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**Legal limits for exercising power  
by states on the voting behavior of other states  
within international organizations**

Legal opinion with particular reference to the International Whaling Commission (IWC), by Dr Urs Saxer, LL.M. (Columbia University, New York), Attorney-at-Law, Associate Professor (Privatdozent) at the Law Faculty of the University of Zurich, and commissioned by the Swiss Working Group for the Protection of Marine Mammals (ASMS), Wädenswil, Switzerland

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## I. INTRODUCTION

1. The situation repeatedly occurs where states represented at international conferences or member states of international organizations attempt either for their own political or their own economic interest to exert sway on the voting behavior of other states, with the aim of influencing the voting conditions. While lobbying activities quite reasonably number among the customary diplomatic and political instruments used by states to persuade other states away from a given standpoint, the question does arise as to whether international law in general and also the law of the international organizations do in fact impose any limits on such practices.

2. This question can become particularly relevant if methods are used and goals are pursued, which automatically give rise to the impression that a state which is particularly concerned is attempting, by using all available open and concealed means, to change the majority stance in an international organization to its own advantage. Such conduct can then lead to a situation where the common will of the states within international organizations is no longer being formulated in a correct manner and, as a result, the results of votes may possibly be distorted.

3. Decisions taken by international organizations are, admittedly, frequently not binding, but often take the form of recommendations<sup>1</sup>. The main elements that are binding are matters decided internally within organizations, such as elections, financial decisions and the fixing of secondary law, etc.<sup>2</sup>. The binding force of other decisions must be derived from the statutes of the organization. However, in the longer term even non-binding decisions can assume a legally binding force as soft law<sup>3</sup>. Generally speaking, the resolutions and recommendations passed by international organizations as an expression of the collective will of the member states carry with them an authority that excludes the possibility that the common will formulated by a community of states has come about as the result of dishonest means. If the will of the organization is to be formulated in an undistorted manner, the lobbying activities and other practices aimed at influencing decisions must fulfill certain minimum criteria of fairness.

4. What can be problematic, *inter alia*, are attempts of an economic and financial nature aimed at influencing decisions. Such attempts have thus far hardly been a main focus for discussion in relation to the decision-making procedures within international organizations. However, it can hardly be denied that states do occasionally use financial and economic means to persuade other states to vote in a certain way. Above all, it is the small or economically weak states that are affected by such attempts at

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<sup>1</sup> Malanczuk pp. 52 *et seq.*

<sup>2</sup> Malanczuk loc. cit.

<sup>3</sup> Soft Law *inter alia* Malanczuk p. 54 *et seq.* This deals with legally fundamentally non-binding declarations, resolutions and decisions. In some cases, however, these either substantiate existing international law or anticipate future international law. Soft law operates in a gray zone between law and politics or *lex lata* and *lex ferenda*.

influencing.<sup>4</sup> As a rule, such practices are carried out in a concealed manner, or indirectly, in such a way that it is not possible to discern a direct connection between financial and economic assistance on the one hand and voting behavior on the other: direct vote-buying is hardly ever made public. The fact that such activities do as a rule take place away from the public eye goes to show that the states concerned themselves have doubts about the ethical and/or legal permissibility of their action<sup>5</sup>. Indeed, such practices lead to a situation where a vote is cast on the basis of criteria that are unrelated to the issue in hand, and this in turn can distort the decisions taken by international organizations.

5. Indications of such attempts at influencing are also evident within the International Whaling Commission (IWC), a body comprising representatives of various states that was set up under the International Convention for the Regulation of Whaling (hereafter referred to as the “Whaling Convention”), which was signed in Washington DC on 2<sup>nd</sup> December 1946. There is a suspicion that states representing a minority stance are attempting to change the majority viewpoint, in order to have the restrictions on whaling currently in force relaxed or lifted altogether. With such a situation, it must be borne in mind that, in accordance with the terms of the Whaling Convention, a decision of this nature would be binding<sup>6</sup>. According to certain sources, similar practices are prevalent in other organizations or among international bodies comprising representatives of different states, in particular in the area of conservation. It was for this reason that the Working Group for the Protection of Marine Mammals commissioned a legal opinion.

6. The legal questions to be assessed here are essentially questions of principle, as they are ones that all international organizations composed of member states have to face. At the same time, however, the specific legal bases of the individual international organizations have to be taken into account, because it is first and foremost the primary and secondary law of an organization that determine the membership right conditions for states, and in particular the exercising of the voting right and the validity of votes conducted. Consequently, the subsequent observations deal with the legal questions to be evaluated in a general manner and at the same time with the specific example of the IWC. These observations can, in part at least, be applied for conferences involving several states and similar gatherings attended by representatives of different states.

7. This inquiry focuses on practices and methods which, according to details supplied by the body that has commissioned this report, are particularly typical, namely:

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<sup>4</sup> These could possibly also be states which have no particular interests themselves or which, for financial reasons, perhaps opt not to become members of an organization and/or to send a delegation.

<sup>5</sup> Similar to this as well is the behavior of states that give financial support to parties and politicians in third countries; cf. Damrosch pp. 17 et seq.

<sup>6</sup> Under Art. I (1) of the Convention, restrictions on whaling are regulated in the Schedule and, according to this provision, the Schedule forms an integral part of the Convention. Amendments are made under the terms of Art. V of the Convention, i.e. by introducing new laws with the possibility for states to object or opt out ; See also *infra* text at No.. 12.

- The corruption of representatives of states in international organizations;
- The threat of suspension or reduction of voluntarily granted financial and economic assistance if the party concerned votes against the interests of the state granting the assistance;
- The granting of economic and financial assistance to states, so that these will vote to support the interests of the state granting the assistance;
- Outright buying of votes;
- The granting of financial and economic advantages to states, thereby allowing the latter to become members of international organizations and then to vote to support the interests of the state that has provided the assistance.

8. The author of this legal opinion is not aware of any concrete rulings in primary or secondary law or of any relevant practice by international organizations or any verdicts delivered by international courts<sup>7</sup> concerning these practices. It would appear as well that there are no clear statements on this issue in literature. It would be incorrect, though, to conclude from this that international law cannot provide any answers to the legal issues at stake. They do not pertain to domestic law. Furthermore, the international standards concerning democratic rights<sup>8</sup> that have been developed for domestic law cannot automatically be applied, especially as the object of this inquiry is not the political rights of individuals, but rather the involvement of states in the decision-making process of international organizations. In summary then, because this issue clearly deals with questions of international law, the answers must come from international law and, in particular, the law of international organizations.

9. From a methodological point of view, the lack of rulings and also of a clear practice of international organizations means that the answers to the legal issues must be found, above all, in the general principles of international law and of the law of international organizations. As will be shown subsequently, considering the matter in this way does allow certain conclusions to be drawn, even though the observations that follow are of necessity of a more general nature. It is obvious as well that there is a clear need for the establishment of rules, and for this reason possibilities for standard-setting are outlined at the end of the document.

10. The scope of this legal opinion does not cover questions relating to the substantive validity of decisions taken by international organizations, i.e. whether or not they

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<sup>7</sup> This might also be connected with the fact that judicial authorities which could resolve such problems by taking binding decisions are largely lacking within international organizations.

<sup>8</sup> Cf., for example, Art. 25. b) of the International Covenant on Civil and Political Rights of 1966 (UN Human Rights' Pact II), which states that every citizen shall have the right and the opportunity, without unreasonable restrictions, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. These standards have been refined at regional level; in some cases considerably so.

comply with the statutes of the organization in terms of content and with the fundamental principles of international law in general. This report will confine itself to the problems of how the decisions taken have come about.

## II. THE IWC AS AN INTERNATIONAL ORGANIZATION

11. International organizations are permanent institutions founded on the basis of an agreement/treaty governed by international law between states with their own international legal personality and with their own organs, through which the states unite as members to pursue common aims, the pursuit of these aims being carried out through and within the framework of these organs<sup>9</sup>. In the light of this definition, it should be examined whether the IWC does in fact constitute an international organization.

12. As previously stated, the contractual basis of the IWC is the Whaling Convention of Washington, which numerous states have joined<sup>10</sup>. This Convention is essentially aimed at protecting the whale stocks; for this purpose, it establishes a system of international regulation, as stated in the preamble of the Convention, as well as establishing the IWC, which issues regulations governing the protection of whales. Article III, para. 1 of the Convention states that the IWC shall be composed of one member from each contracting government. Article 2 stipulates that the Commission shall elect a Chairman and a Vice-Chairman, as well as being allowed to appoint its own Secretary and staff. Most provisions of the Whaling Convention are dedicated to the IWC. Indeed, this is the crucial element of the Convention; the IWC is vested with a central role in the implementation of the Convention. The Convention regulates in particular the tasks and responsibilities of the Commission, which, according to Art. V, include, among others, the issuing of binding decisions for all states, provided that these are accepted by the majority, with the possibility of either opting out or contracting out<sup>11</sup>. Article VI of the Convention also provides for the possibility for the Commission to make recommendations to the contracting governments. The IWC therefore has extensive law-making powers<sup>12</sup>. This point is particularly significant with regard to the questions that have to be answered for the purpose of this legal opinion: not only do we have to judge possible distortions of results of votes on non-binding recommendations, but also of binding decisions<sup>13</sup>.

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<sup>9</sup> On the concept of International Organizations cf. for example, Malanczuk, pp. 92 et seq; Seidl-Hohenveldern/Loibl sub para. 0105 et seq.; Ipsen § 31 sub para. 5 et seq.

<sup>10</sup> At present, there are 38 member states.

<sup>11</sup> Opting out indicates a procedure whereby decisions taken by international organizations do not require ratification by the member states, but take effect on condition that individual states do not prevent them from becoming rule of law by lodging an objection; cf. Klein, in: Graf Vitzthum, 4. Section sub para. 198.

<sup>12</sup> Apart from in supranational communities such as the EU/EG, such law-making powers are still rarely to be found; the principal cases where this would apply are the ICAO, WHO, WMO and the IMO. Cf. also Alexandrowicz, *The Law-Making Functions of the Specialized Agencies of the United Nations*, 1973; Verdross/Simma § 629 et seq.

<sup>13</sup> With the reservation of opting or contracting out, as per Art. V (4) of the Convention.

13. Given the description of the duties of the Commission and also the fact that there is a secretariat, this means that an institutional superstructure with different bodies has been established by the Convention. Within the framework of these bodies, the common will of the contracting states are both formulated and implemented. The principal organ is the Commission, in which all of the contracting states are represented<sup>14</sup>. Consequently, the Commission is a so-called plenary organ which meets on a regular basis and which has drawn up its own procedures and operating regulations<sup>15</sup>. Even though Art. III, para. 1 of the Convention states that government members should represent the contracting states in the IWC, clause A./1 of the Rules of Procedure stipulates that the governments should appoint a Commissioner, who represents them in the Commission. Decision-making within the organization is therefore in the hands of the Commissioners who have been appointed by their national governments. The IWC has issued a set of Financial Regulations governing the financing of the institution and its activities.<sup>16</sup> These regulations regulate in detail all financial questions, including the annual budget, the annual accounts and the auditing of the annual accounts by a trust and auditing company qualified to carry out this task. It must also be pointed out here that the IWC itself is based on an agreement drawn up under international law and that it can make its own law, this being comparable with the secondary law of international organizations.

14. What is striking, however, from the point of view of the general principles of the law of international organizations, is the fact the Convention does not contain any provision stipulating that an international organization should be established with its own international legal personality. Furthermore, the Convention, in contrast to the typical statutes of international organizations, does not contain any details of the procedure for acceptance of new member states, but merely outlines the procedure for adherence to and ratification of the Convention<sup>17</sup>. The involvement of a state in the IWC therefore results exclusively from the unilaterally declared decision to accede to the Convention, but not from the acceptance of that state by a (majority) decision taken by the member states. Finally, there are no provisions outlining the immunity of the organization and of its staff, these being customary among international organizations.

15. Some doubt could therefore be expressed as to whether the IWC is an international organization with international legal personality<sup>18</sup>. The international legal personality

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<sup>14</sup> Art. III (1) of the Convention.

<sup>15</sup> Cf. Rules of Procedure, as amended by the Commission at the 48<sup>th</sup> Annual Meeting, June 1996.

<sup>16</sup> Financial Regulations, as amended by the Commission at the 48<sup>th</sup> Annual Meeting, June 1996.

<sup>17</sup> Art. X (1) provides for ratification by the signatory states, while Art. X (2) provides for adherence to the Convention for states which have not signed the Convention.

<sup>18</sup> Cf. for example, the message of the Swiss Federal Council to Parliament about the International Convention for the Regulation of Whaling on 15<sup>th</sup> August 1979, Official Bulletin 1979 III 630 et seq., in which a motion is put before Parliament for Switzerland to join the Convention, and where it is stated, *inter alia*, that the IWC is a purely executive organ. With regard to the international legal personality, the following observations can be found: "*The International Whaling Commission is a collective organ which expresses the common will of the contracting states. The IWC is not an autonomous unit with its own legal personality. It does not have the characteristics of a subject of international law and, in particular, it is not authorized to conclude international agreements.*" (Official Bulletin, Swiss Federal Council, 1979 III 635).

could, however, be said to result by implication from the legal bases. If we look at the Convention, it can be seen that fundamental principles of the agreement refer to the internal relationship between the various states. This notwithstanding, under Art. IV of the Convention, the IWC can work together with other organizations, institutions and commercial enterprises in certain fields, and these can include international organizations and member states. In addition, Clause C./4 of the Financial Regulations provides for the secretariat to open bank accounts, make payments and purchases, etc., on behalf of the Commission. From this, it is apparent that in certain areas at least the Commission is vested with commercial and legal personality, in particular as far as domestic matters are concerned. Furthermore, it seems entirely conceivable that, for example, co-operation agreements in the IWC's name are concluded with international organizations and special organs of the United Nations, etc. Similarly, the provisions of the Whaling Convention would appear not to exclude the IWC from attending conferences and meetings of international organizations as observers<sup>19</sup>.

16. To a certain extent then, the IWC can be seen as a borderline case. It can be considered either as a poorly developed international organization or as a special case of an agreement being drawn up under international law with an institutional superstructure<sup>20</sup>. When examining the problem in hand here, it must be borne in mind that the opinions of the IWC are formulated in basically the same way as in plenary organs of international organizations, e.g. in the UN General Assembly. It is therefore justified to make an analogy with the law governing international organizations. In clarifying the individual legal questions, it will be necessary to consider how close the formulation is to a normal agreement drawn up under international law. Indeed, this is imperative, as the Vienna Convention on the Law of Treaties<sup>21</sup> explicitly states in its Art. 5 that the Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization<sup>22</sup>.

### **III. PARTICIPATION RIGHTS OF STATES IN INTERNATIONAL ORGANIZATIONS; THE RIGHT TO VOTE**

#### **A. The right to vote as a right and as a function of office**

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<sup>19</sup> In accordance with the Rules of Procedure C.(1), international organizations can be granted entry to the meetings of the IWC as well, in the capacity of observers.

<sup>20</sup> Similar cases that could be cited here are, for example, committees and commissions that are set up on the basis of human rights' treaties; other examples in Seidl-Hohenveldern/Loibl sub para. 0118 et seq.

<sup>21</sup> UNTS vol. 1155, p. 331.

<sup>22</sup> Under the terms of its own Article 4, the Vienna Convention applies only to treaties which are concluded by States after the entry into force of the Vienna Convention itself. The Vienna Convention dated 23. 05. 1969 came into force more than 20 years after the Whaling Convention Washington came into force. Consequently, it cannot apply with immediate effect. It is, however, undisputed that the rulings contained in the Convention are now largely part of customary international law.

17. When a state becomes a member of an international organization, it adopts the laws and obligations arising from the law of the organization and adapts itself to the structure of that organization. The organizational structure is made up, in particular, of the organs in which the organization's policy is formulated and which represent the organization internationally. Given that policy-making within an international organization is based on the member states of the organization, every international organization in principle has a policy-making organ, the so-called plenary organ, in which all member states are represented<sup>23</sup>. In this organ, and also in other organs, the organization's policy is determined, this being an expression of the common will of the states with regard to the goals and areas of activity of the organization. The set-up within the IWC also corresponds to this situation. Among the rights enjoyed by a contracting state of the Whaling Convention is the right to a seat and a vote in the IWC<sup>24</sup>. With the exception of the secretariat, this latter body is the only organ and has thus come to be seen as the plenary organ. The organization's policy decisions are essentially formulated in this organ.

18. The right of every state to vote is thus one of the most important rights in international organizations; membership status is also always connected with the right to vote. There are in principle no organizations with states as members that do not possess the right to vote<sup>25</sup>. The right to vote is, however, not merely a right. It also constitutes involvement in the functioning of the body in question and is therefore essential for the operating of international organizations. This is evident in the fact that in some organizations decisions cannot be declared as legally valid unless a certain number of states takes part in the vote in the first place, or unless a certain number of states give their approval to the decision<sup>26</sup>. The right to vote therefore also has something of an obligation about it, combined with a responsibility, even though there is as a rule no actual obligation to vote.

19. The right to vote has to be exercised in accordance with the primary and secondary law of the organization. Many organizations have provisions governing procedure that lay down how decisions are taken within the organization and how voting has to be conducted. The same is also true for the IWC<sup>27</sup>. In contrast, however, rulings governing content are rare. In principle, the law of international organizations is based on the assumption that the right to vote will be freely exercised. Rulings concerning content refer primarily to reasons for abstaining from voting<sup>28</sup> or to the withdrawal or suspension of the right to vote by way of a sanction<sup>29</sup>.

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<sup>23</sup> Cf. also Ipsen § 31 sub para. 29.

<sup>24</sup> Art. III (1) of the Convention.

<sup>25</sup> Membership without a voting right can be granted, depending on the organization, in the form of associate membership or to status with observer status; more detailed information on this in Seidl-Hohenveldern/Loibl sub para. 0515 et seq.

<sup>26</sup> Cf. the Rules of Procedure of the IWC, B, for example, which stipulates that half of the commission members are required to make up a quorum; see also Art. III (2) of the Whaling Convention, which stipulates that a simple majority among the commission members present is required for decisions to be taken; however, under Art. V,  $\frac{3}{4}$  of the members present are required for decisions to be taken.

<sup>27</sup> Cf. Rules of Procedure E, see also Rules of Debate E.

<sup>28</sup> Cf. for example Art. 27 (3) UN Charter.

<sup>29</sup> Cf. for example Art. 19 UN Charter.

## **B. The pursuit of particular interests by states within the framework of international organizations**

20. The organs of international organizations are not merely responsible for formulating the common interests of the organization; they also serve to ensure that each state can safeguard its own interests within the area of activity of the organization concerned<sup>30</sup>. In principle, the pursuit of particular interests by a state within an international organization is allowed, albeit only within the boundaries of the law of that organization<sup>31</sup> if the organization's law includes provisions to this effect, and also within the boundaries of international law per se<sup>32</sup>.

21. Adherence to the law of the organization means, among other things, that the interests pursued by a given state may not directly oppose the organization's own aims and purpose<sup>33</sup>. By virtue of its loyalty to the organization, a member state is sworn to uphold these aims, even though it is in principle entitled, within the organs of the organization as well as in its bilateral dealings with the other member states, to work to bring about changes using political means. When states pursue particular interests, the means and methods employed in doing so must comply with the organization's law.

22. Furthermore, the means and methods employed must comply with international law in general. In particular, attempts at influencing may not violate the essential principles of the law of co-existence<sup>34</sup>. Such violations of the law and legal dealings on a bilateral basis between member states of international organizations in general do not necessarily have any bearing on the legal conditions within the organization. However, the situation has to be assessed differently when issues are involved that intrude upon the legal conditions of the organization in question, such as the right to vote. If, for example, a vote is cast in the light of a threat of force or the use of force against a member state<sup>35</sup>, the organs of international organizations must be in a position to react in an appropriate manner. It must also be mentioned that, in the practice of international organizations, general international law is often applied subsidiarily to

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<sup>30</sup> Cf. Seidl-Hohenveldern/Loibl sub para. 1101 et seq.; Ipsen § 31 sub para. 29.

<sup>31</sup> Seidl-Hohenveldern/Loibl sub para. 1102.

<sup>32</sup> This results from the extended validity of the general principles of international law within international organizations; cf. also Seidl-Hohenveldern/Loibl sub para. 1515;

<sup>33</sup> Even before an agreement comes into force, a state which has declared that it will to abide by the agreement is obliged to abstain from all actions that would thwart the aim and purpose of a treaty; cf. Art. 18 of the Vienna Convention on the Law of Treaties.

<sup>34</sup> The law of coexistence refers to the fundamental principles of international relations, as outlined, for example, under Art. 2 of the UN Charter which apply generally under customary international law. The well-known *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, which was adopted by the UN General Assembly in 1970, represents an attempt at an authentic interpretation of these principles of co-existence; cf. also text infra Nos 31 et seq.

<sup>35</sup> What a clear infringement of the principles of co-existence would mean; cf. Art. 2 (4) of the UN Charter.

deal with legal questions, even if there is no explicit reference to this in the statutes of the organization<sup>36</sup>. This is merely a result of the fact that international organizations do not as a rule establish any so-called self-contained regimes, i.e. self-contained legal systems which are autonomous vis-à-vis the other international law system, with independent mechanisms for enforcement and the imposing of sanctions<sup>37</sup>. Consequently, as far as the questions to be examined here are concerned, breaches of general international law relating to bilateral relations are relevant, even if such violations of the law do not automatically constitute violations of obligations of membership, for example.

#### **IV. SOVEREIGN EQUALITY OF STATES; PROTECTION OF THE FREEDOM OF WILL AND THE FREEDOM OF DECISION OF STATES**

23. The principle of sovereign equality normally applies for the voting right of member states of international organizations<sup>38</sup>. From this principle, it follows *inter alia* that the vote of every state has the same weight and that each state in principle has a vote in the organization<sup>39</sup>. The same is also true for the IWC<sup>40</sup>.

24. As a result of the sovereignty, the exercising of the right to vote is also protected, in the form of a freedom of will and a freedom to decide on the part of the states. States should be allowed to formulate their own will. It therefore follows that – leaving aside some exceptions that are not of interest here – states may not have any obligations deriving from international law imposed against their will<sup>41</sup>. One state may therefore not impose its will on another state. Instead, it should be possible for the will of a state to be formulated in as unadulterated way as possible. In this way, the political policy-making procedures in a state can also be protected by ensuring that pressures on the institutions and organs of a state are not permissible, constituting as they do a violation of the sovereignty and right of self-determination<sup>42</sup> of the state in question.

25. As far as the involvement of states in international organizations is concerned, it can be concluded from this that, as a result of the principle of sovereign equality, states are entitled to exercise their membership rights in international organizations freely, including as well an entitlement to exercise their right to vote freely. This freedom is restricted only if the law of the organization dictates it. On this point, there

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<sup>36</sup> Cf. also Seidl-Hohenveldern/Loibl sub para. 1512et seq.

<sup>37</sup> If a self-contained regime is in place, only that regime's means for implementing and enforcing decisions may be applied; the means provided for under general international law are not applicable in this case; cf. also the ICJ in the Teheran Hostage Case, ICJ Reports 1980 41; see also Ipsen § 59 sub para. 47.

<sup>38</sup> Cf. explicitly Art. 2 Fig.. 1 UN Charter. See also Seidl-Hohenveldern/Loibl sub para. 1132.

<sup>39</sup> Seidl-Hohenveldern/Loibl sub para. 1132. Regarding the exceptions, i.e. the cases of vote weighting, cf. Seidl-Hohenveldern/Loibl sub para. 1133 and following pages. The most celebrated cases of vote weighting are the Bretton Woods Institutions (IMF, World Bank) and the EU.

<sup>40</sup> Cf. Art. III (1) of the Convention of Washington.

<sup>41</sup> Seidl-Hohenveldern, sub para. 323.

<sup>42</sup> Seidl-Hohenveldern/Stein sub para. 1446 et seq.

are explicit rulings governing the exercising of the right to vote. For example, Art. 19 of the UN Charter stipulates that a member state's right to vote at the General Assembly is suspended if this member state is in arrears in the payment of its financial contributions to the Organization and if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. In addition, Art. 27 (3) of the UN Charter states that parties to a dispute represented in the Security Council must abstain from voting on certain decisions to be taken by that body.

26. It is not only the states themselves that have a considerable interest in seeing that the principles of freedom of will and freedom of decision are adhered to by all states in votes held within international organizations. For when states participate in policy-making processes, they are exercising not only their own sovereign rights, but also, in tandem with the other member states, a function of office. Because the member states' freedom of decision is protected as part of the principle of sovereign equality of states, this being a structural principle of international organizations, there is a guarantee that the decisions taken by organizations do in fact represent the true will of the majority of the states, i.e. the results of votes are not distorted by undue pressures and factors that are unrelated to the issue.

## **V. IMPAIRMENTS OF THE VOTING RIGHT AND/OR OF THE FREEDOM OF WILL AND FREEDOM OF DECISION ON THE PART OF STATES**

### **A. General remarks**

27. The sovereign rights of a state are violated if that state is involuntarily not able to exercise its voting right or if it is forced to cast a vote under circumstances that do not allow it to express its will freely. Such impairments of the voting right, which constitute a violation of sovereignty, can occur as the result of actions taken by the organization or by its organs, or as the result of actions taken by other states.

### **B. Interference by international organizations**

28. International organizations are bound by the principle of sovereign equality of states<sup>43</sup>; their organs therefore have to respect the voting right of the states. These organs can violate the membership rights of a state and its sovereign rights by, for example, withdrawing that state's right to vote through the organs of the organization without any legal basis under the law of the organization. This can be done quite generally or in relation to a particular matter. Excluding or suspending a member state from the right to vote requires a legal basis in the primary or secondary law of the organization concerned, since this is the most important right of membership of an organization's member states. Consequently, international organizations generally have provisions, whereby, under predetermined circumstances, states can be excluded

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<sup>43</sup> Explicitly Art. 2 (1) of the UN Charter; these deal with a general principle.

from the right to vote<sup>44</sup>. It is also conceivable to have a legal basis incorporated in the practice of the organization in the form of an extension of primary or secondary law. General principles of law also form a possible basis<sup>45</sup>. Occasionally organizational practice also resorts to other ways and means, the result of which is equivalent to withdrawal of the right to vote. In certain cases, the representative dispatched by a state or government was not recognized, with the result that the state in question could not exercise its voting right<sup>46</sup>. The admissibility of such conduct under international law is, however, debatable.

### **C. Interference by other member states: The ban on use of force**

29. Third states can also violate the freedom of will and freedom of decision of a state by attempting to exert an influence on that state's voting behavior. States are admittedly at liberty to attempt in the course of political bargaining to persuade other states away from a given stance in a matter that is to be voted on. However, these attempts may not extend so far that a state has an opinion imposed upon it, which is contrary to its own; in other words, it can no longer freely exercise its own will<sup>47</sup>.

30. There is a long tradition in international law relating to the inadmissibility of behavior in international relations whereby a state has a standpoint that runs counter to its own imposed on it. Such conduct constitutes intervention or interference in the affairs of another state, and is proscribed under international law<sup>48</sup>. The Convention on Rights and Duties of States of 26<sup>th</sup> December 1933, of which nearly all South-American states are members, stipulates in Art. 8 that: "*No state has the right to intervene in the internal or external affairs of another*"<sup>49</sup>. The ban on intervention as laid down in the above Convention refers explicitly to the area of foreign policy and the external relations of a state, into which category voting behavior within international organizations also falls<sup>50</sup>.

31. In a similar way, the famous *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* also defines the ban on intervention as one of the central principles of international relations. This Declaration was solemnly adopted by consensus, i.e. without a formal vote, by the UN General Assembly in 1970 after many years of preliminary work<sup>51</sup>:

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<sup>44</sup> Cf., for example, Art. 19 of the UN Charter

<sup>45</sup> On the significance of the general principles of law in the law of international organizations: Seidl-Hohenveldern/Loibl sub para. 1613.

<sup>46</sup> This mainly concerned South Africa; cf. also Verdross/Simma § 114 FN 16 with further references.

<sup>47</sup> In detail on this point: Damrosch pp. 1 et seq..

<sup>48</sup> Cf. also Damrosch pp. 3 et seq..

<sup>49</sup> See also Damrosch pp. 6 et seq.

<sup>50</sup> On the validity of the ban on intervention in foreign policy, see also Seidl-Hohenveldern/Stein sub para. 1453 et seq.

<sup>51</sup> G.A. Res 2625 (XXV), adopted by consensus by the UN General Assembly on 24<sup>th</sup> October 1970; a forerunner to this was the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*

*"The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter:*

*No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other States. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.*

*No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or to interfere in civil strife in another State.*

..

*Every State has an inalienable right to choose its political, economic social and cultural system, without interference in any form by another State.*

..."

32. This excerpt from the declaration stipulates *inter alia* protection for the states in their internal and external affairs of policy against direct or indirect interventions from individual third states or groups of states. This protection refers to the use of or threat of force. In addition, in general terms, emphasis is placed on the inadmissibility of the use of economic, political or any other type of measure to coerce a state in order to obtain from it the subordination of the exercising of its sovereign rights, with the aim of securing advantages from that state. This ban applies for interference in both the internal and external affairs of a state.

33. The right to vote in an international organization constitutes an activity of foreign policy of a state. It is therefore protected by the international ban as well. The involvement of states in international organizations and treaties with an institutional structure has become increasingly important in recent decades, just as the significance of organizations and multilateral treaties has also grown considerably in significance. Involvement in international organizations, i.e. the exercising of the rights associated with that involvement, and in particular the right to vote as well, is a central pillar of the foreign policy of every state. Every state must therefore be free in principle to decide how it exercises these rights.

34. From the point of view of international law in general, there are two criteria in particular that are crucial in determining whether a case of improper intervention or improper interference in the internal and/or external affairs of a state has occurred, namely the voluntary nature of the decision of the state in question<sup>52</sup> and the means employed<sup>53</sup>. If a state decides to vote in a certain way of its own free will within an international organization, no improper coercion can be said to have taken place. "Of its own free will" means that the will of the state in question has been formulated as part of the customary political decision-making processes of that state, in such a way

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*and the Protection of Their Independence and Sovereignty* of 21<sup>st</sup> December 1965, G.A. Res 2131 (XX). General remarks on this: Damrosch pp. 8 et seq.

<sup>52</sup> If a decision is taken by a state of its own free will, no coercion has taken place.

<sup>53</sup> General remarks on this point: Ipsen § 59 sub para. 52 et seq.; see also Doehring sub para. 124.

that the will of the state is expressed in an unadulterated manner. A state can admittedly opt to determine its decision-making process within an institutionalized or ad hoc group of states jointly, together with other states<sup>54</sup>. However, if when voting the state does not adhere to the joint stance adopted, the organization is still bound to accept this departure away from the agreed stance on account of the sovereign equality of states.

35. In contrast, what does constitute improper conduct are attempts, using whatever methods, made by one state to induce another state to vote in such a way that the will of the voting state can no longer be expressed in an unadulterated manner. This represents an intervention in the foreign policy decision-making processes of a state, in such a way that these decision-making processes no longer function in the correct way or are bypassed altogether. The methods used can be considered either as improper under international law per se or, given the concrete circumstance, as a full violation of international law. This will be discussed subsequently.

## **VI. ASSESSMENT OF INDIVIDUAL METHODS USED IN THE EXERTION OF INFLUENCE BY STATES**

### **A. Methods which constitute a violation of international law per se**

#### *1. General remarks*

36. Among the methods which constitute a violation of international law per se, two main categories must be stressed in particular; namely the use of or the threat of force against a state, and the corruption of a representative of a state or the threat of force against a representative of a state. The corresponding provisions of the Vienna Convention on the Law of Treaties of 23. 5. 1969 provide an analogy for the inadmissibility of these methods. Votes conducted within international organizations cannot be equated with the concluding of treaties/agreements between states under international law. However, decisions taken by international organizations and decisions by plenary organs constitute an independent source of international law, if they are legally binding<sup>55</sup>. The legal relationship of the IWC to a contractual institution without its own international legal subjectivity, combined with the fact that the IWC is empowered to take legally binding decisions, i.e. authorized to make laws<sup>56</sup>, justifies the application of the corresponding provisions of the Vienna Convention on the Law of Treaties. Added to this is the fact that these provisions safeguard precisely those legally protected rights that are of significance in the case of exertion of influence on

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<sup>54</sup> The EU states agreed jointly upon their position vis-à-vis GATT in the EU decision-making processes. Co-ordination of voting behavior within regional organizations and on the part of groups of states does not pose any problem, provided that fixing of voting behavior in this way stems either from an agreement-based precommitment on the part of the states or from their willingness to be involved in such conduct.

<sup>55</sup> See also Malanczuk p. 52 et seq; Ipsen § 31 sub para. 43 with further references.

<sup>56</sup> With the possibility of opting out as well.

voting behavior, namely the sovereignty and freedom on the part of a state in its decision-making process.

## 2. *Threat or use of coercion against a state*

37. The exertion of pressure against a state by threatening or using force to induce that state to vote in a certain way in an international organization clearly constitutes illegal conduct under international law. The use of or threat of force violates *erga omnes* mandatory international law currently in force and represents one of the most serious breaches of international law possible<sup>57</sup>. It is the strongest form of an inadmissible intervention. As a rule, the legal consequences resulting from the use of or threat of force are invalid under international law and cannot be recognized under the principle *ex iniuria ius non oritur*<sup>58</sup>. Thus, it is in principle uncontested that any changes in a state's territory resulting from the use or threat of force cannot be recognized<sup>59</sup>. Furthermore, Article 52 of the Vienna Convention on the Law of Treaties stipulates that the use of these methods against a state to bring about the conclusion of a treaty will lead to that treaty being declared null and void, which clearly serves to illustrate the extraordinary degree of unlawfulness that such conduct represents. From this it can be concluded that the exercising of these methods against a state to coerce that state into a certain voting behavior within an international organization is likewise also clearly illegal under international law. A state that has to take decisions in respect of its foreign policy under the threat of force or with force exercised against it, i.e. under circumstances that possibly threaten its very existence (state of emergency), does not formulate this policy of its own free will.

## 3. *Corruption of representatives of a state*

38. Another of the improper methods used is corruption of the representative of a state. If the representative of a state is corrupted in such a way that he exercises his state's right to vote contrary to instructions, i.e. contrary to what has been agreed with his home state, the will and therefore the sovereign rights of the state in questions are violated, since the vote cast by this representative of the state does not correspond to the true will of the state. The Vienna Convention on the Law of Treaties therefore contains a provision in Art. 50, whereby a state may invoke such corruption as invalidating its consent to be bound by the treaty. This legal consequence, which refers to treaties/agreements, cannot automatically be applied to votes conducted within international organizations, as such votes cannot be equated with the conclusion of treaties/agreements<sup>60</sup>. However, Art. 50 clearly illustrates the extent of illegality that corruption of a state's representative constitutes. Such conduct means that the expression of will of a state does not correspond to its true will and therefore violates

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<sup>57</sup> Cf. also Art. 2 (4) of the UN Charter; Malanczuk p. 309 et seq.

<sup>58</sup> Ipsen § 23 sub para. 42 et seq.

<sup>59</sup> Ipsen § 23 sub para. 43.

<sup>60</sup> Cf. beginning of sub para. 36.

its sovereign rights. The same is also true for votes conducted within international organizations.

#### 4. *Coercion of a representatives of a state*

39. Another improper method used is the exercising of coercion against a representative of a state. Coercion of a representative of a state by threatening or by other actions to induce this individual to vote in accordance with the wishes of another state also constitutes a violation of the sovereign rights of the country of origin of this representative of state, since, in this case as well, the will expressed do not correspond to the true will of the state in question, i.e. the correct decision procedures with regard to the determination of the foreign policy of the home state are violated or bypassed. According to Art 51 of the Vienna Convention on the Law of Treaties, such an offence means that a state's consent to be bound by a treaty is without any legal effect. By analogy then, the exercising of coercion against a representative of a state in connection with votes in international organizations is also inadmissible under international law.

### **B. Other forms of coercion that contravene international law or the misrepresentation of a state's expression of will**

#### 1. *General remarks*

40. With the methods that have been outlined thus far, contravention of international law has been particularly in evidence, and it is for this reason that these methods have been subject to a ruling for treaties/agreements at international level. These are particularly blatant cases of exercising coercion or of misrepresenting a state's expression of will, which in themselves contravene international law. There are also other methods that may or may not be seen as contravening international law, depending on the circumstances.

41. We can take as a starting point the outlining of the means which the Declaration on Friendly Relations describes as improper conduct in paragraph 2 of the section concerning the ban on intervention. As a result of the use of these means, a state is forced to relinquish exercising its sovereign rights and, in this way, particular advantages can be obtained from it. The exercising of coercion using economic, political or other means is particularly prominent here. It must also be borne in mind that the declaration describes direct or indirect intervention in the domestic or external affairs of a state in general as inadmissible. Finally, it must be remembered as well that during the conference at which the Vienna Convention on the Law of Treaties was concluded, the request from socialist states and third-world countries to give the concept of force, as described in Article 52 of the Convention, an extensive meaning, so that it would also include the exercising of economic and political pressure, was rejected<sup>61</sup>. The conference did, however, unanimously decide on a declaration that was accepted into the Final Act. According to this declaration, political or economic

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<sup>61</sup> Cf. Ipsen § 15 sub para. 30.

pressure is incompatible with the sovereign equality of states and with the freedom of consent<sup>62</sup>.

42. Conversely, it must be stressed that political, economic and other means are frequently employed in bilateral relations, in order to persuade states to adopt a certain conduct. It is important from the legal point of view to ascertain whether or not the use of these means can be equated with a coercion that ultimately leads to the improper functioning of the decision-making processes in domestic and/or foreign policy matters. This means, in the light of the concrete circumstances, that the methods used have to be categorized as dishonest and no longer fair. In principle, the methods used to achieve the political aim that is being striven for have to be both relevant and in proportion.

### *2. Corruption of politicians*

43. By way of an example, it would be improper if one state were to corrupt influential politicians from another state and thereby achieve a situation where the corrupted officials' state supported the interests of the corrupting state in a vote within an international organization. The lobbying of one state by politicians of another state is not fundamentally improper<sup>63</sup>, although there are opinions in literature that do consider it to be so<sup>64</sup>. If, however, this lobbying is combined with payments of bribes or slush money or of other personal advantages, which then lead to the situation where politicians predominantly support the interests of a third state rather than those of their own state or their own electorate, such methods do certainly appear to be unfair<sup>65</sup>. It also means that the decision-making processes in such states are distorted, since extraneous criteria, i.e. personal advantages, influence decisions that should in fact be taken strictly in the interests of that state's policy.

### *3. Retorsion and Reprisal*

44. It is likewise improper conduct if a state resorts to countermeasures, i.e. to retorsion or reprisal, or threatens to use these in order to force another state to vote in a certain way. Under international law, retorsion is in itself a permissible reaction to a hostile act or a violation of international law committed by another state; it does itself constitute a hostile act, but is nevertheless permissible as a reaction to a hostile act or to a violation of international law<sup>66</sup>. Subject to special obligations under international law, the manner of exercising the right to vote can, however, never be seen as either a hostile act or a violation of international law, but is rather an expression of the freedom of will and decision of the state. Consequently, there is as a rule no actual

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<sup>62</sup> UN Doc. CONF.39/11/Add. 2, 285, also in: ZaöRV 1969 693; see also Ipsen loc. cit. on this

<sup>63</sup> For detailed information: Damrosch *passim*.

<sup>64</sup> Damrosch *op. cit.*

<sup>65</sup> Cf. also the legislation in individual states which forbid the support of parties by third states; see Damrosch pp. 21 et seq.

<sup>66</sup> Seidl-Hohenveldern/Stein sub para. 1775; Doehring sub paras 1025 et seq.

connection between the threatened or executed act of retorsion and the goal which the act of retorsion seeks to achieve, which ultimately constitutes an interference in the rights of the state concerned. As it is not relevant to the issue in hand, such a measure violates the freedom of decision of the state concerned.

45. This is all the more true for reprisal, which is a reaction to a violation of international law. Reprisals intrude upon legal rights of a state that are protected under international law. They are justified as countermeasures only if a state has violated norms of international law<sup>67</sup>. It is therefore not permissible if, for example, one state suspends international treaties and therefore stops any benefits that another state is supposed to receive under the provisions of the treaty, with the aim of inducing the other state to behave in a certain way, which it would not otherwise be entitled to do under international law. The suspension of treaties constitutes cause for a sanction on account of treaty violation and is illegal under international law, if it is not a reaction to a previous illegality under international law<sup>68</sup>. Free exercising of the right to vote is not normally a violation of international law. Reprisal in response to a certain voting behavior therefore has no permissible objective under international law; it does not serve the purpose of encouraging the state in question to conduct itself in a manner that conforms to international law<sup>69</sup>. Countermeasures are, accordingly, inadmissible. This is all the more the case when we consider that a state is not only exerting its own will concerning foreign policy, but it is also exercising a function of office within an international organization.

### **C. The linking of economic and financial assistance with exercising of the voting right**

#### *1. Issues*

46. To what extent is it permissible to make the granting or continuation of economic assistance to a state dependent on that state giving its political support to the state granting the economic and financial assistance or on exercising its right to vote in a certain way? It could be argued that if the assistance is granted voluntarily, the ban on intervention in the external affairs of a state is not being breached if the donor state has decreed that the economic assistance is granted on condition that the receiving state pursues an external and/or domestic political stance that is convenient for the donor state. As long as we are dealing here with conduct that stems from a voluntary decision and is not based on any obligation arising from international law, the donor state is at liberty to make its gesture conditional on the receiving state adhering to a particular political line<sup>70</sup>. Distinctions do have to be made, however, as far as this viewpoint is concerned.

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<sup>67</sup> Malanczuk p. 271 f.; Seidl-Hohenveldern/Stein sub para. 1776; Doehring sub paras 1029 et seq.

<sup>68</sup> Doehring sub para. 1029.

<sup>69</sup> On this general prerequisite for reprisals, see also Doehring sub para. 1032

<sup>70</sup> e.g. Seidl-Hohenveldern/Stein sub para. 1454.

## 2. *The threat of stopping financial and economic assistance*

47. Although it is true that voluntary economic assistance can be made conditional on certain stipulations, these stipulations must observe the inalienable rights of the states in their international relations, in such a way that the state receiving the assistance is able to take decisions voluntarily<sup>71</sup>. Seen from this angle then, the stopping of or threat to stop economic assistance in order to induce a state to cast its vote in a certain way must be viewed with a critical eye from the point of view of international law. The stopping of economic assistance that had been voluntarily granted previously would appear to constitute either a retorsion or the threat of retorsion, i.e. a hostile act, this being permissible only as a reaction to another hostile act or to a violation of international law. Exercising of the right to vote is, however, an inalienable right of member states of international organizations. Consequently, acting in this way is illegal<sup>72</sup>.

48. This is all the more the case if the state concerned is dependent on this economic assistance. States can find themselves in dire predicaments if, for example, they receive economic assistance from different states with conflicting interests. The following example illustrates this point: State A is dependent on foreign economic assistance. State B, which has previously given its unconditional economic support, now makes this assistance conditional upon State A supporting its standpoint within certain international organizations. State C has thus far likewise granted unconditional economic assistance to State A. State C, however, has an opposing stance to State B. In order to exert pressure on State A, State C announces that it will likewise not continue to grant the economic assistance unless State A supports its position. State A thus finds itself caught in a hopeless conflict situation and automatically loses out, irrespective of how it decides to proceed. It is apparent from this that such action on the part of States B and C is not compatible with the sovereignty and the freedom of decision of State A.

## 3. *The linking of new economic and financial assistance with a commitment to exercise the voting right in a specific manner*

49. At first glance, the situation must be judged differently if State B offers State A economic assistance either with the request or on the expectation that State A will exercise its right to vote within an international organization to suit the interests of

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<sup>71</sup> The following explanations are restricted to the relations between states. However, they cannot automatically be applied to the relationship between states and international organizations; cf., for example, the International Monetary Fund, which often attaches certain conditions to the financial contributions it makes to states with economic difficulties, whereby the economic and financial policy of the receiving state has to be adjusted. Nevertheless, these conditions are the result of open negotiations with the state that are often discussed in public as well.

<sup>72</sup> What does not pose a problem, however, is the cutting or suspension of economic and financial aid on account of violations of human rights in the receiving state as part of blanket suspension of foreign aid or if there is a general change in the foreign aid policy of the donor state; cf. also Damrosch 34 et seq.

State B. It appears on the face of it that both sides have voluntarily entered into the agreement. State B makes a payment, which it would not be obliged to do under international law, this being subject to certain explicit or tacit conditions that have to be fulfilled by State A. State A is free to decide whether it wishes to accept this contribution under the conditions demanded by State B. In these circumstances, State A can possibly even “auction” its vote, provided that it does not have its own specific material interests arising from the issue to be decided. State A can approach State C, from which it already knows that State C holds a different viewpoint from State B, and then induce State C to make a higher offer.

50. In such a situation, for either financial or economic reasons, State A submits to the will of third states in a question relevant to the issue itself, albeit voluntarily. This does not necessarily mean that there will be a violation of the normal decision-making processes in a state. States that enter into such agreements can also adopt the view vis-à-vis the organizations and their member state that the agreement concerns only the parties to that agreement and not third parties for which the agreement constitutes a *res inter alios acta* in the sense of Art. 34 of the Vienna Convention on the Law of Treaties. Consequently, the agreement should – or indeed *cannot* – concern the organization or its member states.

51. This viewpoint overlooks the fact that an agreement of this nature has repercussions on the international organization concerned, because State A is no longer exercising its right to vote on the basis of objective criteria. What is uppermost in its mind when taking its decision is not the matter in hand to be judged, but rather its own economic interests in its relations with another member state. State A receives payment indirectly for exercising its right to vote. Admittedly, bilateral agreements between member states of international organizations that have an influence on voting behavior are in principle independent of the legal relations that have been created both with and within the international organizations<sup>73</sup>. However, as will be shown subsequently, such bilateral agreements bring about behavior that is not compatible with the membership rights in international organizations and does in fact violate their law<sup>74</sup>.

#### 4. *Vote-buying in the strictest sense*

52. The granting of economic advantages in return for the casting of a vote to suit the state that is granting the advantages does not constitute direct vote-buying in the sense of a direct association between economic and/or financial advantages and the casting of a vote. This link is more an indirect one, in that there is an agreement between the states involved in respect of what is expected when the vote is cast, although this expectation is not normally the subject of an agreement directly. With vote-buying, on the other hand, there is a direct association between the advantages and the casting of

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<sup>73</sup> These are a *res inter alios acta* according to Art. 34 of the Vienna Convention on the Law of Treaties.

<sup>74</sup> Cf. *infra text Nos 54 et seq.*

the vote. The state that is set to receive the advantages promises in return to cast its vote to suit the donor state.

53. Any considerations concerning the legal situation of economic and financial assistance must apply all the more to vote-buying in the strictest sense, because there is clearly a direct link here between financial/economic advantages on the one hand and voting behavior on the other. Such an agreement, which is a voting right commitment agreement based on financial motives, or a vote-buying agreement, intrudes directly upon the affairs of the international organization. In general terms, the question remains whether voting right commitment agreements are permissible. Commitment concerning voting right is particularly problematic in view of the principle of sovereign equality of states as a structural principle of international organizations.<sup>75</sup> What is not permissible in any event is vote-buying, since the vote is being cast in such a case solely in connection with financial considerations in the interest of a third state, and not on the basis of objective considerations with a view to the *raison d'être* of the organization. As will be shown subsequently, this constitutes a violation of membership obligations.

#### **D. Violation of structural characteristics of international organizations and of membership obligations**

##### *1. Incompatibility with structural characteristics of international organizations*

54. For various reasons, the practices and agreements examined thus far appear in principle to be incompatible with the structural bases of international organizations:

- When they occur individually or in numbers, these phenomena can lead to a situation where majorities are either changed or reinforced in elections because of financial considerations. This then means that financial rather than objective standpoints become crucial for the outcome of decisions. In consequence, the results of votes become increasingly distorted.
- Such practices and agreements lead to opaque decision-making processes in international organizations, because the linking of economic assistance with a certain voting behavior is not generally made public. This lack of transparency can be intensified if states demand a secret ballot to enable them to better conceal their voting behavior.

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<sup>75</sup> Such commitments must be transparent in any event, i.e. they must as a rule have a foundation based on international law, they must be based on factual motives and they must be reversible, thus ensuring that the principle of sovereign equality of states is fully respected. With supranational communities, there is another appreciation of the situation. These communities have taken under their own wing certain responsibilities that used to be reserved to the states and now exercise these responsibilities through the organs of the community. In such cases, there is a commitment concerning the voting right governed by an agreement. This notwithstanding, a vote cast by a member state against the decisions taken by the community in the international organization would have to be recognized, in particular on account of the sovereign equality of states and also because decisions of the community as a *res inter alios acta* are not binding for the organization.

- If the granting of economic advantages to secure a certain voting behavior within international organizations were to become a widespread phenomenon, richer states would increasingly be able to determine the content of what is decided. This in turn would lead to the economically weaker states being placed at a disadvantage once again, and in particular among the global organizations.

55. Seen as a whole, the practice of granting economic advantages in return for a certain voting behavior would, as a broader phenomenon, undermine the formation of political will and the decision-making processes within international organizations; it would also impede their efforts to achieve their aims, while also threatening the credibility of international organizations. Such practices are therefore ultimately incompatible with the rights and objectives of a member state of international organizations. This applies both for the state that is granting the economic assistance in return for a certain voting behavior as well as for the state that accepts such conditions.

## *2. Violation of membership obligations, especially of the principle of acting in good faith in exercising membership rights*

56. What is violated here in particular is the principle that, in view of the rights and duties of member states of international organizations, these states have a commitment to the principle of acting in good faith<sup>76</sup>. We are dealing here with a general principle of Law in accordance with Art. 38 (1) of the ICJ Statute, i.e. with a formal source of international law, which, although it can be applied only subsidiarily, is of importance in exactly those areas where rulings on treaty law or on customary law do not exist<sup>77</sup>. The principle of good faith refers in practice above all to the fulfillment of obligations under international law.<sup>78</sup> It is nevertheless undisputed that it applies as well for the exercising of rights. Consequently, the exercising of rights in a manner that is counter to the principle of *bona fides* constitutes an abuse of a state's rights<sup>79</sup>. Furthermore, under Art. 31 (1) of the Vienna Convention on the Law of Treaties, the principle of good faith is a basis for interpretation of treaties drawn up under international law<sup>80</sup>. Since Art. 5 of the same Convention stipulates that the Convention applies to any treaty which is the constituent instrument of an international organization, constituent treaties can and must be interpreted according to the principle of good faith, bearing in mind the aim and purpose of the organization.

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<sup>76</sup> Cf. for example Art. 2 (2) of the UN Charter. Although this does refer to the principle of good faith only in terms of the obligations outlined under the UN Charter.

<sup>77</sup> On the function and the meaning of general principles of law see also Doehring, sub paras 407 *et seq.*

<sup>78</sup> Cf. for example Art. 26 of the Vienna Convention on the Law of Treaties, which states under the title 'Pacta sunt servanda': "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

<sup>79</sup> For example Alfred Verdross, *Völkerrecht*, 2<sup>nd</sup> Edition, Vienna 1950 p. 493. For detailed information, Doehring sub paras 410 and 417.

<sup>80</sup> Art. 31 (1) of the Vienna Convention on the Law of Treaties reads thus: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

57. The obligation to fulfill commitments under international law in good faith also includes the obligation that membership rights in international organizations may not be exercised in an improper manner. The principle of loyalty to the organization applies here, i.e. that membership rights must be exercised in good faith with a view to the common aims of the member states. Therefore, if financial advantages alone become the decisive factor when the voting right is exercised, rather than objective motives, a state that allows itself to be promised or granted financial advantages in return for voting in a certain way is acting in a manner that is abusive of its rights. This state is exploiting its voting power solely for short-term financial advantages that it stands to gain for itself in return for supporting a third state, and is thus no longer displaying a commitment to the pursuit of the common aims of the organization. This constitutes abuse of the state's voting right, which is not merely a right of the member states but also a function of office that is also connected with other responsibilities.

58. The state that either grants or promises to grant economic advantages to third states, to ensure that these states will vote according to its wishes and to its advantage, is also acting improperly and committing a breach of its loyalty to the organization. Although a state is free to represent and promote its own interests within international organizations, it is not free to choose the methods it adopts. As a result of its membership, a state obtains a status that is linked to rights and obligations; some of these are also functions of office and are combined with responsibilities. Consequently, the methods used to exert influence may not contravene international law, nor may they be unfair or dishonest practices. The use of economic and/or financial means may place states in such a predicament that they can no longer freely exercise their sovereign rights. The state exercising influence in this way is thus violating the norms of the right of coexistence. It is to be assumed that this is particularly the case for economically weaker states, these being the main targets for attempts at influencing decisions. A state that attempts to alter the voting conditions to its advantage by using financial and other economic means is also seeking to induce other member states to abuse their membership rights. It is therefore opting to exercise its membership rights in a manner that no longer corresponds to the basic requirements for the determining of political will and decision-making processes within international organizations. It is seeking to distort the will of the organization. The exercising of membership rights in this way is an abuse of these rights and the means used are unfair, i.e. improper.

#### **E. Integrity of the motives and means**

59. When exercising their membership rights, member states of international organizations are bound by the principle of good faith. Consequently, they may not exercise these rights, including, for example, their voting right, in an abusive manner. They can seek to exert influence on other member states, in order to persuade these states to vote according to their interests. However, in choosing the methods that they will employ, member states of organizations are bound by the obligations arising from their membership. They may not use any methods that are incompatible with the orderly functioning of the decision-making processes of the organization. When

choosing their methods, the member states must adhere to the principle of good faith. It follows from this that there are unfair methods which undermine the decision-making procedure and/or which constitute an abuse of rights.

60. Economic and/or financial advantages as a direct or indirect service in return for a vote being cast in a certain way constitute an abuse of rights. The result is that decisions are taken in international organizations on the basis of criteria that are not related to the issue. Because of such practices, other member states are induced to abuse their voting right, as financial or economic advantages, which are granted by or promised by a third state, are unrelated motives for exercising the right to vote. In consequence, decisions are taken by international organizations on the basis of unrelated criteria and the majority stance is distorted. States that seek to alter the majority stance in this way are abusing their membership rights and thereby violating their membership obligations as well.

## **VII. LEGAL EFFECTS**

### **A. Can the rules of the Vienna Convention on the Law of Treaties be applied?**

61. As constituent treaties of international organizations are multilateral treaties, the rules concerning the legal effects of treaty violations can be applied to them, unless the constituent treaty contains special stipulations<sup>81</sup>. Art. 60 (2) of the Vienna Convention on the Law of Treaties contains a ruling on the legal effects of material breaches of treaties by one of the parties to the treaty. According to this provision, if there is a material breach of the treaty by one of the parties, the remaining parties to the treaty are justified, either jointly or under certain circumstances individually as well, in terminating or suspending the treaty altogether or solely in the relations with the defaulting party. When applied to international organizations, this can virtually amount to the expulsion or suspension of membership of the defaulting state. However, according to Art 65 and the subsequent Articles of the Vienna Convention a special procedure would need to be followed for this. In practice, though, this procedure is not much observed and has not become customary international law. In addition, there is the fact that international organizations or their member states are frequently not interested in expelling one of their members, because once that member has been expelled or resigned from the organization, it is no longer bound by the primary and secondary law of the organization<sup>82</sup>.

### **B. Countermeasures**

62. Countermeasures may be taken or sanctions imposed against a member state, in order to urge it to fulfill its obligations arising from the law of the international

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<sup>81</sup> Cf. Seidl-Hohenveldern/Loibl sub paras 2001 et seq.

<sup>82</sup> Seidl-Hohenveldern/Loibl sub para. 2032.

organization. A possible scenario here would be either sanctions imposed by the organization itself or countermeasures from the individual member states.

63. Countermeasures on the part of the organization are possible if the constituting instruments of the organization provide for such measures<sup>83</sup>. It would be conceivable, for example, to impose economic sanctions against a state that violates its membership rights, as well as suspending that state's membership rights and taking other measures which could go as far as expelling the state from the organization<sup>84</sup>. In addition, the organs or international organizations, and in particular the plenary organ, can always discuss and condemn the conduct of the defaulting state<sup>85</sup>.

64. One possible sanction is also for the organization to withdraw or suspend the state's voting right on account of this abuse or of a violation of other membership obligations. An organization is authorized in principle to regulate questions relating to the voting right as part of the organization's implied powers<sup>86</sup>. The organization can therefore decide as well that, under certain circumstances, a state's voting right is withdrawn or suspended. However, such rulings do require a legal basis in the law of the organization, given that the right to vote is the crucial right of participation for states in international organizations. This means that the basis for withdrawal or suspension of a state's right to vote must be explicitly or implicitly provided for in the constituting treaty of the organization.

65. In addition, an organization can employ procedural measures to prevent a distortion of the result of a vote or to correct a result that has been distorted:

- One of the common measures used is to order a secret ballot. However, because of the lack of publicity about the voting in such a case, a secret ballot can do more to promote a distorted result rather than preventing it<sup>87</sup>. At the IWC, there is the procedural obstacle that the secret ballot would probably first have to be agreed to by the states taking part in the ballot<sup>88</sup>.
- A ballot may be repeated if there is substantial evidence that a ballot result has been distorted by dishonest practices. This would be conceivable, for example, in

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<sup>83</sup> General remarks on the countermeasures taken by international organizations Seidl-Hohenveldern/Loibl sub paras 2004 *et seq.*; Ipsen § 31 sub paras 17 *et seq.*

<sup>84</sup> On expulsion of states Seidl-Hohenveldern/Loibl sub para. 2030 *et seq.*

<sup>85</sup> Seidl-Hohenveldern/Loibl sub para. 2009.

<sup>86</sup> Implied powers means the responsibilities of international organizations that are not directly provided for in the primary law of the organization, but which are necessary for the organization to be able to fulfill its tasks; cf. also Ipsen § 6 sub para. 8 f. From this point of view, regulating of the voting right and the protection of the formation of the organization's political will from abuses would appear to be necessary regulatory powers.

<sup>87</sup> If a secret ballot is held, it is easier for states to reach agreements with each other because it is not apparent for the other states how each state has voted. Above all, however, it is not possible to check whether representatives of states are being corrupted, as the voting behavior of the individual states is not made public, not even to the home country of the representative in question.

<sup>88</sup> Cf. C (1) of the Rules of Debate and the Rules of Procedure E. (3) (c).

the case of corruption of representatives of a state<sup>89</sup>. The question does arise, however, as to who is in fact authorized to order that the ballot be repeated<sup>90</sup>. It also has to be borne in mind that the same result can occur again if the ballot is repeated. A repeated ballot can nevertheless give an opportunity to those states that have exercised their voting right with financial or economic motives in mind to rethink their position

- An attempt can also be made to exclude those states that have a vested interest in the outcome of a vote from voting because of this interest. The same scenario could also be envisaged for states that have received financial or economic advantages for exercising their voting right. The exclusion of a state from voting does, however, require a special basis in the primary and secondary law of an international organization, as states are normally allowed within international organizations to exercise their voting right on issues in which they have direct economic, financial, political or other interests.

66. Without an explicit basis in the law of the organization in question, the possibilities for international organizations to prevent unfair practices being employed in the formation of the political will of the organization are somewhat limited. Above all, the organs of the organization concerned can bring such occurrences to the attention of the public, or they can pass their own sentence on states that resort to dishonest practices. However, if internal standards and procedures to regulate such conduct are lacking within the organizations, there are also no possibilities for the organizations to order that real countermeasures be taken against such states and to suspend them in their voting right, for example.

## **VIII. SUMMARIZED EVALUATION OF THE PRACTICES EXAMINED**

### **A. Principles**

67. The practices examined are unfair because they are not compatible with fundamental principles of general international law or with the law of the international organizations. In some cases, they are tantamount to coercion as they render it impossible for the states concerned to form their political will freely in votes held within international organizations. As a result, these practices violate the principle of sovereign equality of states. If the practices do not amount to coercion, they are still unfair methods because they violate the undistorted formation of political will in international organizations. As members of international organizations, states are also exercising a function of office with their voting right. In so doing, they are assuming a responsibility for the correct running of the organization and of its decision-making processes. The linking of economic and/or financial assistance from one state with the

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<sup>89</sup> It is obvious in this case that the will expressed by a state does not coincide with its true will. A state is in principle entitled to ensure that its true will is recognized. This is of particular importance when the majority stance has been distorted because the representatives of certain states have been corrupted.

<sup>90</sup> It is at the very least doubtful whether the Chairman can call for the ballot to be repeated subsequently. Such an issue would frequently have to be decided by the general assembly.

demand that another state votes in a certain way within an international organization means that the interests and aims of the organization are not the prime considerations when the vote is being cast; instead, the economic or financial motives of the receiving state come to the fore. Consequently, the use of the practices being examined unavoidably leads to a situation where the states involved misuse their voting right for their own aims that are unrelated to the main issue.

68. An abuse of rights in this way violates the principle of good faith, a principle that is also valid in the exercising of membership rights and duties within international organizations. This becomes particularly evident if majority stances in international organizations are altered in this way. Such practices are incompatible with Good Governance in international organizations.

69. The practices under examination will subsequently be assessed in summary form in terms of international law; this time with specific reference to the IWC.

### **B. Financially motivated new membership of states**

70. There is suspicion surrounding the IWC that states become members of the organization merely because they receive economic and/or financial advantages from other member states in return. As a reciprocal gesture, these new members are expected to cast their vote in accordance with the will of the donor states. Clearly, the permissibility of such action under international law needs to be examined.

71. The Whaling Convention is a so-called open convention: according to Article X (2) of the convention, any state may adhere to it unconditionally after informing the Government of the United States of America in writing. Consequently, every state has the right to join the Convention and, as a result, under Art. III (1) is entitled to send a representative to the IWC. When joining, a state does not have to prove that it has any particular interests, nor that it is concerned by the organization's activities in any way; its motives are irrelevant and it is also not accountable for these motives.

72. One restriction that can be placed on the right to join the Convention is to impose a ban on abuse of rights. If it were to be proved that membership of the Convention was being used in such a way that the rights associated with membership were clearly being abused and that a member was acting in contravention of the organization's purpose, this would constitute a case of abuse of rights. Becoming a member of the Convention with the aim of having restrictions on whaling relaxed, even if this were in return for financial and/or economic advantages, would in all probability not fulfill these criteria, as this stance does not directly violate the purpose of the Convention<sup>91</sup>.

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<sup>91</sup> According to the preamble of the Convention, its purpose is to protect the whales on the one hand, but also to regulate whaling. The Convention itself does not prohibit whaling, but constitutes a legal basis for the instruments to regulate whaling.

73. It would be a borderline case if a state were to join the Convention solely for financial reasons because of economic/financial support that had been promised. Given that states are free to join the convention in any event, the economic/financial support can be considered merely as circumstantial evidence of an abuse of rights. If an occurrence of abuse of rights were to be accepted, there would need to be other elements present from which it could be concluded that a state wished to violate the trust of the organization in a general way.

74. The Convention does not contain any formal procedure for objections, whereby states that are party to the Convention could express reservations about a new state becoming a member of the Convention. This does not, however, exclude the possibility for individual contracting states to express their reservations vis-à-vis new members that are suspected of gaining membership for financial reasons in return for supporting the specific interests of another contracting state. These reservations can be expressed to the state in question, to other contracting states, as well as within the IWC in general. In so doing, it can be pointed out that such conduct constitutes an abuse of rights.

#### **C. Corruption of representatives of states/delegates; exercising of coercion**

75. On the analogy of Art. 50 of the Vienna Convention on the Law of Treaties, the corruption of representatives of states and delegates is unlawful. The same is true, on the analogy of Art. 51 of the Vienna Convention, for the exercising of coercion against representatives of states and delegates. As a result of such conduct, the will of the state is clearly distorted, and this violates the principle of the sovereign equality of states.

#### **D. Suspension or reduction of economic and financial assistance**

76. The suspension or reduction of economic assistance that has been granted previously as a reaction to voting behavior that does not coincide with the interests of the state granting the assistance constitutes an act of retorsion or reprisal, which is not permissible under international law. Because of the principle of sovereign equality of states, the states are free to exercise their voting right as they choose. Consequently, when a state exercises its voting right as it chooses, this cannot be considered either as a hostile act or as a violation of international law vis-à-vis another member state. The suspension or reduction of economic and financial assistance in response to a certain voting behavior therefore constitutes a violation of the principle of the sovereign equality of states and is not permissible.

77. The issuing of a threat to suspend or reduce economic and financial assistance also conflicts with the freedom of states to form their own political will and their freedom to take decisions when exercising their right to vote, both of which are protected by the principle of the sovereign equality of states. Furthermore, such a measure requires

that the state in question has exercised its voting right in an abusive manner, as a result of which it has violated its membership obligations vis-à-vis the international organization. Consequently, such threats are also inadmissible.

#### **E. Economic and/or financial advantages used to influence voting behavior**

78. The use of economic and/or financial advantages to influence voting behavior does not necessarily have to violate the sovereign principle of equality of states. Such advantages can be based entirely on a voluntary arrangement. However, if the advantages are explicitly linked to voting behavior, such a condition would appear to be incompatible with the principle of sovereign equality of states.

79. Furthermore, such practices are unfair. For the state receiving the economic assistance, voting behavior is being determined by improper motives unrelated to the goals and purposes of the organization. In exercising its voting right, therefore, this state is breaching the principle of good faith. States that use such means to influence a vote are attempting to distort the result of a ballot conducted within an international organization. A state that resorts to such methods is also inducing other states to behave in a manner that abuses their rights and thus undermines the decision-making processes of international organizations. This conduct also violates the obligation of the state to carry out its legal commitments within an international organization in accordance with the principle of good faith.

### **IX. POSSIBILITIES FOR ACTION**

#### **A. General remarks**

80. The IWC does not have any particular sanctions in response to the violation of membership obligations, apart from the possibility to suspend a member's voting right if it falls into arrears with the payment of its membership contributions<sup>92</sup>. Furthermore, it is to be assumed that the expulsion or suspension of defaulting states is not an option within the IWC<sup>93</sup>. The following means of action are therefore limited to the possibilities that are generally available within international organizations. A distinction can be made here between possibilities for action by the member states and possibilities for action by the organization. This distinction should, however, not be overestimated, bearing in mind that, under the terms of the Whaling Convention, there are no other organs apart from the IWC as the plenary organ responsible for formulating the political will of the organization. Consequently, all stimuli for decisions and debates must emanate from individual members.

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<sup>92</sup> Cf. Rules of Procedure E. (2).

<sup>93</sup> Expelled states are no longer included in the whaling regulation procedure, as a result of which it becomes much more difficult for the aims of the Whaling Convention to be realized.

## **B. Possibilities for autonomous action by IWC member states**

81. One of the possibilities for autonomous action by individual member states is for them to make every effort to warn of the danger of distortion of the decision-making process within the IWC. Member states can make other member states aware of unfair practices and explain their own position in this regard. They can point out that these practices violate the membership obligations of the organization and principles of general international law. Where there is a well-founded suspicion of dishonest conduct by a state, other member states can complain to the government of that state. If it is certain that dishonest practices have occurred, member states can also lodge a protest formally with the governments concerned. Finally, the member states can raise such practices within the IWC as well, as a subject for discussion. Two possibilities could be envisaged here: either to raise the issue as a general problem, or to deal with specific incidents.

## **C. Possibilities for action within the IWC**

### *1. Condemning of concrete practices and individual states*

82. Within the IWC, it is possible for dishonest practices concerning vote-rigging to be discussed, either in general or specific terms, and for decisions to be taken accordingly. The IWC must make such incidents a central topic of discussion, given that its own internal decision-making policy is at stake here. No special basis is required for this in the Whaling Convention or in the organization's secondary law, e.g. in the Rules of Procedure. Furthermore, the IWC can impose the necessary decisions and rulings based on the organization's implied powers. Such decisions serve to guarantee the proper functioning of the organization's decision-making processes and the determining of its political will. The organ concerned is in principle authorized to take action itself, in particular if it is a plenary organ. Consequently, it is not necessary to make any addition to the Whaling Convention.

83. Concrete practices and individual states can be condemned, provided that there is sufficient proof that these states have in fact used or been involved in the use of unfair practices. It must be stressed in any decision taken that such practices are unethical, that they constitute an abusive exercising of membership rights, a violation of membership rights, and that they are not compatible with the requirements for good governance within an international organization.

### *2. Standard-setting by the IWC*

84. Another possibility is that of standard-setting, i.e. the IWC issues general rules of conduct outlining dishonest practices and defining procedures and instruments that are aimed at stamping out such dishonest practices in the future. The IWC is in principle authorized to issue such standards, as these would result from the implied powers that form part of the IWC's internal organization. Rulings such as these must, however,

comply with the provisions of the Whaling Convention and with the principles of general international law.

85. The following principles could be included in the rules of conduct when standards are being defined:

- The exercising of membership rights in good faith and respect of the principle of loyalty to the organization.
- The general obligation on the part of states not to grant or promise to grant other states and/or representatives financial or economic advantages either directly or indirectly in return for exercising their voting right in a certain manner.
- The general obligation on the part of the states not to accept any financial or economic advantages in return for exercising their voting right in a certain manner, and to prevent the representatives of their state from becoming involved in such practices.
- The condemning of practices that have been individually defined as incompatible with the legal obligations laid down in the Whaling Convention.

To create transparency, an obligation on the part of the member states to provide information, without being asked to do so, about any form of economic/financial assistance received from other member states which has either resulted from or is connected with the Convention in any way.

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Rules to be applied in the event of violation of these obligations. The object of these rules can be the fixing of procedures to establish violation of the obligations, while also including sanctions, such as the suspension of the voting right and the repetition of the vote without the offending states taking part.

86. It must be the aim of such standards to put in concrete terms the requirements for Good Governance in the area of policy formulation and decision-making by international organizations, thereby ensuring that the will of the organization is not distorted. This issue is both a crucial and fundamental one for the organization.

Zürich, 26<sup>th</sup> June 2001

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