supreme Court judgments "criminalizing free speech which fosters hatred against persons" were based on "an overriding societal interest". *See also* Cass R. Sunstein, *Democracy and Shifting Preferences, in The Idea of Democracy*, 196, 217, 220-222 (David Copp, Jean Hampton and John E. Roemer eds, 1993) discussing the frontiers of free speech law in the United States—as foreseen in the First Amendment—and its limitations in relation to hate speech and pornography.

The decision to put aside the myth may be a bold notion but it is time to redefine *de facto* obsolete concepts. While the obituary of SE may be premature in the general context of relations among states, it is long overdue in the specific context of IGOs. As with all ends, SE's departure from international institutional law will be eulogized for its legacy. Honouring the memory of this mythical doctrine I would say that:

> The tottered myth of SE was demythologized at age 300 something. Although its birth date and parents are disputed, SE is generally thought to have been born in the seventeenth century and to have been fathered by Hugo Grotius in the same period as the birth of the nation-state. Initially essential to counter hegemony in state relations it rose to the position of *jus cogens*. SE's demise began as the role of the nation-state diminished and that of IGOs increasingly gained prominence. Having gradually lost its *raison d'être* in global governance, it was increasingly upstaged and eventually replaced by functionalism and legitimacy in international institutional law. Although kept alive artificially during most of the twentieth century, recognizing its increasing futility in the new era of globalization, at the end of the second millennium the legal community decided to pull the plug on SE from international institutional law.

2. A *Golden Opportunity for Change in International Governmental Organizations*

> "No healthy society becomes the prisoner of its law; but no healthy society has ever grown to maturity without accepting and broadening the rule of law".
>
> C. Wilfred Jenks[1560]

The most fundamental contention of the current study has been that international institutional law theory cannot be grounded on the principle of SE and that preserving and increasing peoples confidence in our institutions is dependent on functional and legitimate decision-making processes. Accordingly, functionalism and legitimacy must be the 'ultimate' norms for global governance (*see supra* Diagram III on the hierarchy of international norms and accompanying text).

A corollary contention is that international institutional law theory can neither be grounded on global democratic governance. The normative implication of this is that global governance requires extra-SE and extra-democratic standards. This is not to say that egalitarian and democratic principles do not have genuine appeal morally but, practically and politically, in the context of international institutional law, they are not functional. Ultimately, the judgment of having an unequal and an undemocratic international institution rather than a non-functional one is, I believe, the right one and an inevitable one.

As jurists, we are called upon from time to time to identify weaknesses which have developed in our system and then to work for their reform. However, reforming any legal system is usually a lengthy and controversial process. Advocates of the *status quo* are inevitably caught in an intellectual battle with those advocating change. In national forums reforms are generally adopted via national legislatures. This is not an option in the international arena as it lacks analogous legislative organs. Accordingly, changes or reforms at the international level are much more complex, lengthy and controversial. We may, however, begin the process of reform by containing the idealism of anachronistic

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[1560] Jenks—*Corpus Juris* of Social Justice, *supra* note 592, p. 136.

norms (*infra* VI.B.2.a) so as to usher in the new millennium by embracing new approaches for global governance (*infra* VI.B.2.b).

a) Containing the Idealism of the Doctrine of Sovereign Equality

The question of interstate equality differs in the twentieth century as opposed to the seventeenth century. Today's international community is too complex to allow for a single principle—i.e. SE—to be the dominant determining factor in the decision-making structures of the many hundreds of IGOs in existence. The doctrine of SE must, therefore, not be interpreted or applied in absolute terms but, rather, be characterized by a continuous process of societal adjustment.[1561] Given that the human condition is first and foremost characterized by continuous change, it is only proper, if not essential that juridical constructions (e.g. the principle of SE) and the legal system (e.g. international law and organizations) require continual adjustments to their foundations so as to conform to changing societal realities.

The latter part of this century has seen the functionality of the international system being most seriously and dangerously plagued by the excessive emphasis which—despite the decreasing role of the state in global governance—has been placed on sovereignty and, by extension, the SE of states both within and outside IGOs.[1562] Concurrently, the poor reflection of this principle in international institutional processes (e.g. decision-making) has greatly damaged the legitimacy of the principle in international contexts.

Global governance requires novel ideas which will help address contemporary realities and facilitate both decision-making and adherence to decisions taken at the international level. It requires functional and more legitimate approaches to solutions and resolutions. Accordingly, in contemporary global conditions, all principles which fall short of ensuring

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[1561] *Cf.* BRANDEIS ON DEMOCRACY, *supra* note 102, p. 66, referring to the "Brandeis brief" which held that law must reflect societal conditions. More specifically, in national law, Brandeis "*reflected his conviction that the Constitution had to be interpreted so as to allow legislative experimentation in the light of new societal circumstances and that it was the lawyer's function to delineate those circumstances.*" [emphasis in original]. Conversely, it could be said that, in international law, the constituent instruments of IGOs (i.e. Charters, Conventions, Constitutions, Articles of Agreement, etc.) need to be interpreted in light of "new societal circumstances"—i.e. a functionally legitimate legal order of global governance—as opposed to archaic dogmas—i.e. SE. *Cf. also* KOOIJMANS, *supra* note 12, p. 29, noting that only "intellectual arrogance" would conceive a legal system for all circumstances.

[1562] *Cf.* David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 HARV. INT'L L.J. 373, 375-376 (1991), noting that "the old international law was hopelessly compromised by ideological strife and an overemphasis on state sovereignty" while the new international law must "move away from sovereignty and doctrines of procedure to a ... revitalization of international institutions."

the functionality and legitimacy of an organization must be excluded from the structure of IGOs.

On the same—functional and legitimate—bases, international institutional law theory can neither be grounded on idealistic democratic premises. The gaining momentum of the current trend of democratizing decision-making processes in IGOs must, therefore, be checked. The time is ripe for changes. However, the advance of any new international norm must be based on a careful cost-benefit analysis which will balance given societal circumstances[1563] (e.g. power relations).

In today's era of increasing interdependence of states, globalization and globalized decision-making, IGOs must be empowered with the necessary means to govern. Functional and legitimate decision-making processes is the only way by which to preserve and increase people's confidence in international institutions and international law. Idealistic and/or anachronistic doctrines such as SE and democracy cannot address the requirements and demands of the new global order and, therefore, must be retired within the context of and international institutional law.

In the final analysis, we must ask ourselves what kind of an international society do we want and what kind of international organizations will best support global governance. The findings which I have presented in this essay with regard to the breach of the principle of SE in international institutional law shed light on the timely need to reconsider this principle in international governance and attempt to contain it within functional and legitimate parameters.

b) Ushering in the New Millennium by Embracing Functional and Legitimate norms as *jus cogens* in global governance

Forecasting with any degree of certainty the future development of global governance is not possible. However, it is safe to say that interdependence and globalization are irreversible phenomena. The fundamental transformation which the international community has been, and is, undergoing demands a revisiting of the very foundations of international law so as to reed ourselves of the shackles of anachronistic or non-viable legal and/or political concepts and discover innovative solutions which address contemporary

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[1563] *See* POUND, *supra* note 105, p. 47; WALKER, *supra* note 3, p. 1154.

realities. As international institutions continue to strengthen their dominant decision-making role in the new world order of global governance, it is imperative that they both epitomize and reflect the character and norms of contemporary society. In this respect it is opportune to usher in the new millennium by embracing functionalism and legitimacy as the *jus cogens*—in lieu of SE or democratic premises—for global governance.

By exploring the principle of SE in the context of the decision-making processes in certain key IGOs and by identifying some of the substantive problems which international institutions are being faced with today, I have sought to provide a better understanding of the present system of global governance and to enrich the debate by providing more viable approaches—i.e. functional and legitimate—for the resolution of these problems. Through this study I hope to further the process of discovery and dialogue, and to influence the evolution of legal thinking by helping to map out innovative paths—e.g. re-positioning the principle of SE and abolishing it from the context of international institutional law—by which international decision-making can become more responsive to the realities of the contemporary world, and, thus, more functional and legitimate.

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VIII. ANNEXES

IGO—YEAR FOUNDED ORGAN	SOVEREIGN EQUALITY IN CONSTITUENT ACT	MEMBERSHIP COMPOSITION	DECISIONS	VOTING RULE	CONSENSUS	SIMPLE MAJORITY	2/3 MAJORITY	QUALIFIED MAJORITY/ SPECI MAJORITY
ILO—1919 & 1946 GENERAL CONFERENCE	SE ≠ expressly mentioned but indirectly SE since it is a Specialized Agency of UN	Universal & Plenary Organ 173 member states 4 Delegates / state = 692 Total Delegates (2 Gvt +1 Employee + 1 Employer) [Art. 3.1 ILO Constitution]	Recommendations are Non-Binding but obligation to bring them before competent national authorities [Art. 19. 6 ILO Constitution] Conventions are binding, imposing an obligation to ratify or submit periodic reports [Art. 19. 5e) ILO Constitution]	Unique Tripartite Structure One Delegate = One Vote i.e. One State, Four Votes [Art. 4.1 ILO Constitution]	VP	VM & general rule unless otherwise specified [Art. 17.2 ILO Constitution]	VM = Membership admission and re-admission 2/3 delegates present including 2/3 of gvt delegates present [Art. 1.4 & 1.6 ILO Constitution] V M= Change in the seat of ILO Office [Art. 6 ILO Constitution] VM on Final Vote on Adoption of Convention or Recommendation [Article 19.2 ILO Constitution] VM = Constitutional amendments [Art. 36 ILO Constitution]	≠
ILO—1919 & 1946 GOVERNING BODY	SE ≠ expressly mentioned but indirectly SE since it is a Specialized Agency of UN	Restrictive organ 14 member states 56 Total Delegates (28 Gvt + 14 Employer + 14 Employee) (Includes 5 Permanent states) [Art. 7 ILO Constitution]	Binding but on some issues an appeal or approval lies with the General Conference [Art. 7.3) & 6) ILO Constitution]	One Delegate = One vote i.e. One State, Four Votes	VP	VM = general rule unless otherwise specified.	VM on Objections to Agenda & Inclusions on new items by Conference [Art. 16.2 & 16.3 ILO Constitution]	VM = 3/5 on cases of specia urgency on decision to refe question to Conference [Art. 10.7 ILO Standing Orde
UN—1945 GENERAL ASSEMBLY	= SE	Universal & Plenary =185 states [Art. 9 Charter]	Discussions and Recommendations = Non-Binding [Art. 10 Charter]	One state, One Vote [Art. 18.1 Charter]	VP	VM [Art. 18.3 Charter]	VM [Art. 18.2 Charter]	≠
UN—1945 SECURITY COUNCIL	= SE	Restrictive = 15 states (5 Permanent and 10 Rotating) [Art. 23 Charter]	Recommendations & Resolutions Binding [Art. 25 Charter] in international peace and security issues but otherwise not generally binding	One state, One Vote	VP	≠	≠	VM on 'procedural matters' =9/15 [Art. 27 2 Charter] VM on 'all other matters' 9/15 including concurring votes o Permanent Members [Art. 27 Charter]
IMF—1945 BOARD OF GOVERNORS & EXECUTIVE BOARD	SE ≠ expressly mentioned but indirectly SE since it is a Specialized Agency of the UN	Plenary 2 Delegates/ state (1 Governor & 1 alternate) [Art. XII s. 2 a) IMF Articles] Restricted: 24 Directors representing all member states	Binding	Weighted Voting (vote by Governor or Alternate) [Art. XII s.5 a) IMF Articles]	VP	VM = general rule unless otherwise specified [Art. XII 5c) IMF Articles]	≠	VM = 70% majority on "Important decisions" [Arts III s. 3 d) & V s. 7e) & V s d) & V s. 9 c) & V s. 12 j) et al IMF Articles] VM = 75% majority arts XXVI s 2 b) & XXVII s.1 VM = 85% majority on "structural issues" [Articles III s. 2 c) & V s. 12 b) & XII s.1 & XXIX b) et al. IMF

IGO—YEAR FOUNDED ORGAN	SOVEREIGN EQUALITY IN CONSTITUENT ACT	MEMBERSHIP COMPOSITION	DECISIONS	VOTING RULE	CONSENSUS	SIMPLE MAJORITY	2/3 MAJORITY	QUALIFIED MAJORITY/ SPECIA MAJORITY
OECD—1960 COUNCIL	≠SE	Plenary = 29 states	Binding only consenting state [Art. 6.2 OECD Convention]	One state, One Vote [Art. 6.2 OECD Convention]	VM [Art. 6.1 OECD Convention]	≠	≠	≠
MIGA—1988 COUNCIL OF GOVERNORS **&** **BOARD OF DIRECTORS**	SE ≠ expressly mentioned but indirectly SE since it is a Specialized Agency of the UN	Plenary = 145 states Divided into Categories I & II [Art. 30 MIGA Convention] Restricted = 24 Directors Divided into Categories I & II	Binding	Weighted Voting & Parity [Art. 39 MIGA Convention]	VP	VM [Art. 40 a) MIGA Convention]	≠	Special or Higher Majority —2/3 total votes + 55 % subscriptions [Arts 39 d), 11 MIGA Conv.] [Par. 63 MIGA Commentary] —Majority of member states Majority of total voting powe —3/5 Governors + 4/5 of tot voting power [Arts 52 & 59 MIGA Conv.]
EU—1951, 1957, 1965, 1986, 1992, 1997[1] COUNCIL	≠SE	Plenary = 15 states	Regulations = Directly Binding Directives = Partially Binding (i.e. in the object, not the form) and Occasionally Directly Binding Decisions (*stricto sensu*) = Selectively Directly Binding Recommendations and Opinions = Non-Binding but some legal effects	Weighted Voting	VP	VM = 44/87	≠	VM = 62/87
EU PARLIAMENT	≠SE	Plenary = 626 MEP	Opinions & Resolutions on Assent & Co-decision Procedures = Binding Opinions & Resolutions on Co-operation Procedure = Non-Binding	One MEP, one vote	≠	VM	≠	VM = Absolute Majority— i.e. 314/626 Higher Majority— i.e. 3/5 votes cast Double Majority— i.e. 2/3 votes cast + Majority Membership/

ANNEX II UNITED NATIONS (UN'S) MEMBERSHIP LIST

United Nations Member States

With the admission of Palau, there are now 185 Member States of the United Nations. The Member States and the dates on which they joined the Organization are listed below:

Member -- (*Date of Admission*)

Afghanistan -- ***(19 Nov. 1946)***
Albania -- ***(14 Dec. 1955)***
Algeria -- ***(8 Oct. 1962)***
Andorra -- ***(28 July 1993)***
Angola -- ***(1 Dec. 1976)***
Antigua and Barbuda -- ***(11 Nov. 1981)***
Argentina -- ***(24 Oct. 1945)***
Armenia -- ***(2 Mar. 1992)***
Australia -- ***(1 Nov. 1945)***
Austria -- ***(14 Dec. 1955)***
Azerbaijan -- ***(9 Mar. 1992)***
Bahamas -- ***(18 Sep. 1973)***
Bahrain -- ***(21 Sep. 1971)***
Bangladesh -- ***(17 Sep. 1974)***
Barbados -- ***(9 Dec. 1966)***
Belarus -- ***(24 Oct. 1945)***
--On 19 September 1991, Byelorussia informed the United Nations that it had changed its name to Belarus.

Belgium -- ***(27 Dec. 1945)***
Belize -- ***(25 Sep. 1981)***
Benin -- ***(20 Sep. 1960)***
Bhutan -- ***(21 Sep. 1971)***
Bolivia -- ***(14 Nov. 1945)***
Bosnia and Herzegovina -- ***(22 May 1992)***
Botswana -- ***(17 Oct. 1966)***
Brazil -- ***(24 Oct. 1945)***
Brunei Darussalam -- ***(21 Sep. 1984)***
Bulgaria -- ***(14 Dec. 1955)***
Burkina Faso -- ***(20 Sep. 1960)***
Burundi -- ***(18 Sep. 1962)***
Cambodia -- ***(14 Dec. 1955)***
Cameroon -- ***(20 Sep. 1960)***
Canada -- ***(9 Nov. 1945)***
Cape Verde -- ***(16 Sep. 1975)***
Central African Republic -- ***(20 Sep. 1960)***
Chad -- ***(20 Sep. 1960)***
Chile -- ***(24 Oct. 1945)***
China -- ***(24 Oct. 1945)***

China -- *(24 Oct. 1945)*
Colombia -- *(5 Nov. 1945)*
Comoros -- *(12 Nov. 1975)*
Congo -- *(20 Sep. 1960)*
Costa Rica -- *(2 Nov. 1945)*
Côte d'Ivoire -- *(20 Sep. 1960)*
Croatia -- *(22 May 1992)*
Cuba -- *(24 Oct. 1945)*
Cyprus -- *(20 Sep. 1960)*
Czech Republic -- *(19 Jan. 1993)*
--Czechoslovakia was an original Member of the United Nations from 24 October 1945. In a letter dated 10 December 1992, its Permanent Representative informed the Secretary-General that the Czech and Slovak Federal Republic would cease to exist on 31 December 1992 and that the Czech Republic and the Slovak Republic, as successor States, would apply for membership in the United Nations. Following the receipt of its application, the Security Council, on 8 January, recommended to the General Assembly that the Czech Republic be admitted to United Nations membership. The Czech Republic was thus admitted on 19 January as a Member State.

Democratic People's Republic of Korea -- *(17 Sep. 1991)*
Democratic Republic of the Congo -- *(20 Sep. 1960)*
Denmark -- *(24 Oct. 1945)*
Djibouti -- *(20 Sep. 1977)*
Dominica -- *(18 Dec. 1978)*
Dominican Republic -- *(24 Oct. 1945)*
Ecuador -- *(21 Dec. 1945)*
Egypt -- *(24 Oct. 1945)*
--Egypt and Syria were original Members of the United Nations from 24 October 1945. Following a plebiscite on 21 February 1958, the United Arab Republic was established by a union of Egypt and Syria and continued as a single Member. On 13 October 1961, Syria, having resumed its status as an independent State, resumed its separate membership in the United Nations. On 2 September 1971, the United Arab Republic changed its name to the Arab Republic of Egypt.

El Salvador -- *(24 Oct. 1945)*
Equatorial Guinea -- *(12 Nov. 1968)*
Eritrea -- *(28 May 1993)*
Estonia -- *(17 Sep. 1991)*
Ethiopia -- *(13 Nov. 1945)*
Fiji -- *(13 Oct. 1970)*
Finland -- *(14 Dec. 1955)*
France -- *(24 Oct. 1945)*
Gabon -- *(20 Sep. 1960)*
Gambia -- *(21 Sep. 1965)*
Georgia -- *(31 July 1992)*
Germany -- *(18 Sep. 1973)*
-- The Federal Republic of Germany and the German Democratic Republic were admitted to membership in the United Nations on 18 September 1973. Through the accession of the German Democratic Republic to the Federal Republic of Germany, effective from 3 October 1990, the two German States have united to form one sovereign State.

Ghana -- *(8 Mar. 1957)*
Greece -- *(25 Oct. 1945)*
Grenada -- *(17 Sep. 1974)*

Grenada -- *(17 Sep. 1974)*
Guatemala -- *(21 Nov. 1945)*
Guinea -- *(12 Dec. 1958)*
Guinea-Bissau -- *(17 Sep. 1974)*
Guyana -- *(20 Sep. 1966)*
Haiti -- *(24 Oct. 1945)*
Honduras -- *(17 Dec. 1945)*
Hungary -- *(14 Dec. 1955)*
Iceland -- *(19 Nov. 1946)*
India -- *(30 Oct. 1945)*
Indonesia -- *(28 Sep. 1950)*
--By letter of 20 January 1965, Indonesia announced its decision to withdraw from the United Nations "at this stage and under the present circumstances". By telegram of 19 September 1966, it announced its decision "to resume full cooperation with the United Nations and to resume participation in its activities". On 28 September 1966, the General Assembly took note of this decision and the President invited representatives of Indonesia to take seats in the Assembly.

Iran (Islamic Republic of) -- *(24 Oct. 1945)*
Iraq -- *(21 Dec. 1945)*
Ireland -- *(14 Dec. 1955)*
Israel -- *(11 May 1949)*
Italy -- *(14 Dec. 1955)*
Jamaica -- *(18 Sep. 1962)*
Japan -- *(18 Dec. 1956)*
Jordan -- *(14 Dec. 1955)*
Kazakhstan -- *(2 Mar. 1992)*
Kenya -- *(16 Dec. 1963)*
Kuwait -- *(14 May 1963)*
Kyrgyzstan -- *(2 Mar. 1992)*
Lao People's Democratic Republic -- *(14 Dec. 1955)*
Latvia -- *(17 Sep. 1991)*
Lebanon -- *(24 Oct. 1945)*
Lesotho -- *(17 Oct. 1966)*
Liberia -- *(2 Nov. 1945)*
Libyan Arab Jamahiriya -- *(14 Dec. 1955)*
Liechtenstein -- *(18 Sep. 1990)*
Lithuania -- *(17 Sep. 1991)*
Luxembourg -- *(24 Oct. 1945)*
Madagascar -- *(20 Sep. 1960)*
Malawi -- *(1 Dec. 1964)*
Malaysia -- *(17 Sep. 1957)*
--The Federation of Malaya joined the United Nations on 17 September 1957. On 16 September 1963, its name was changed to Malaysia, following the admission to the new federation of Singapore, Sabah (North Borneo) and Sarawak. Singapore became an independent State on 9 August 1965 and a Member of the United Nations on 21 September 1965.

Maldives -- *(21 Sep. 1965)*
Mali -- *(28 Sep. 1960)*
Malta -- *(1 Dec. 1964)*
Marshall Islands -- *(17 Sep. 1991)*
Mauritania -- *(7 Oct. 1961)*

Mauritania -- *(7 Oct. 1961)*
Mauritius -- *(24 Apr. 1968)*
Mexico -- *(7 Nov. 1945)*
Micronesia (Federated States of)-- *(17 Sep. 1991)*
Monaco -- *(28 May 1993)*
Mongolia -- *(27 Oct. 1961)*
Morocco -- *(12 Nov. 1956)*
Mozambique -- *(16 Sep. 1975)*
Myanmar -- *(19 Apr. 1948)*
Namibia -- *(23 Apr. 1990)*
Nepal -- *(14 Dec. 1955)*
Netherlands -- *(10 Dec. 1945)*
New Zealand -- *(24 Oct. 1945)*
Nicaragua -- *(24 Oct. 1945)*
Niger -- *(20 Sep. 1960)*
Nigeria -- *(7 Oct. 1960)*
Norway -- *(27 Nov. 1945)*
Oman -- *(7 Oct. 1971)*
Pakistan -- *(30 Sep. 1947)*
Palau -- *(15 Dec. 1994)*
Panama -- *(13 Nov. 1945)*
Papua New Guinea -- *(10 Oct. 1975)*
Paraguay -- *(24 Oct. 1945)*
Peru -- *(31 Oct. 1945)*
Philippines -- *(24 Oct. 1945)*
Poland -- *(24 Oct. 1945)*
Portugal -- *(14 Dec. 1955)*
Qatar -- *(21 Sep. 1971)*
Republic of Korea -- *(17 Sep. 1991)*
Republic of Moldova -- *(2 Mar. 1992)*
Romania -- *(14 Dec. 1955)*
Russian Federation -- *(24 Oct. 1945)*
--The Union of Soviet Socialist Republics was an original Member of the United Nations from 24 October 1945. In a letter dated 24 December 1991, Boris Yeltsin, the President of the Russian Federation, informed the Secretary-General that the membership of the Soviet Union in the Security Council and all other United Nations organs was being continued by the Russian Federation with the support of the 11 member countries of the Commonwealth of Independent States.

Rwanda -- *(18 Sep. 1962)*
Saint Kitts and Nevis -- *(23 Sep. 1983)*
Saint Lucia -- *(18 Sep. 1979)*
Saint Vincent and the Grenadines -- *(16 Sep. 1980)*
Samoa -- *(15 Dec. 1976)*
San Marino -- *(2 Mar. 1992)*
Sao Tome and Principe -- *(16 Sep. 1975)*
Saudi Arabia -- *(24 Oct. 1945)*
Senegal -- *(28 Sep. 1960)*
Seychelles -- *(21 Sep. 1976)*
Sierra Leone -- *(27 Sep. 1961)*
Singapore -- *(21 Sep. 1965)*

Slovakia -- ***(19 Jan. 1993)***
--Czechoslovakia was an original Member of the United Nations from 24 October 1945. In a letter dated 10 December 1992, its Permanent Representative informed the Secretary-General that the Czech and Slovak Federal Republic would cease to exist on 31 December 1992 and that the Czech Republic and the Slovak Republic, as successor States, would apply for membership in the United Nations. Following the receipt of its application, the Security Council, on 8 January, recommended to the General Assembly that the Slovak Republic be admitted to United Nations membership. The Slovak Republic was thus admitted on 19 January as a Member State.

Slovenia -- ***(22 May 1992)***
Solomon Islands -- ***(19 Sep. 1978)***
Somalia -- ***(20 Sep. 1960)***
South Africa -- ***(7 Nov. 1945)***
Spain -- ***(14 Dec. 1955)***
Sri Lanka -- ***(14 Dec. 1955)***
Sudan -- ***(12 Nov. 1956)***
Suriname -- ***(4 Dec. 1975)***
Swaziland -- ***(24 Sep. 1968)***
Sweden -- ***(19 Nov. 1946)***
Syrian Arab Republic -- ***(24 Oct. 1945)***
--Egypt and Syria were original Members of the United Nations from 24 October 1945. Following a plebiscite on 21 February 1958, the United Arab Republic was established by a union of Egypt and Syria and continued as a single Member. On 13 October 1961, Syria, having resumed its status as an independent State, resumed its separate membership in the United Nations.

Tajikistan -- ***(2 Mar. 1992)***
Thailand -- ***(16 Dec. 1946)***
The former Yugoslav Republic of Macedonia -- ***(8 Apr. 1993)***
--The General Assembly decided on 8 April 1993 to admit to United Nations membership the State being provisionally referred to for all purposes within the United Nations as "The former Yugoslav Republic of Macedonia" pending settlement of the difference that had arisen over its name.

Togo -- ***(20 Sep. 1960)***
Trinidad and Tobago -- ***(18 Sep. 1962)***
Tunisia -- ***(12 Nov. 1956)***
Turkey -- ***(24 Oct. 1945)***
Turkmenistan -- ***(2 Mar. 1992)***
Uganda -- ***(25 Oct. 1962)***
Ukraine -- ***(24 Oct. 1945)***
United Arab Emirates -- ***(9 Dec. 1971)***
United Kingdom of Great Britain and Northern Ireland -- ***(24 Oct. 1945)***
United Republic of Tanzania -- ***(14 Dec. 1961)***
--Tanganyika was a Member of the United Nations from 14 December 1961 and Zanzibar was a Member from 16 December 1963. Following the ratification on 26 April 1964 of Articles of Union between Tanganyika and Zanzibar, the United Republic of Tanganyika and Zanzibar continued as a single Member, changing its name to the United Republic of Tanzania on 1 November 1964.

United States of America -- ***(24 Oct. 1945)***
Uruguay -- ***(18 Dec. 1945)***
Uzbekistan -- ***(2 Mar. 1992)***

Vanuatu -- *(15 Sep. 1981)*
Venezuela -- *(15 Nov. 1945)*
Viet Nam -- *(20 Sep. 1977)*
Yemen -- *(30 Sep. 1947)*
--Yemen was admitted to membership in the United Nations on 30 September 1947 and Democratic Yemen on 14 December 1967. On 22 May 1990, the two countries merged and have since been represented as one Member with the name "Yemen".

Yugoslavia -- *(24 Oct. 1945)*
Zambia -- *(1 Dec. 1964)*
Zimbabwe -- *(25 Aug. 1980)*

Source: UN Press Release ORG/1190 (15 Dec. 1994)
Updated 17 July 1997

Members

The Council has 15 members-- five permanent members and 10 elected by the General Assembly for two-year terms:

Membership and Presidency of the Security Council in 1998		
Month	*Presidency*	*Membership Term Ends*
January	**France**	**Permanent Member**
February	**Gabon**	**31 December 1999**
March	**Gambia**	**31 December 1999**
April	**Japan**	**31 December 1998**
May	**Kenya**	**31 December 1998**
June	**Portugal**	**31 December 1998**
July	**Russian Federation**	**Permanent Member**
August	**Slovenia**	**31 December 1999**
September	**Sweden**	**31 December 1998**
October	**United Kingdom**	**Permanent Member**
November	**United States**	**Permanent Member**
December	**Bahrain**	**31 December 1999**
	Brazil	**31 December 1999**
	China	**Permanent Member**
	Costa Rica	**31 December 1998**

The following countries ended their two-year membership term on 31 December 1997:

- Chile
- Egypt
- Guinea-Bissau
- Poland
- Republic of Korea

ANNEX III UNITED NATIONS CHARTER

THE CHARTER OF THE UNITED NATIONS

of June 26, 1945 (Text: UNCIO XV, 335)

as amended by General Assembly Resolution 1991 (XVIII) of December 17, 1963—in force since August 31, 1965 (UNTS 557, 143), 2101 (XX) of December 20, 1965—in force since June 12, 1968 (UNTS 638, 308), and 2847 (XXVI) of December 20, 1971—in force since September 24, 1973 (UNTS 892, 119).

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

Chapter I. Purposes and Principles

ART. 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

ART. 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Chapter II. Membership

ART. 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

ART. 4

(1) Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

(2) The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

ART. 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges

of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

ART. 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

Chapter III. Organs

ART. 7

(1) There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

(2) Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

ART. 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

Chapter IV. The General Assembly

Composition

ART. 9

(1) The General Assembly shall consist of all the Members of the United Nations.

(2) Each Member shall have not more than five representatives in the General Assembly.

Functions and Powers

ART. 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

ART. 11

(1) The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

(2) The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

(3) The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

(4) The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

ART. 12

(1) While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

(2) The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

ART. 13

(1) The General Assembly shall initiate studies and make recommendations for the purpose of:

a) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;

b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

(2) The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph 1 (*b*) above are set forth in Chapters IX and X.

ART. 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

ART. 15

(1) The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

(2) The General Assembly shall receive and consider reports from the other organs of the United Nations.

ART. 16

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

ART. 17

(1) The General Assembly shall consider and approve the budget of the Organization.

(2) The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

(3) The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

Voting

ART. 18

(1) Each member of the General Assembly shall have one vote.

(2) Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 (*c*) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

(3) Decisions on other questions, including the determination of additional categories of questions, to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

ART. 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

Procedure

ART. 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

ART. 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

ART. 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

Chapter V. The Security Council

Composition

ART. 23

(1) The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

(2) The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

(3) Each member of the Security Council shall have one representative.

Functions and Powers

ART. 24

(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

(2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

(3) The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

ART. 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

ART. 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

Voting

ART. 27

(1) Each member of the Security Council shall have one vote.

(2) Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

(3) Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Procedure

ART. 28

(1) The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.

(2) The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

(3) The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

ART. 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

ART. 30

The Security Council shall adopt its own rules of procedure including the method of selecting its President.

ART. 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

ART. 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

Chapter VI. Pacific Settlement of Disputes

ART. 33

(1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

(2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

ART. 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

ART. 35

(1) Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

(2) A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

(3) The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

ART. 36

(1) The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

(2) The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

(3) In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Art. 37

(1) Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

(2) If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Art. 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

Chapter VII. Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression

Art. 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Art. 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Art. 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Art. 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Art. 43

(1) All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call

and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

(2) Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

(3) The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Art. 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Art. 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Art. 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Art. 47

(1) There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

(2) The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

(3) The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

(4) The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.

Art. 48

(1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

(2) Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

ART. 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

ART. 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

ART. 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Chapter VIII. Regional Arrangements

ART. 52

(1) Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

(2) The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

(3) The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

(4) This Article in no way impairs the application of Articles 34 and 35.

ART. 53

(1) The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

(2) The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

ART. 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

Chapter IX. International Economic and Social Cooperation

ART. 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a) higher standards of living, full employment, and conditions of economic and social progress and development;

b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

ART. 56

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

ART. 57

(1) The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

(2) Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

ART. 58

The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies.

ART. 59

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

ART. 60

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

Chapter X. The Economic and Social Council

Composition

ART. 61

(1) The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly.

(2) Subject to the provisions of paragraph 3, eighteen members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

(3) At the first election after the increase in the membership of the Economic and Social Council from twenty-seven to fifty-four members, in addition to the members elected in the place of the nine members whose term of office expires at the end of that year, twenty-seven

additional members shall be elected. Of these twenty-seven additional members, the term of office of nine members so elected shall expire at the end of one year, and of nine other members at the end of two years, in accordance with arrangements made by the General Assembly.

(4) Each member of the Economic and Social Council shall have one representative.

Functions and Powers

ART. 62

(1) The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

(2) It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

(3) It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

(4) It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

ART. 63

(1) The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

(2) It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

ART. 64

(1) The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. It may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

(2) It may communicate its observations on these reports to the General Assembly.

ART. 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

ART. 66

(1) The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

(2) It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.

(3) It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

Voting

ART. 67

(1) Each member of the Economic and Social Council shall have one vote.

(2) Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

Procedure

ART. 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

ART. 69

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

ART. 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

ART. 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

ART. 72

(1) The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.

(2) The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

Chapter XI. Declaration regarding Non-Self-Governing Territories

ART. 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c) to further international peace and security;

d) to promote constructive measures of development, to encourage research, and to co-

operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

ART. 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

Chapter XII. International Trusteeship System

ART. 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

ART. 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

a) to further international peace and security;

b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

ART. 77

(1) The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a) territories now held under mandate;

b) territories which may be detached from enemy states as a result of the Second World War; and

c) territories voluntarily placed under the system by states responsible for their administration.

(2) It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

ART. 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

ART. 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

ART. 80

(1) Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

(2) Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

ART. 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

ART. 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

ART. 83

(1) All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

(2) The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

(3) The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

ART. 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory.

ART. 85

(1) The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

(2) The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

Chapter XIII. The Trusteeship Council

Composition

ART. 86

(1) The Trusteeship Council shall consist of the following Members of the United Nations:

a) those Members administering trust territories;

b) such of those Members mentioned by name in Article 23 as are not administering trust territories; and

c) as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

(2) Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

Functions and Powers

ART. 87

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

a) consider reports submitted by the administering authority;

b) accept petitions and examine them in consultation with the administering authority;

c) provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and

d) take these and other actions in conformity with the terms of the trusteeship agreements.

ART. 88

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

Voting

ART. 89

(1) Each member of the Trusteeship Council shall have one vote.

(2) Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

Procedure

ART. 90

(1) The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.

(2) The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

ART. 91

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

Chapter XIV. The International Court of Justice

ART. 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

ART. 93

(1) All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

(2) A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

ART. 94

(1) Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

(2) If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

ART. 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

ART. 96

(1) The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

(2) Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Chapter XV. The Secretariat

ART. 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

ART. 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-

General shall make an annual report to the General Assembly on the work of the Organization.

ART. 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

ART. 100

(1) In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

(2) Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

ART. 101

(1) The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

(2) Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

(3) The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Chapter XVI. Miscellaneous Provisions

ART. 102

(1) Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

(2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

ART. 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

ART. 104

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

ART. 105

(1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

(2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

(3) The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

Chapter XVII. Transitional Security Arrangements

ART. 106

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

ART. 107

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

Chapter XVIII. Amendments

ART. 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

ART. 109

(1) A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

(2) Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.

(3) If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

Chapter XIX. Ratification and Signature

ART. 110

(1) The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.

(2) The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.

(3) The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.

(4) The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

ART. 111

The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.

DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

ANNEX IV INTERNATIONAL LABOUR ORGANIZATION'S (ILO'S) MEMBERSHIP LIST

ILO Home

INTERNATIONAL LABOUR ORGANIZATION

INFORMATION LEAFLET (text only)

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Member States [A - G] [H - O] [P - Z]

Afghanistan	Albania	Algeria	Angola	Antigua and Barbuda
Argentina	Armenia	Australia	Austria	Azerbaijan
Bahamas	Bahrain	Bangladesh	Barbados	Belarus
Belgium	Belize	Benin	Bolivia	Bosnia and Herzegovina
Botswana	Brazil	Bulgaria	Burkina Faso	Burundi
Cambodia	Cameroon	Canada	Central African Republic	Chad
Chile	China	Colombia	Comoros	Congo
Costa Rica	Côte d'Ivoire	Croatia	Cuba	Cyprus
Czech Republic	Denmark	Djibouti	Dominica	Dominican Republic
Ecuador	Egypt	El Salvador	Equatorial Guinea	Eritrea
Estonia	Ethiopia	Fiji	Finland	France

Gabon	Gambia	Georgia	Germany	Ghana
Greece	Grenada	Guatemala	Guinea	Guinea-Bissau
Guyana	Haiti	Honduras	Hungary	Iceland
India	Indonesia	Iran, Islamic Rep. of	Iraq	Ireland
Israel	Italy	Jamaica	Japan	Jordan
Kazakstan	Kenya	Korea, Republic of	Kuwait	Kyrgystan
Lao People's Democratic Republic	Latvia	Lebanon	Lesotho	Liberia
Libyan Arab Jamahiriya	Lithuania	Luxembourg	Madagascar	Malawi
Malaysia	Mali	Malta	Mauritania	Mauritius
Mexico	Moldova, Republic of	Mongolia	Morocco	Mozambique
Myanmar	Namibia	Nepal	Netherlands	New Zealand
Nicaragua	Niger	Nigeria	Norway	Oman
Pakistan	Panama	Papua New Guinea	Paraguay	Peru
Philippines	Poland	Portugal	Qatar	Romania
Russian Federation	Rwanda	Saint Lucia	Saint Vincent and the Grenadines	San Marino
Sao Tome and Principe	Saudi Arabia	Senegal	Seychelles	Sierra Leone
Singapore	Slovakia	Slovenia	Solomon Islands	Somalia

South Africa	Spain	Sri Lanka	St. Kitts and Nevis	Sudan
Suriname	Swaziland	Sweden	Switzerland	Syrian Arab Republic
Tajikistan	Tanzania, United Republic of	Thailand	The former Yugoslav Republic of Macedonia	Togo
Trinidad and Tobago	Tunisia	Turkey	Turkmenistan	Uganda
Ukraine	United Arab Emirates	United Kingdom	United States	Uruguay
Uzbekistan	Venezuela	Viet Nam	Yemen	Yugoslavia
Zaire	Zambia	Zimbabwe		

Cover page
Member States
The ILO: origins/how it works
The ILO: what it does
Labour studies/ Training Centre
International labour standards
ILO publications/ library services
Employment promotion/ technical cooperation

For further information, please contact Bureau of Public Information (PRESSE) at Tel: +41.22.799.7940 or Fax: +41.22.799.8577.

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ILO Home

Governing Body

Reference

Membership, 1996-99

States of chief industrial importance

The Governments of the following countries are automatically members of the Governing Body: Brazil, China, France, Germany, India, Italy, Japan, Russian Federation, the United Kingdom and the United States

Elected members

As elected on 10 June 1996 and modified to 20 June 1997

Government members

Titular members	*Deputy members*
Africa	
• Congo	• Algeria
• Egypt	• Central African Republic
• Guinea	• Côte d'Ivoire
• Mauritius	• Ethiopia
• Nigeria	• Namibia
• Swaziland	• Senegal

- South Africa
- Uganda

Americas

- Canada
- Chile
- Colombia
- Panama
- Suriname
- Argentina
- Costa Rica
- Cuba
- Mexico
- Peru

Asia

- Bangladesh
- Republic of Korea
- Saudi Arabia
- Thailand
- Indonesia
- Islamic Republic of Iran
- Jordan
- Malaysia
- Mongolia
- Pakistan
- Philippines
- Syrian Arab Republic

Europe

- Hungary
- Poland
- Turkey
- Austria
- Croatia
- Finland

- Slovakia
- Spain
- Sweden
- Ukraine

Employer members

Titular members	*Deputy members*
Mr. J. Aka-Anghui (Côte d'Ivoire)	Mr. A. Abou-Abdalah (Morocco)
Mr. I.P. Anand (India)	Mr. J. Aboughe-Obame (Gabon)
Mr. A. Dahlan (Saudi Arabia)	Mr. P.I. Beye (Senegal)
Mr. F. Díaz Garaycoa (Ecuador)	Mr. B. Botha (South Africa)
Miss D. France (United Kingdom)	Mr. N.H. Cho (Republic of Korea)
Mr. E. Hoff (Norway)	Mr. A.J. Donato (Brazil)
Mr. A. Katz (United States)	Mr. W. Durling (Panama)
Mr. A, M'Kaissi (Tunisia)	Mr. D. Funes de Rioja (Argentina)
Mr. J.J. Oechslin (France)	Mr. J. van Holm (Belgium)
Mr. T.D. Owuor (Kenya)	Mr. I.C. Imoisili (Nigeria)
Mr. J. de Regil Gómez Muriel (Mexico)	Mr. A. Jeetun (Mauritius)
Mr. T. Suzuki (Japan)	Mr. V. Kolmogorov (Russian Federation)
Mr. A. Tan (Philippines)	Mr. J.-M. Lacasa Aso (Spain)
Mr. R. Thüsing (Germany)	Mr. J. Lawson (Canada)
	Mr. S. Marshall (New Zealand)
	Mr. B. Noakes (Australia)
	Mr. B. Robinson (Jamaica)
	Mrs. L. Sasso-Mazzufferi (Italy)
	Mr. A. Tabani (Pakistan)

Worker members

Titular members	*Deputy members*
Mr. W. Brett (United Kingdom)	Mr. E. Abou-Rizk (Lebanon)
Mr. U. Edström (Sweden)	Mr. C. Agyei (Ghana)
Mrs. U. Engelen-Kefer (Germany)	Mr. K. Ahmed (Pakistan)
Mr. R. Falbr (Czech Republic)	Mr. C. Angco (Philippines)
Mr. C. Gray (United States)	Mr. R.A. Baldassini (Argentina)
Mr. S. Itoh (Japan)	Mr. L. Basnet (Nepal)
Mr. Kikongi di Mwinsa (Democratic Republic of Congo)	Mr. M. Blondel (France)
Mr. W. Mansfield (Australia)	Mr. Y. Kara (Israel)
Mr. S. Mookherjee (India)	Mr. A. Lettieri (Italy)
Mr. J.-C. Parrot (Canada)	Mr. I. Mayaki (Niger)
Mr. F. Ramírez León (Venezuela)	Mr. D. Mokgalo (South Africa)
Mr. I. Sahbani (Tunisia)	Mr. B.P. Mpangala (United Republic of Tanzania)
Mr. A. Sánchez Madariaga (Mexico)	Mrs. P. O'Donovan (Ireland)
Mr. G. Sibanda (Zimbabwe)	Mr. Z. Rampak (Malaysia)
	Mr. M. Rozas (Chile)
	Mr. M. Shmakov (Russian Federation)
	Mr. L. Sombes (Cameroon)
	Mr. L. Trotman (Barbados)
	Mr. T. Wojcik (Poland)

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ANNEX V INTERNATIONAL MONETARY FUND'S (IMF'S) MEMBERSHIP LIST, QUOTAS, GOVERNORS, AND VOTING POWER

IMF QUOTAS, GOVERNORS, AND VOTING POWER
GENERAL DEPARTMENT AND SPECIAL DRAWING RIGHTS DEPARTMENT
January 5, 1998

A B C D E F G H I J K L
M N O P Q R S T U V Y Z TOTALS

Member	QUOTA		Governor *Alternate*	VOTES	
	Millions of SDRs	Percent of Total[1]		Number[2]	Percent of Total[1]
Afghanistan, Islamic State of	120.4	0.08	Vacant *Vacant*	1,454	0.10
Albania	35.3	0.02	Shkelqim Cani *Gramoz Pashko*	603	0.04
Algeria[3]	914.4	0.63	Abdelouahab Keramane *Mohammed Laksaci*	9,394	0.63
Angola	207.3	0.14	Mário de Alcântara Monteiro *Eduardo Leopoldo Severim de Morais*	2,323	0.16
Antigua and Barbuda[3]	8.5	0.006	John St. Luce *Dwight Venner*	335	0.02
Argentina[3]	1,537.1	1.06	Roque Benjamin Fernández *Pedro Pou*	15,621	1.05
Armenia[3]	67.5	0.05	Armen Darbinian *Bagrat Asatrian*	925	0.06
Australia[3]	2,333.2	1.61	Peter Costello *E. A. Evans*	23,582	1.58
Austria[3]	1,188.3	0.82	Klaus Liebscher *Thomas Lachs*	12,133	0.81
Azerbaijan	117.0	0.08	Fikret Husseyn Oglu Yusifov *Elman Siradjogly Rustamov*	1,420	0.10

Member	QUOTA		Governor *Alternate*	VOTES	
	Millions of SDRs	Percent of Total[1]		Number[2]	Percent of Total[1]
Bahamas, The[3]	94.9	0.07	William Allen *Julian W. Francis*	1,199	0.08
Bahrain[3]	82.8	0.06	Ibrahim Abdul Karim *Abdulla Hassan Saif*	1,078	0.07
Bangladesh[3]	392.5	0.27	Akbar Ali Khan	4,175	0.28

			Lutfar Rahman Sarker		
Barbados[3]	48.9	0.03	Owen S. Arthur *Winston Cox*	739	0.05
Belarus	280.4	0.19	Gennadiy Stanislavovich Aleynikov *Nicolay Filippovich Rumas*	3,054	0.20
Belgium[3]	3,102.3	2.13	Alfons Verplaetse *Gregoire Brouhns*	31,273	2.09
Belize[3]	13.5	0.009	Manuel Esquivel *Keith A. Arnold*	385	0.03
Benin[3]	45.3	0.03	Moise Mensah *Paulin L. Cossi*	703	0.05
Bhutan	4.5	0.003	Dorji Tshering *Sonam Wangchuk*	295	0.02
Bolivia[3]	126.2	0.09	Edgar Millares Ardaya *Juan Antonio Morales*	1,512	0.10
Bosnia and Herzegovina	121.2	0.08	Manojlo Coric *Kasim Omicevic*	1,462	0.10
Botswana[3]	36.6	0.03	Baledzi Gaolathe *Freddy Modise*	616	0.04
Brazil	2,170.8	1.49	Pedro Sampaio Malan *Gustavo Henrique de Barroso Franco*	21,958	1.47
Brunei Darussalam[3]	150.0	0.10	Haji Hassanal Bolkiah *Haji Selamat Haji Munap*	1,750	0.12
Bulgaria	464.9	0.32	Svetoslav Gavriyski *Dimitar Radev*	4,899	0.33
Burkina Faso[3]	44.2	0.03	Tertius Zongo *Lucien Marie Noel Bembamba*	692	0.05
Burundi	57.2	0.04	Mathias Sinamenye *Enmanuel Ndayiragije*	822	0.06

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Cambodia	65.0	0.05	THOR Peng Leath *SUM Nipha*	900	0.06
Cameroon[3]	135.1	0.09	Edouard Akame Mfoumou *Sadou Hayatou*	1,601	0.11

Canada[3]	4,320.3	2.97	Paul Martin *Gordon G. Thiessen*	43,453	2.91
Cape Verde	7.0	0.005	Antonio Gualberto Do Rosario *Oswaldo Miguel Sequeira*	320	0.02
Central African Republic[3]	41.2	0.03	Anicet-Georges Dologuele *Auguste Tene-Koyzoa*	662	0.04
Chad[3]	41.3	0.03	Bichara Chérif Daoussa *Tahir Souleymane Haggar*	663	0.04
Chile[3]	621.7	0.43	Carlos Massad *Jorge Marshall*	6,467	0.43
China[3]	3,385.2	2.33	DAI Xianglong *CHEN Yuan*	34,102	2.28
Colombia	561.3	0.39	Miguel Urrutia *Antonio José Urdinola Uribe Ocampo*	5,863	0.39
Comoros[3]	6.5	0.004	Mohamed Ali Soilihi *Said Ahmed Said Ali*	315	0.02
Congo, Democratic Republic of the[4]	291.0	0.20	Vacant *Vacant*	000	0.00
Congo, Republic of[3]	57.9	0.04	Nguila Moungounga-Nkombo *Ange-Edouard Poungui*	829	0.06
Costa Rica[3]	119.0	0.08	Rodrigo Bolaños Zamora *Francisco de Paula Gutierrez Gutierrez*	1,440	0.10
Côte d'Ivoire[3]	238.2	0.16	N'Goran Niamien *Tiemoko Kone*	2,632	0.18
Croatia[3]	261.6	0.18	Marko Skreb *Zdravko Rogic*	2,866	0.19
Cyprus[3]	100.0	0.07	A.C. Afxentiou *H.G. Akhniotis*	1,250	0.08
Czech Republic[3]	589.6	0.41	Josef Tosovský *Pavel Spepánek*	6,146	0.41
	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Denmark[3]	1,069.9	0.74	Bodil Nyboe Andersen *Michael Dithmer*	10,949	0.73
Djibouti[3]	11.5	0.008	Djama Mahamoud Haid *Houmed Abdou Daoud*	365	0.02

Dominica[3]	6.0	0.004	Julius C. Timothy *Cary A. Harris*	310	0.02
Dominican Republic[3]	158.8	0.11	Héctor Valdez Albizu *Luis Manuel Piantini*	1,838	0.12

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Ecuador[3]	219.2	0.15	Danilo Carrera *Fidel Jaramillo*	2,442	0.16
Egypt	678.4	0.47	Mohieddin El-Gharib *Ismail Hassan Mohamed*	7,034	0.47
El Salvador[3]	125.6	0.09	Jose Roberto Orellana Milla *Manuel Enrique Hinds*	1,506	0.10
Equatorial Guinea[3]	24.3	0.02	Marcelino Oyono Ntutumu *Martin-Crisantos Ebe Mba*	493	0.03
Eritrea	11.5	0.008	Tekie Beyene *Ghebriel Fassil*	365	0.02
Estonia[3]	46.5	0.03	Vahur Kraft *Peter Lõhmus*	715	0.05
Ethiopia	98.3	0.07	Dubale Jale *Teklewold Atnafu*	1,233	0.08

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Fiji[3]	51.1	0.04	James Ah Koy *Jone Y. Kubuabola*	761	0.05
Finland[3]	861.8	0.59	Sirkka Hämäläinen *Esko Ollila*	8,868	0.59
France[3]	7,414.6	5.10	Dominique Strauss-Kahn *Jean-Claude Trichet*	74,396	4.98

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Gabon[3]	110.3	0.08	Marcel Doupamby Matoka *Jean-Paul Leyimangoye*	1,353	0.09
Gambia, The[3]	22.9	0.02	Dominic Mendy	479	0.03

			Momodou Clarke Bajo		
Georgia[3]	111.0	0.08	Nodar Javakhishvili *Temur Basilia*	1,360	0.09
Germany[3]	8,241.5	5.67	Hans Tietmeyer *Theo Waigel*	82,665	5.53
Ghana[3]	274.0	0.19	Kwabena Duffuor *Victor Selormey*	2,990	0.20
Greece[3]	587.6	0.40	Lucas D. Papademos *Nikolaos Garganas*	6,126	0.41
Grenada[3]	8.5	0.006	Keith Mitchell *Brian Francis*	335	0.02
Guatemala[3]	153.8	0.11	Edin Homero Velasquez Escobedo *José Alejandro Arévalo Alburez*	1,788	0.12
Guinea[3]	78.7	0.05	Ibrahima Kassory Fofana *Cherif Bah*	1,037	0.07
Guinea-Bissau[3]	10.5	0.007	Issufo Sanhá *Rui Barros*	355	0.02
Guyana[3]	67.2	0.05	Bharrat Jagdeo *Archibald Livingston Meredith*	922	0.06

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Haiti[3]	60.7	0.04	Leslie Delatour *Fred Joseph*	857	0.06
Honduras[3]	95.0	0.07	Hugo Noe Pino *Guillermo Bueso*	1,200	0.08
Hungary[3]	754.8	0.52	Gyorgy Suranyi *Laszlo Akar*	7,798	0.52

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Iceland[3]	85.3	0.06	Birgir Isl. Gunnarsson *Halldór J. Krisjánsson*	1,103	0.07
India[3]	3,055.5	2.10	P. Chidambaram *Bimal Jalan*	30,805	2.06
Indonesia[3]	1,497.6	1.03	J. Soedradjad Djiwandono	15,226	1.02

			Dono Iskandar Djojosubroto		
Iran, Islamic Republic of	1,078.5	0.74	Mohsen Nourbakhsh *Ahmad Azizi*	11,035	0.74
Iraq	504.0	0.35	Hikmet M. Al Azawi *Abdul Wahid A. Abdullah Al-Makhzoumi*	5,290	0.35
Ireland[3]	525.0	0.36	Charlie McCreevy *Maurice O'Connell*	5,500	0.37
Israel[3]	666.2	0.46	Yaakov Neeman *David Klein*	6,912	0.46
Italy[3]	4,590.7	3.16	Carlo A. Ciampi *Vincenzo Desario*	46,157	3.09

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Jamaica[3]	200.9	0.14	Omar Davies *Derick Milton Latibeaudiere*	2,259	0.15
Japan[3]	8,241.5	5.67	Hiroshi Mitsuzuka *Yasuo Matsushita*	82,665	5.53
Jordan[3]	121.7	0.08	Suleiman Hafez *Ziad Fariz*	1,467	0.10

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Kazakhstan[3]	247.5	0.17	Alexander Sergeevich Pavlov *Oraz A. Jandosov*	2,725	0.18
Kenya[3]	199.4	0.14	Musalia Mudavadi *Micah Kiprono Cheserem*	2,244	0.15
Kiribati[3]	4.0	0.003	Beniamina Tinga *Taneti Maamau*	290	0.02
Korea[3]	799.6	0.55	Chang-Yuel Lim *Kyung Shik Lee*	8,246	0.55
Kuwait[3]	995.2	0.68	Nasser Abdullah Al-Roudan *Salem Abdulaziz Al-Sabah*	10,202	0.68
Kyrgyz Republic[3]	64.5	0.04	Marat Sultanov *Askar I. Sarygulov*	895	0.06

Member	QUOTA Millions of SDRs	QUOTA Percent of Total[1]	Governor *Alternate*	VOTES Number[2]	VOTES Percent of Total[1]
Lao People's Democratic Republic	39.1	0.03	Pany Yathotou *Bounlith Khennavong*	641	0.04
Latvia[3]	91.5	0.06	Roberts Zile *Einars Repse*	1,165	0.08
Lebanon[3]	146.0	0.10	Riad Toufic Salameh *Nasser Saidi*	1,710	0.11
Lesotho	23.9	0.02	C.T. Thamae *Anthony Mothae Maruping*	489	0.03
Liberia	71.3	0.05	Elio E. Saleeby *Charles R. Bright*	963	0.06
Libya	817.6	0.56	Taher E. Jehaimi *Mohamed Finaish*	8,426	0.56
Lithuania[3]	103.5	0.07	Reinoldijus Sarkinas *Violeta Latviene*	1,285	0.09
Luxembourg[3]	135.5	0.09	Jean-Claude Juncker *Pierre Jaans*	1,605	0.11

Member	QUOTA Millions of SDRs	QUOTA Percent of Total[1]	Governor *Alternate*	VOTES Number[2]	VOTES Percent of Total[1]
Macedonia, former Yugoslav Republic of	49.6	0.03	Ljubc Trpeski *Vacant*	746	0.05
Madagascar[3]	90.4	0.06	Andrianarivo Tantely *Gaston Edouard Ravelojaona*	1,154	0.08
Malawi[3]	50.9	0.04	M.A.P. Chikaonda *E. Ngalande*	759	0.05
Malaysia[3]	832.7	0.57	Ahmad Mohd. Don *Aris Othman*	8,577	0.57
Maldives	5.5	0.004	Arif Hilmy *Mohamed Jaleel*	305	0.02
Mali[3]	68.9	0.05	Soumaïla Cisse *Mandé Sidibé*	939	0.06
Malta[3]	67.5	0.05	Emanuel Ellul *Vacant*	925	0.06
Marshall Islands[3]	2.5	0.002	Ruben R. Zackhras	275	0.02

			Michael Konelios		
Mauritania	47.5	0.03	Mohamedou Ould Michel *Sidi Mohamed Ould Biya*	725	0.05
Mauritius[3]	73.3	0.05	Vasant Kumar Bunwaree *Mitrajeet Dhaneswhar Maraye*	983	0.07
Mexico[3]	1,753.3	1.21	Guillermo Ortiz Martinez *Miguel Mancera Aguayo*	17,783	1.19
Micronesia, Federated States of[2]	3.5	0.002	John Ehsa *Lorin Robert*	285	0.02
Moldova[3]	90.0	0.06	Leonid Talmaci *Valeriu Chitan*	1,150	0.08
Mongolia[3]	37.1	0.03	Puntsagiin Tsagaan *Jigjid Unenbat*	621	0.04
Morocco[3]	427.7	0.29	Mohamed Seqat *Vacant*	4,527	0.30
Mozambique	84.0	0.06	Tomaz Augusto Salomão *Adriano Afonso Maleiane*	1,090	0.07
Myanmar	184.9	0.13	Khin Maung Thein *Kyaw Kyaw Maung*	2,099	0.14

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Namibia[3]	99.6	0.07	Nangolo Mbumba *Tom K. Alweendo*	1,246	0.08
Nepal[3]	52.0	0.04	Satyendra Pyara Shrestha *Madhab Prasad Ghimire*	770	0.05
Netherlands[3]	3,444.2	2.37	A.H.E.M. Wellink *J. W. Oosterwijk*	34,692	2.32
New Zealand[3]	650.1	0.45	Winston Peters *Donald T. Brash*	6,751	0.45
Nicaragua[3]	96.1	0.07	Noel Ramirez *Noel Sacasa*	1,211	0.08
Niger[3]	48.3	0.03	Ahmadou Mayaki *Mahamane Annou*	733	0.05
Nigeria	1,281.6	0.88	Anthony A. Ani *Paul A. Ogwuma*	13,066	0.87
Norway[3]	1,104.6	0.76	Kjell Storvik	11,296	0.76

Svein Ingvar Gjedrem

Member	QUOTA Millions of SDRs	QUOTA Percent of Total[1]	Governor *Alternate*	VOTES Number[2]	VOTES Percent of Total[1]
Oman[3]	119.4	0.08	Ali bin Mohammed bin Moosa *Hamood Sangour Al-Zadjali*	1,444	0.10

Member	QUOTA Millions of SDRs	QUOTA Percent of Total[1]	Governor *Alternate*	VOTES Number[2]	VOTES Percent of Total[1]
Pakistan[3]	758.2	0.52	Muhammad Yaqub *Mueen Afzal*	7,832	0.52
Palau[3]	2.25	0.002	Tommy E. Remengesau, Jr. *Elbuchel Sadang*	272	0.02
Panama[3]	149.6	0.10	Guillermo O. Chapman, Jr. *Jose A. de la Ossa*	1,746	0.12
Papua New Guinea[3]	95.3	0.07	Roy Yaki *Koiari Tarata*	1,203	0.08
Paraguay[3]	72.1	0.05	Hermes Aníbal Gómez Ginard *Jorge Francisco Gulino Ferrari*	971	0.07
Peru[3]	466.1	0.32	Germán Suárez Chávez *Jorge Camet Dickmann*	4,911	0.33
Philippines[3]	633.4	0.44	Gabriel C. Singson *Roberto F. De Ocampo*	6,584	0.44
Poland[3]	988.5	0.68	Leszek Balcerowicz *Pawel Samecki*	10,135	0.68
Portugal[3]	557.6	0.38	Antonio Jose Fernandes de Sousa *António Manuel Pereira Marta*	5,826	0.39

Member	QUOTA Millions of SDRs	QUOTA Percent of Total[1]	Governor *Alternate*	VOTES Number[2]	VOTES Percent of Total[1]
Qatar[3]	190.5	0.13	Mohammed bin Khalifa Al-Thani *Abdullah Khalid Al-Attiyah*	2,155	0.14

Member	QUOTA Millions of SDRs	QUOTA Percent of Total[1]	Governor *Alternate*	VOTES Number[2]	VOTES Percent of Total[1]

Romania	754.1	0.52	Mugur Isarescu *Dan Mogos*	7,791	0.52
Russia[3]	4,313.1	2.97	Sergei K. Dubinin *Aleksei Kudrin*	43,381	2.90
Rwanda	59.5	0.04	Donat Kaberuka *François Mutemberezi*	845	0.06
	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
St. Kitts and Nevis[3]	6.5	0.004	Halva Hendrickson *Wendell Lawrence*	315	0.02
St. Lucia[3]	11.0	0.008	Kenny D. Anthony *Zenith James*	360	0.02
St. Vincent and the Grenadines[3]	6.0	0.004	James F. Mitchell *Maurice Edwards*	310	0.02
Samoa[3]	8.5	0.006	Tuilaepa S. Malielegaoi *Epa Tuioti*	335	0.02
San Marino[3]	10.0	0.007	Clelio Galassi *Fiorenzo Stolfi*	350	0.02
São Tomé and Príncipe	5.5	0.004	Carlos Quaresma Batista de Sousa *Arlindo Afonso de Carvalho*	305	0.02
Saudi Arabia[3]	5,130.6	3.53	Ibrahim A. Al-Assaf *Hamad Al-Sayyari*	51,556	3.45
Senegal[3]	118.9	0.08	Papa Ousmane Sakho *Mamadou Lamine Loum*	1,439	0.10
Seychelles[3]	6.0	0.004	James Michel *Norman Weber*	310	0.02
Sierra Leone[3]	77.2	0.05	Thaimu Bangura *Stephen M. Swaray*	1,022	0.07
Singapore[3]	357.6	0.25	Richard Hu Tsu Tau *Lee Ek Tieng*	3,826	0.26
Slovak Republic[3]	257.4	0.18	Vladimír Masár *Sergej Kozlik*	2,824	0.19
Slovenia[3]	150.5	0.10	France Arhar *Samo Nucic*	1,755	0.12
Solomon Islands[3]	7.5	0.005	Rick Nelson Houenipwela	325	0.02

			Manasseh Sogavare		
Somalia	44.2	0.03	Vacant *Vacant*	692	0.05
South Africa[3]	1,365.4	0.94	Christian Lodewyk Stals *Maria Ramos*	13,904	0.93
Spain[3]	1,935.4	1.33	Rodrigo de Rato Figaredo *Luis Angel Rojo*	19,604	1.31
Sri Lanka[3]	303.6	0.21	Chandrika Bandaranaika Kumaratunga *A.S. Jayawardena*	3,286	0.22
Sudan[4]	169.7	0.12	Vacant *Vacant*	000	0.00
Suriname[3]	67.6	0.05	Tjandrikapersad Gobardhan *Henk Goedschalk*	926	0.06
Swaziland[3]	36.5	0.03	Themba N. Masuku *Martin Dlamini*	615	0.04
Sweden[3]	1,614.0	1.11	Urban Bäckström *Kari Lotsberg*	16,390	1.10
Switzerland[3]	2,470.4	1.70	Hans Meyer *Kaspar Villiger*	24,954	1.67
Syrian Arab Republic	209.9	0.14	Mohammed Imady *Mohammad Bachar Kabbarah*	2,349	0.16
	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Tajikistan	60.0	0.04	Gulomzhon Dzhuraevich Babayev *Anvarsho Muzafarov*	850	0.06
Tanzania[3]	146.9	0.10	Daniel N. Yona *Idris M. Rashidi*	1,719	0.12
Thailand[3]	573.9	0.39	CHAIYAWAT Wilbulswasdi *JAROONG Nookhwun*	5,989	0.40
Togo[3]	54.3	0.04	Barry Moussa Barque *Mongo Aharh-Kpessou*	793	0.05
Tonga[3]	5.0	0.003	Kinikinilau Tutoatasi Fakafanua *S.T.T. 'Utoikamanu*	300	0.02
Trinidad and Tobago[3]	246.8	0.17	Brian Kuei Tung	2,718	0.18

			Winston C. Dookeran		
Tunisia[3]	206.0	0.14	Mohamed El Beji Hamda *Tahar Sioud*	2,310	0.15
Turkey[3]	642.0	0.44	Günes Taner *Gazi Erçel*	6,670	0.45
Turkmenistan	48.0	0.03	Yolly Gurbanmuradov *Khydirkuli M. Achilov*	730	0.05

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Uganda[3]	133.9	0.09	Jehoash Mayanja-Nkangi *Charles N. Kikonyogo*	1,589	0.11
Ukraine[3]	997.3	0.69	Victor Youshchenko *Ihor Mityukov*	10,223	0.68
United Arab Emirates[3]	392.1	0.27	Sultan Bin Nasser Al-Suwaidi *Mohammed Khalfan Bin Khirbash*	4,171	0.28
United Kingdom[3]	7,414.6	5.10	Gordon Brown *Edward A.J. George*	74,396	4.98
United States[3]	26,526.8	18.25	Robert E. Rubin *Alan Greenspan*	265,518	17.78
Uruguay[2]	225.3	0.16	Humberto Capote *Juan Moreira*	2,503	0.17
Uzbekistan	199.5	0.14	MULLAJONOV Faizulla Makhsudjanovich *Tatyana N. Guskova*	2,245	0.15

	QUOTA			VOTES	
Member	Millions of SDRs	Percent of Total[1]	Governor *Alternate*	Number[2]	Percent of Total[1]
Vanuatu[3]	12.5	0.009	Vincent Boulekone *Sampson Ngwele*	375	0.03
Venezuela[3]	1,951.3	1.34	Antonio Casas González *José Manuel Tineo*	19,763	1.32
Vietnam	241.6	0.17	Do Que Luong *Le Duc Thuy*	2,666	0.18

Member	QUOTA Millions of SDRs	QUOTA Percent of Total[1]	Governor *Alternate*	VOTES Number[2]	VOTES Percent of Total[1]
Yemen, Republic of [3]	176.5	0.12	Alawi Saleh Al-Salami *Ahmed Abdul-Rahman Al-Samawi*	2,015	0.13

Member	QUOTA Millions of SDRs	QUOTA Percent of Total[1]	Governor *Alternate*	VOTES Number[2]	VOTES Percent of Total[1]
Zambia	363.5	0.25	Ronald Damson Siame Penza *Jacob M. Mwanza*	3,885	0.26
Zimbabwe[3]	261.3	0.18	Herbert Murerwa *Leonard Ladislus Tsumba*	2,863	0.19
TOTALS General Dept. and Special Drawing Rights Dept.	145,321.05	100.00[5]		1,493,603	100.00[5]

[1]At the present time all 182 members are participants in the Special Drawing Rights Department.

[2]Voting power varies on certain matters pertaining to the General Department with use of the Fund's resources inthat Department.

[3]These countries have accepted the obligations of Article VIII, Sections 2, 3, and 4 of the Articles of Agreement.

[4]The Democratic Republic of the Congo and Sudan's voting rights were suspended effective June 2, 1994 and August 9, 1993, respectively, pursuant to Article XXVI, Section 2*(b)* of the Articles of Agreement.

[5]This figure may differ from the sum of the percentages shown for individual countries because of rounding.

[IMF Home] [Executive Directors] [Officers]

IMF EXECUTIVE DIRECTORS AND VOTING POWER
GENERAL DEPARTMENT AND SPECIAL DRAWING RIGHTS DEPARTMENT
January 5, 1998

Director *Alternate*	Casting Votes of	Votes by Country	Total Votes[1]	Percent of Fund Total[2]
APPOINTED				
Karin Lissakers *Barry S. Newman*	United States	265,518	265,518	17.78
Bernd Esdar *Wolf-Dieter Donecker*	Germany	82,665	82,665	5.53
Yukio Yoshimura *Hideaki Ono*	Japan	82,665	82,665	5.53
Vacant *Ramon Fernandez*	France	74,396	74,396	4.98
Gus O'Donnell *Jon Shields*	United Kingdom	74,396	74,396	4.98
ELECTED				
Willy Kiekens (Belgium) *Johann Prader* *(Austria)*	Austria	12,133		
	Belarus	3,054		
	Belgium	31,273		
	Czech Republic	6,146		
	Hungary	7,798		
	Kazakhstan	2,725		
	Luxembourg	1,605		
	Slovak Republic	2,824		
	Slovenia	1,755		
	Turkey	6,670	75,983	5.09
J. de Beaufort Wijnholds (Netherlands) *Yuriy G. Yakusha* *(Ukraine)*	Armenia	925		
	Bosnia and Herzegovina	1,462		
	Bulgaria	4,899		
	Croatia	2,866		
	Cyprus	1,250		
	Georgia	1,360		
	Israel	6,912		
	Macedonia, former Yugoslav Republic of	746		
	Moldova	1,150		
	Netherlands	34,692		
	Romania	7,791		
	Ukraine	10,223	74,276	4.97

Juan José Toribio (Spain) *Javier Guzmán-Calafell (Mexico)*	Costa Rica	1,440		
	El Salvador	1,506		
	Guatemala	1,788		
	Honduras	1,200		
	Mexico	17,783		
	Nicaragua	1,211		
	Spain	19,604		
	Venezuela	19,763	64,295	4.30
Enzo R. Grilli (Italy) *Nikolaos Coumbis (Greece)*	Albania	603		
	Greece	6,126		
	Italy	46,157		
	Malta	925		
	Portugal	5,826		
	San Marino	350	59,987	4.02
Thomas A. Bernes (Canada) *Charles X. O'Loghlin (Ireland)*	Antigua and Barbuda	335		
	Bahamas, The	1,199		
	Barbados	739		
	Belize	385		
	Canada	43,453		
	Dominica	310		
	Grenada	335		
	Ireland	5,500		
	Jamaica	2,259		
	St. Kitts and Nevis	315		
	St. Lucia	360		
	St. Vincent and the Grenadines	310	55,500	3.72
Kai Aaen Hansen (Denmark) *Eva Srejber (Sweden)*	Denmark	10,949		
	Estonia	715		
	Finland	8,868		
	Iceland	1,103		
	Latvia	1,165		
	Lithuania	1,285		
	Norway	11,296		
	Sweden	16,390	51,771	3.47
Abdulrahman A. Al-Tuwaijri (Saudi Arabia) *Sulaiman M. Al-Turki (Saudi Arabia)*	Saudi Arabia	51,556	51,556	3.45
Dinah Z. Guti (Zimbabwe) *José Pedro de Morais, Jr. (Angola)*	Angola	2,323		
	Botswana	616		
	Burundi	822		

	Eritrea	365		
	Ethiopia	1,233		
	Gambia, The	479		
. . .	Kenya	2,244		
	Lesotho	489		
	Liberia	963		
	Malawi	759		
	Mozambique	1,090		
	Namibia	1,246		
	Nigeria	13,066		
	Sierra Leone	1,022		
	South Africa	13,904		
	Swaziland	615		
	Tanzania	1,719		
	Uganda	1,589		
	Zambia	3,885		
	Zimbabwe	2,863	51,292	3.43
G. F. Taylor (Australia)	Australia	23,582		
Okyu Kwon (Korea)	Kiribati	290		
	Korea	8,246		
	Marshall Islands	275		
	Micronesia, Federated States of	285		
	Mongolia	621		
	New Zealand	6,751		
	Papua New Guinea	1,203		
	Philippines	6,584		
	Samoa	335		
	Seychelles	310		
	Solomon Islands	325		
	Vanuatu	375	49,182	3.29
A. Shakour Shaalan (Egypt)	Bahrain	1,078		
Vacant	Egypt	7,034		
	Iraq	5,290		
	Jordan	1,467		
	Kuwait	10,202		
	Lebanon	1,710		
	Libya	8,426		
	Maldives	305		
	Oman	1,444		
	Qatar	2,155		
	Syrian Arab Republic	2,349		
	United Arab Emirates	4,171		
	Yemen, Republic of	2,015	47,646	3.19
ZAMANI Abdul Ghani (Malaysia)	Brunei Darussalam	1,750		
Subarjo Joyosumarto (Indonesia)	Cambodia	900		
	Fiji	761		

	Indonesia	15,226		
	Lao People's Democratic Republic	641		
. . .	Malaysia	8,577		
	Myanmar	2,099		
	Nepal	770		
	Singapore	3,826		
	Thailand	5,989		
	Tonga	300		
	Vietnam	2,666	43,505	2.91
Aleksei V. Mozhin (Russia) *Andrei Vernikov (Russia)*	Russia	43,381	43,381	2.90
Roberto F. Cippa (Switzerland) *Wieslaw Szczuka (Poland)*	Azerbaijan	1,420		
	Kyrgyz Republic	895		
	Poland	10,135		
	Switzerland	24,954		
	Tajikistan	850		
	Turkmenistan	730		
	Uzbekistan	2,245	41,229	2.76
Abbas Mirakhor (Islamic Republic of Iran) *Mohammed Datri (Morocco)*	Afghanistan, Islamic State of	1,454		
	Algeria	9,394		
	Ghana	2,990		
	Iran, Islamic Republic of	11,035		
	Morocco	4,527		
	Pakistan	7,832		
	Tunisia	2,310	39,542	2.65
Alexandre Kafka (Brazil) *Hamid O'Brien (Trinidad and Tobago)*	Brazil	21,958		
	Colombia	5,863		
	Dominican Republic	1,838		
	Ecuador	2,442		
	Guyana	922		
	Haiti	857		
	Panama	1,746		
	Suriname	926		
	Trinidad and Tobago	2,718	39,270	2.63
M. R. Sivaraman (India) *H. B. Disanayaka (Sri Lanka)*	Bangladesh	4,175		
	Bhutan	295		
	India	30,805		
	Sri Lanka	3,286	38,561	2.58

ZHANG Zhixiang (China) *HAN Mingzhi (China)*	China	34,102	34,102	2.28
A. Guillermo Zoccali (Argentina) *Nicolás Eyzaguirre (Chile)*	Argentina	15,621		
	Bolivia	1,512		
	Chile	6,467		
	Paraguay	971		
	Peru	4,911		
	Uruguay	2,503	31,985	2.14
Koffi Yao (Côte d'Ivoire) *Alexandre Barro Chambrier (Gabon)*	Benin	703		
	Burkina Faso	692		
	Cameroon	1,601		
	Cape Verde	320		
	Central African Republic	662		
	Chad	663		
	Comoros	315		
	Congo, Republic of	829		
	Côte d'Ivoire	2,632		
	Djibouti	365		
	Equatorial Guinea	493		
	Gabon	1,353		
	Guinea	1,037		
	Guinea-Bissau	355		
	Madagascar	1,154		
	Mali	939		
	Mauritania	725		
	Mauritius	983		
	Niger	733		
	Rwanda	845		
	São Tomé and Príncipe	305		
	Senegal	1,439		
	Togo	793	19,936	1.33
			1,492,639[3,4]	99.93[5]

[1]Voting power varies on certain matters pertaining to the General Department with use of the Fund's resources in that Department.

[2]Percentages of total votes (1,493,603) in the General Department and the Special Drawing Rights Department.

[3]This total does not include the votes of Palau and Somalia, which did not participate in the 1996 Regular Election of Executive Directors. The votes of these members are 964--0.07 percent of those in the General Department and Special Drawing Rights Department.

[4]This total does not include the votes of the Democratic Republic of the Congo and Sudan, which were suspended effective June 2, 1994 and August 9, 1993, respectively, pursuant to Article XXVI, Section 2*(b)* of the Articles of Agreement.

[5]This figure may differ from the sum of the percentages shown for individual Directors because of rounding.

[IMF Home] [Members] [Officers]

ANNEX VI MULTILATERAL GUARANTEE INVESTMENT AGENCY'S (MIGA'S) MEMBERSHIP LIST

MIGA Member Country List http://www.miga.org/members.htm

MIGA MULTILATERAL INVESTMENT GUARANTEE AGENCY

MIGA Member Countries (145)

Industrialized Countries (20)

Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States

Developing Countries (125)

AFRICA: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Congo (Republic of), Congo (Democratic Republic of), Côote d'Ivoire, Equatorial Guinea, Ethiopia, Eritrea, Gambia, Ghana, Guinea, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Nigeria, Senegal, Sierra Leone, Seychelles, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, Zimbabwe

ASIA/PACIFIC: Bangladesh, China, Fiji, India, Indonesia, Korea, Malaysia, Micronesia, Nepal, Pakistan, Palau, Papua New Guinea, Philippines, Samoa, Singapore, Sri Lanka, Vanuatu, Viet Nam

MIDDLE EAST / NORTH AFRICA: Algeria, Bahrain, Egypt, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Quatar, Saudi Arabia, Tunisia, United Arab Emirates, Yemen

EUROPE/CENTRAL ASIA: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Bosnia-Herzegovina, Republic of, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyz Republic, Lithuania, Macedonia, Malta, Moldova, Poland, Romania, Russian Federation, Slovak Republic, Slovenia, Turkey, Turkmenistan, Ukraine, Uzbekistan

LATIN AMERICA / CARIBBEAN: Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile,Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Paraguay, Panama, Peru, St. Lucia, St. Vincent, Trinidad & Tobago, Uruguay, Venezuela

Countries in the Process of Fulfilling Membership Requirements (16)

AUSTRALIA,

AFRICA: Chad, Gabon, Guinea-Bissau, Niger,Rwanda

ASIA / PACIFIC: Cambodia, Mongolia, Solomon Islands, Thailand

MIDDLE EAST / NORTH AFRICA: Syrian Arab Republic

EUROPE / CENTRAL ASIA: Latvia, Tajikistan, Yugoslavia

LATIN AMERICA / CARIBBEAN: St. Kitts & Nevis, Suriname

Status: April 20, 1998

MIGA • MULTILATERAL INVESTMENT GUARANTEE AGENCY

MIGA MULTILATERAL INVESTMENT GUARANTEE AGENCY

[Summary Table] [Home]

Category 1 Members

MIGA Capital Subscription Data

Category One Countries	No. of Shares	Total Subscription (in US$)	Date Signed	Date Ratified	Member	Fully Paid *)
Australia	1,713	18,534,660	09/30/96			
Austria	775	8,385,500	04/29/97	09/17/97	12/16/97	
Belgium	2,030	21,964,600	09/21/89	06/30/92	09/18/92	Y
Canada	2,965	32,081,300	04/10/86	10/29/87	04/12/88	Y
Denmark	718	7,768,760	08/27/86	08/18/87	04/12/88	Y
Finland	600	6,492,000	05/13/88	12/28/88	12/28/88	Y
France	4,860	52,585,200	07/22/86	12/28/89	12/28/89	Y
Germany	5,071	54,868,220	07/24/86	10/06/87	04/12/88	Y
Greece	280	3,029,600	07/18/86	05/24/89	08/30/93	Y
Iceland	90	973,800				
Ireland	369	3,992,580	09/18/86	07/05/89	10/27/89	Y
Italy	2,820	30,512,400	02/19/86	04/29/88	04/29/88	Y
Japan	5,095	55,127,900	09/12/86	06/05/87	04/12/88	Y
Luxembourg	116	1,255,120	09/24/90	06/04/91	08/29/91	Y
Netherlands	2,169	23,468,580	02/03/86	10/09/87	04/12/88	Y
New Zealand	513	5,550,660				
Norway	699	7,563,180	06/06/88	07/03/89	08/09/89	Y
Portugal	382	4,133,240	10/01/87	06/06/88	06/06/88	Y
Spain	1,285	13,903,700	04/27/88	04/29/88	04/29/88	Y
Sweden	1,049	11,350,180	04/02/87	12/31/87	04/12/88	Y
Switzerland	1,500	16,230,000	07/07/86	02/08/88	04/12/88	Y
United Kingdom	4,860	52,585,200	04/09/86	04/12/88	04/12/88	Y
United States	20,519	222,015,580	06/18/86	04/12/88	04/12/88	Y
TOTAL	60,478	654,371,960	21	20	20	

*) Investments from these member countries are eligible for MIGA guarantees.

[Summary Table] [Category 2 Table] [Home]

Status: April 20, 1998

MIGA MULTILATERAL INVESTMENT GUARANTEE AGENCY

MIGA • MULTILATERAL INVESTMENT GUARANTEE AGENCY

[Summary Table] [Category 1 Table] [Home]

Category 2 Members

MIGA Capital Subscription Data

Category Two Countries	No. of Shares	Total Subscription (in US$)	Date Signed	Date Ratified	Member	Fully Paid *)
Afghanistan	118	1,276,760				
Albania	58	627,560	10/15/91	10/15/91	10/15/91	Y
Algeria	649	7,022,180	04/17/95	02/22/96	06/04/96	Y
Angola	187	2,023,340	09/19/89	09/19/89	09/19/89	Y
Antigua & Barbuda	50	541,000				
Argentina	1,254	13,568,280	11/28/90	11/29/90	02/11/92	Y
Armenia	80	865,600	09/16/92	09/16/92	12/05/95	Y
Azerbaijan	115	1,244,300	09/18/92	09/22/92	09/23/92	Y
Bahamas, The	100	1,082,000	09/22/92	06/02/93	10/04/94	Y
Bahrain	77	833,140	08/06/86	11/12/86	04/12/88	Y
Bangladesh	340	3,678,800	03/13/87	03/13/87	04/12/88	Y
Barbados	68	735,760	05/23/86	05/23/86	04/12/88	Y
Belize	50	541,000	06/18/92	06/25/92	06/29/92	Y
Belarus	233	2,521,060	08/13/92	09/17/92	12/03/92	Y
Benin	61	660,020	04/17/86	07/28/94	09/26/94	Y
Bhutan	50	541,000				
Bolivia	125	1,352,500	05/05/86	09/26/91	10/03/91	Y
Bosnia-Herzegovina	80	865,600	09/22/89	09/06/91	03/19/93	Y
Botswana	50	541,000	08/31/89	09/26/89	05/15/90	Y
Brazil	1,479	16,002,780	09/23/90	09/23/92	01/07/93	Y
Bulgaria	365	3,949,300	07/22/91	07/27/92	09/23/92	Y
Burkina Faso	61	660,020	10/02/87	11/02/88	11/02/88	Y
Burundi	74	800,680	04/30/95	03/18/96	03/10/98	Y
Cambodia	93	1,006,260	10/01/93			
Cameroon	107	1,157,740	01/27/88	10/07/88	10/07/88	Y
Cape Verde	50	541,000	09/28/89	04/20/93	05/10/93	Y
Central African Rep	60	649,200				
Chad	60	649,200	11/09/95			
Chile	485	5,247,700	04/10/86	03/29/88	04/12/88	Y
China	3,138	33,953,160	04/28/88	04/30/88	04/30/88	Y
Colombia	437	4,728,340	05/27/86	09/08/95	11/30/95	Y
Comoros	50	541,000				
Congo, Republic of	65	703,300	06/07/88	07/05/90	10/16/91	Y
Congo, Dem. Rep. of	338	3,657,160	03/26/86	02/07/89	02/07/89	
Costa Rica	117	1,265,940	09/23/89	03/19/93	02/08/94	Y
Cote d'Ivoire	176	1,904,320	05/29/86	06/07/88	06/07/88	Y
Croatia	187	2,023,340	09/22/89	09/06/91	03/19/93	Y
Cyprus	104	1,125,280	06/25/86	03/11/87	04/12/88	Y
Czech Republic	445	4,814,900	09/20/90	09/20/90	01/01/93	Y
Djibouti	50	541,000				
Dominica	50	541,000	04/29/88	08/02/91	10/07/91	Y
Dominican Republic	147	1,590,540	11/17/94	11/19/96	03/07/97	Y
Ecuador	182	1,969,240	10/11/85	01/15/86	04/12/88	Y
Egypt, Arab Rep. of	459	4,966,380	06/06/86	09/21/87	04/12/88	Y
El Salvador	122	1,320,040	03/12/91	06/17/91	12/20/91	Y
Equatorial Guinea	50	541,000	04/07/86	06/17/92	10/27/94	Y

Eritrea	50	541,000	10/11/95	10/11/95	09/10/96	Y
Estonia	65	703,300	09/24/92	09/24/92	09/24/92	Y
Ethiopia	70	757,400	09/21/90	02/21/91	07/12/91	Y
Fiji	71	768,220	10/03/86	05/24/90	09/24/90	Y
Gabon	96	1,038,720	04/15/94			
Gambia, The	50	541,000	10/15/91	10/15/91	09/11/92	Y
Georgia	111	1,201,020	09/24/92	11/20/92	12/29/92	Y
Ghana	245	2,650,900	06/25/86	04/29/88	04/29/88	Y
Grenada	50	541,000	01/31/86	01/28/88	04/12/88	Y
Guatemala	140	1,514,800	10/15/91	07/10/96	07/11/96	Y
Guinea	91	984,620	09/25/89	11/19/93	10/05/95	Y
Guinea-Bissau	50	541,000	09/27/90			
Guyana	84	908,880	08/05/88	01/18/89	01/18/89	Y
Haiti	75	811,500	09/29/87	12/11/96	12/11/96	Y
Honduras	101	1,092,820	10/09/91	06/30/92	06/30/92	Y
Hungary	564	6,102,480	03/10/87	04/21/88	04/21/88	Y
India	3,048	32,979,360	04/13/92	09/20/93	01/06/94	Y
Indonesia	1,049	11,350,180	06/26/86	09/26/86	04/12/88	Y
Iran, Islamic Rep	1,659	17,950,380				
Iraq	350	3,787,000				
Israel	474	5,128,680	01/22/92	05/21/92	05/21/92	Y
Jamaica	181	1,958,420	09/11/86	12/15/87	04/12/88	Y
Jordan	97	1,049,540	02/05/86	12/16/86	04/12/88	Y
Kazakhstan	209	2,261,380	07/23/92	09/18/92	08/12/93	Y
Kenya	172	1,861,040	10/02/87	11/28/88	11/28/88	Y
Kiribati **)						
Korea	449	4,858,180	10/11/85	11/24/87	04/12/88	Y
Kuwait	930	10,062,600	03/06/87	07/06/87	04/12/88	Y
Kyrgyz Republic	77	833,140	09/23/92	09/28/92	09/21/93	Y
Lao People's Dem	60	649,200				
Latvia	97	1,049,540	09/29/93	09/29/93		
Lebanon	142	1,536,440	05/27/94	06/07/94	10/19/94	Y
Lesotho	50	541,000	12/22/86	01/30/87	04/12/88	Y
Liberia	84	908,880				
Libya	549	5,940,180	10/15/91	02/19/92	04/05/93	Y
Lithuania	106	1,146,920	09/22/92	09/22/92	06/08/93	Y
Macedonia, FYR of	50	541,000	09/22/89	09/06/91	03/19/93	Y
Madagascar	100	1,082,000	05/27/87	06/08/88	06/08/88	Y
Malawi	77	833,140	02/12/87	05/14/87	04/12/88	Y
Malaysia	579	6,264,780	07/02/91	08/02/91	12/06/91	Y
Maldives	50	541,000				
Mali	81	876,420	10/05/90	10/05/90	10/22/92	Y
Malta	75	811,500	09/16/86	02/13/90	09/12/90	Y
Marshall Islands **)						
Mauritania	63	681,660	04/10/91	10/08/91	09/08/92	Y
Mauritius	87	941,340	11/04/88	10/19/90	12/28/90	Y
Mexico	1,192	12,897,440				
Micronesia	50	541,000	06/24/93	08/11/93	08/11/93	Y
Moldova	96	1,038,720	09/22/92	09/22/92	06/09/93	Y
Mongolia	58	627,560	06/14/91	01/06/92		
Morocco	348	3,765,360	04/11/86	09/16/92	09/17/92	Y
Mozambique	97	1,049,540	11/11/93	11/30/93	11/23/94	Y
Myanmar - (Burma)	178	1,925,960				
Namibia	107	1,157,740	09/25/90	09/25/90	09/25/90	Y
Nepal	69	746,580	09/23/92	09/23/93	02/09/94	Y
Nicaragua	102	1,103,640	09/28/90	04/13/92	06/12/92	Y
Niger	62	670,840	04/11/94			
Nigeria	844	9,132,080	09/23/86	03/08/88	04/12/88	Y
Oman	94	1,017,080	06/21/88	01/24/89	01/24/89	Y
Pakistan	660	7,141,200	07/07/86	12/01/86	04/12/88	Y
Palau	50	541,000	12/16/97	12/16/97	12/16/97	Y
Panama	131	1,417,420	01/31/95	05/21/96		
02/21/97 Y						
Papua New Guinea	96	1,038,720	05/09/90	10/29/90	10/21/91	Y
Paraguay	80	865,600	09/13/91	05/26/92	06/30/92	Y

Peru	373	4,035,860	12/19/90	06/05/91	12/02/91	Y
Philippines	484	5,236,880	09/15/86	11/22/93	02/08/94	Y
Poland	764	8,266,480	01/23/89	12/28/89	06/29/90	Y
Qatar	137	1,482,340	06/27/96	06/27/96	10/22/96	Y
Romania	555	6,005,100	08/06/91	06/22/92	09/10/92	Y
Russian Federation	3,137	33,942,340	09/15/92	12/29/92	12/29/92	Y
Rwanda	75	811,500	10/27/89	10/27/89		
Samoa	50	541,000	09/12/86	03/17/87	04/12/88	Y
Sao Tome & Principe	50	541,000				
Saudi Arabia	3,137	33,942,340	04/08/86	08/06/86	04/12/88	Y
Senegal	145	1,568,900	10/30/85	03/10/87	04/12/88	Y
Seychelles	50	541,000	06/22/92	08/20/92	09/15/92	Y
Sierra Leone	75	811,500	12/04/85	05/07/96	06/20/96	Y
Singapore	154	1,666,280	06/03/97	06/20/97	02/24/98	Y
Slovak Republic	222	2,402,040	09/20/90	09/20/90	01/01/93	Y
Slovenia	102	1,103,640	09/22/89	09/06/91	03/19/93	Y
Solomon Islands	50	541,000	10/03/96			
Somalia	78	843,960				
South Africa	943	10,203,260	12/16/92	03/02/94	03/10/94	Y
Sri Lanka	271	2,932,220	10/03/86	05/27/88	05/27/88	Y
St. Kitts & Nevis	50	541,000	04/18/86			
St. Lucia	50	541,000	01/13/86	07/25/88	07/25/88	Y
St. Vincent	50	541,000	04/26/90	06/08/90	09/10/90	Y
Sudan	206	2,228,920	03/10/87	08/21/91	11/07/91	Y
Suriname	82	887,240	03/20/95			
Swaziland	58	627,560	09/25/89	04/03/90	04/18/90	Y
Syrian Arab Rep	168	1,817,760	09/28/90			
Tadjikistan	74	800,680	06/04/93	07/26/93		
Tanzania	141	1,525,620	09/24/90	01/24/91	06/19/92	Y
Thailand	421	4,555,220	10/03/96			
Togo	77	833,140	05/30/86	04/15/88	04/15/88	Y
Tonga **)						
Trinidad & Tobago	203	2,196,460	01/17/91	09/10/91	07/02/92	Y
Tunisia	156	1,687,920	10/01/86	06/07/88	06/07/88	Y
Turkey	462	4,998,840	10/11/85	06/03/88	06/03/88	Y
Turkmenistan	66	714,120	09/26/92	09/26/92	10/01/93	Y
Uganda	132	1,428,240	09/30/91	05/18/92	06/10/92	Y
Ukraine	764	8,266,480	09/27/93	09/27/93	07/19/94	Y
United Arab Emir.	372	4,025,040	09/18/92	10/20/93	10/20/93	Y
Uruguay	202	2,185,640	04/08/86	12/09/92	03/01/93	Y
Uzbekistan	175	1,893,500	09/24/92	09/24/92	11/04/93	Y
Vanuatu	50	541,000	03/07/86	07/27/88	07/27/88	Y
Venezuela	1,427	15,440,140	08/26/92	11/30/93	05/09/94	Y
Viet Nam	220	2,380,400	09/27/93	04/04/94	10/05/94	Y
Yemen, Rep of	155	1,677,100	10/01/86	01/10/90	03/12/96	Y
Yugoslavia, Fed Rep	231	2,499,420	09/22/89	09/06/91		
Zambia	318	3,440,760	10/07/86	06/06/88	06/06/88	Y
Zimbabwe	236	2,553,520	09/27/89	04/02/92	04/10/92	Y
TOTAL	47,436	513,257,520	140	130	125	124

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*) Investments into Category Two member countries made by investors from Category One or Category Two member countries are eligible for MIGA guarantees.
**) A member country of the Bank but has not yet applied for membership in MIGA.

[Summary Table] [Home]

Status: April 20, 1998

MIGA MULTILATERAL INVESTMENT GUARANTEE AGENCY

Summary Capital Subscription Data

(As of March 31, 1998)

1. Signed

	Prospective Members	Signed		
		No. of Members	No. of Shares	Amount (in US$)
Category 1	23	21	59,875	647,847,500
Category 2				
Africa	*48*	*42*	*6,127*	*66,294,140*
Asia	*30*	*22*	*11,450*	*123,889,000*
Europe, Central Asia	*29*	*29*	*9,594*	*103,807,080*
Middle East, North Africa	*19*	*17*	*8,019*	*86,765,580*
Latin America & Caribbean Countries	*32*	*30*	*7,997*	*86,527,540*
Sub-Total	158	140	43,187	467,283,340
Total	**181**	**161**	**103,062**	**1,115,130,840**
Percent of Authorized Capital				**103.06%**

2. Ratified

		Prospective Members	Ratified		
			No. of Members	No. of Shares	Amount (in US$)
Category 1		23	20	58,162	629,312,840
Category 2					
	Africa	*48*	*38*	*5,859*	*63,394,380*
	Asia	*30*	*19*	*10,886*	*117,786,520*
	Europe, Central Asia	*29*	*29*	*9,594*	*103,807,080*
	Middle East, North Africa	*19*	*16*	*7,851*	*84,947,820*
	Latin America & Caribbean Countries	*32*	*28*	*7,865*	*85,099,300*
	Sub-Total	158	130	42,055	455,035,100
Total		**181**	**150**	**100,217**	**1,084,347,940**
Percent of Authorized Capital					**100.22%**

3. Full Members

	Prospective Members	Full Members		
		No. of Members	No. of Shares	Amount (in US$)
Category 1	23	20	58,162	629,312,840
Category 2				
Africa	*48*	*37*	*5,784*	*62,582,880*
Asia	*30*	*18*	*10,828*	*117,158,960*
Europe, Central Asia	*29*	*26*	*9,192*	*99,457,440*
Middle East, North Africa	*19*	*16*	*7,851*	*84,947,820*
Latin America & Caribbean Countries	*32*	*28*	*7,865*	*85,099,300*
Sub-Total	158	125	41,520	449,246,400
Total	**181**	**145**	**99,682**	**1,078,559,240**
Percent of Authorized Capital				**99.68%**

ANNEX VII THE LUXEMBOURG COMPROMISE[1]

EUROPEAN COMMUNITIES: ARRANGEMENTS ON VOTING IN COUNCIL OF MINISTERS; RELATIONS BETWEEN COUNCIL AND COMMISSION*

ARRANGEMENTS MADE IN LUXEMBOURG

BETWEEN THE FOREIGN AFFAIRS MINISTERS OF THE SIX

ON JANUARY 31, 1966

Arrangement Regarding Collaboration Between

The EEC Council of Ministers and the Commission

Close collaboration between the /EEC/ Council of Ministers and the Commission is an essential element for the operation and development of the Community.

The Council considers it appropriate, in order to improve and intensify this collaboration further and at all levels, to apply the following practical terms for cooperation, to be adopted by common consent on the basis of Article 162 of the EEC Treaty, without prejudice to the respective competences and powers of the two institutions.

1 - Before adopting a proposal of special importance, it is desirable for the Commission to make the appropriate contacts with the Governments of the member States through their permanent representatives, without it's being possible for this procedure to derogate the right of initiative that the Commission derives from the Treaty.

2 - Proposals and all other official documents that are forwarded by the Commission to the Council and to the member States can be made public only after the member States have been formally seized of them and after the texts are in their possession.

The Official Journal /of the European Communities/ should be so arranged as to indicate documents with binding force in a distinct manner. The terms whereby texts for which publication is required can be published will be adopted during the work in progress to reorganize the Official Journal.

*[Reproduced from an unofficial translation in French Affairs - No. 188 (February 7, 1966), a press release issued by the Embassy of France Press and Information Service, New York.]

3 - Letters of credence of heads of missions accredited to the Community by nonmember States will be presented to the President of the Council and to the President of the Commission meeting together for that purpose.

4 - Approaches on matters of substance to the Council or the Commission by representatives of nonmember States will be the subject of reciprocal information that is both rapid and complete.

5 - The Council and the Commission shall, in the framework of the implementation of Article 162, hold consultations on the timeliness, the terms and the nature of any contacts that the Commission may establish with international organizations under Article 229 of the Treaty.

6 - Cooperation between the Council and the Commission in the area of Community information, which was the subject of deliberation by the Council on September 24, 1963, will be strengthened so that the program of the Press and Information Service is defined and its implementation followed conjointly according to procedures that will subsequently be specified and could entail the creation of an ad hoc body.

7 - The Council and the Commission will define, in the framework of the financial regulations relative to the establishment and execution of the budgets of the Communities, the means for increasing the effectiveness of control over the assumption, approval and execution of expenditures by the Communities.

Arrangement Regarding Majority Voting

1 - In the event of decisions that can be adopted by majority on the proposal of the Commission, when very important interests of one or several partners are at stake, the members of the Council will attempt, within a reasonable period of time, to arrive at solutions that could be adopted by all members of the Council in respect of their mutual interests and those of the Community, in accordance with Article 2 of the Treaty.

2 - With regard to the preceding paragraph, the French delegation considers that, when very important interests are concerned, discussion must be continued until unanimous agreement has been reached.

3 - The six delegations acknowledge that a difference of opinion remains on what should be done in the event that conciliation cannot be fully attained.

4 - The six delegations nonetheless consider that this difference of opinion does not prevent the resumption, according to normal procedure, of the Community's work.

[1] *Arrangements Made in Luxembourg Between the Foregin Affairs Ministers of the Six on January 31, 1966, reprinted in* 5 ILM 316 (1966).

5 - The members of the Council intend to take the following decisions by common agreement:

- Agricultural financial regulation.
- Supplements to the organization of the fruit and vegetable markets.
- Regulation on the organization of the sugar market.
- Regulation on the organization of the fats market.
- Fixing common prices for beef, rice, sugar, olive oil, oil-yielding seeds and milk.

Work Schedule

After having reached agreement on the problem of qualified majority voting and on the cooperation between the Council and the Commission, the delegations of the member States adopted the following work schedule:

A - The draft budgets of the EEC and the ECSC will be adopted in writing before February 15, 1966 and will be immediately forwarded to the Assembly.

B - The EEC Council will meet at the earliest convenience to settle as priority the problem of financing the common agricultural policy. Simultaneously, discussion will be resumed on other problems, particularly on the GATT trade negotiations, and also on the problems of adjusting national tariffs with regard to nonmember countries.

C - The representatives of the Governments of the member States will meet on the day set for the next meeting of the Council and will begin discussions on the composition of the new Commission, as well as on the choice of its President and Vice Presidents.

They will also agree upon the date on which the instruments of ratification will be deposited during the first quarter of 1966, provided that the required parliamentary ratifications have been obtained and that an agreement is reached on the composition, Presidency and Vice Presidency of the Commission.

Statement by the French Council of Ministers

At the close of the French Council of Ministers meeting held in Paris on February 2, Information Minister Yvon Bourges read the following statement on the Six's decisions in Luxembourg:

"The Council /of Ministers/ has approved the decisions taken in Luxembourg by the Foreign Affairs Ministers of the Six. France is thus in a position to safeguard its interests, in all events, while maintaining its participation in the /European/ Economic Community.

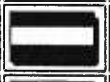
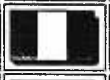
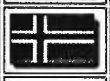
"On the other hand, the conditions for the functioning of the Brussels Commission have fortunately been defined.

"Lastly, the opportunity to complete the implementation of the agricultural Common Market, which was no longer apparent last June 30th, thereby causing France's absence and the interruption of the Six's work, is again open.

"In taking note with satisfaction of the prospects thus held out for economic cooperation, the French Government remarked once again to what extent the smooth operation and the development of economic cooperation would be facilitated by the organization of European political cooperation, in favor of which it has long taken a position and formulated proposals."

ANNEX VIII ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT'S (OECD'S) MEMBERSHIP LIST

About OECD: Member Countries http://www.oecd.org/about/member-countries.html

	Australia (1971)		Austria (1961)		Belgium (1961)
	Canada (1961)		Czech Republic (1995)		Denmark (1961)
	Finland (1969)		France (1961)		Germany (1961)
	Greece (1961)		Hungary (1996)		Iceland (1961)
	Ireland (1961)		Italy (1961)		Japan (1964)
	Korea (1996)		Luxemburg (1961)		Mexico (1994)
	The Netherlands (1961)		New Zealand (1973)		Norway (1961)
	Poland (1996)		Portugal (1961)		Spain (1961)
	Sweden (1961)		Switzerland (1961)		Turkey (1961)
	United Kingdom (1961)		United States (1961)		

Back to "About OECD"


back to the
OECD Home Page