

**INSTITUTIONAL PATTERNS IN INTERNATIONAL TREATY
MAKING: PROBLEMS IN ECONOMIC MODELS**

by

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Abstract

Institutional patterns of international treaty making practice are examined in light of three economic approaches. The uniqueness of this study is its focus on existing institutional arrangements for creating treaties. Some common economic models are extended to address crucial elements of the problems and processes of international treaty making. These extensions make several important contributions to the literature.

Economic literature relating to treaty making and international organization is reviewed, and the work of two well known economist-practitioners is highlighted.

The “economic theory of alliances” is applied to a previously un-addressed topic - conventional international law, and is extended to include the participation of Non-Governmental Organizations. This model produces several outcomes depending upon the participants’ expectations of each other. These outcomes result in larger overall production of public goods than the standard model suggests.

The “public choice” research program is examined, through a widely cited work applied to the nature of international organizations. A methodological critique of this approach is offered, and a “public choice” interpretation of the economic theory of alliances, as extended in the previous Chapter, is explored.

“Constitutional Economics” distinguishes between situations where choices are made among potential constraints, versus situations where choices are made within constraints. Treaty making is an example of this first type of situation. The emergence of the so-called “consensus

procedure" is examined in light of the cost theory of voting. This procedure is presented as an unintended consequence of government failure to work within certain constraints of traditional voting procedures. It is suggested that this innovation is a successful method for dealing with situations of choices among alternative constraints.

This dissertation makes significant contributions in four areas: (1) the history of economic practice; (2) the application and extension of the economic theory of alliances; (3) a methodological critique of "public choice" economics; and (4) the notion of collective choice "among" constraints is examined in the context of UN treaty conferences, with an economic interpretation of the so-called "consensus procedure." Thus, this work is shown to have implications on a number of specific topics relating to the institutional patterns of international treaty making, implications that have not been previously evident in the literature.

Dedication

To Sharon, Andrew and Ian for their love and support.

Quotation

The world is all that is the case.

...

What we cannot speak about we must pass over in silence.

~ Ludwig Wittgenstein, cousin of Fredrick von Hayek,

Tractatus Logico-Philosophicus

numbers 1.0 and 7.0

It is essential to acknowledge, near the outset of discussion, that individuals choose to impose constraints or limits on their own behavior primarily, even if not exclusively, as a part of an exchange in which the restrictions on their own actions are sacrificed in return for the benefits that are anticipated from the reciprocally extended restrictions on the actions of others with whom they interact along the boundaries of private spaces and within the confines of acknowledged public spaces.

~ James Buchanan, student of Fredrick von Hayek, (1990)

“The Domain of Constitutional Economics”

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Chapter One

Introduction: Economics, International Law and Organization

Economics is a science of human choices in the face of relative scarcity. Within economics there has emerged a number approaches to problem situations that lay outside a market framework, and within the realm of legal, social and political institutions. I shall examine international treaty making in light of three economic approaches. These are the “market failure” or “public interest” approach; the “government failure” or “public choice” approach, and general economic approach that James Buchanan (1990) calls “Constitutional Political Economics.” All of these approaches, have only briefly been applied to the problems of international law and treaties.

The uniqueness of this study is the examination of institutional arrangements for creating treaties, rather than narrowly focusing on a particular treaty and the particular problems it is being designed to solve. Some common economic models will be extended to address crucial elements of the problem and process of international treaty making itself. These extensions make several important contributions to the literature.

1.1. The economic approach

In general, the economic approach, or what might be called the core methodology of economics consists of three components; (1) the analytical orientation of methodological individualism; (2) the behavioral metaphysical principle of individual rationality embodied in what is

generally referred to as the maximization hypothesis; and (3) the logic of the decision situation the individual is assumed to face, this is often called simply the problem situation. The balance of this section briefly reviews these three core methodological components of the economic approach, which are common to each of the three disciplinary approaches that will be examined in subsequent chapters below.

1.1.1. Methodological individualism

The height of truly understanding the precept of methodological individualism is the fact that only individuals make choices. Firms do not make choices, governments do not make choices. Individuals who have chosen to work within a collective arrangement with others (call it a firm or a government), make choices that they designate as being on behalf of the collective arrangement with others.

From this understanding most all of what we commonly call institutions evaporates into nothing more than cognition of relationships between and among individuals. Institutions are only figments of our imagination, our thoughts about what we perceive or imagine others (both singly and in groups) to require of us in the choices we make and the actions we take.

This interpretation on the requirements of methodological individualism places a strong emphasis on “realism” in our assumptions in economic theory, a degree of realism that is commonly discarded, for the simpler, and epistemologically more vulgar, anthropomorphism - the transference of human qualities and capacities to non-human (or at least in this case non-individualist) entities in the form of the “firm,” the “government,” the “economy,” and even the “market.”

1.1.2. The maximization hypothesis

Individuals seek to maximize their personal aims, and desires. While this notion has long been linked to the psychological state of the individual, and more particularly, with the utilitarian psychology, such a link is neither necessary, nor beneficial in forming better explanations of an individual's behavior. Further, and this is the most important point from a theoretical consistency perspective, to specify and rely upon a particular psychological model or standard utility function violates our initial premise of individualism, by mutating it into methodological utilitarianism. Where only utility functions decide, and inform bodies how and in what way to act.

This rejection of psychologism still leaves us with the difficulty of specifying and perhaps formulating the particular aims, desires, and expectations we posit our individuals to have in particular situations. To address this difficulty, it seems harmless to admit the specification of a broad and perhaps never fully defined individual objective function. Such a function would contain what we objectively know of our individual's aims, desires and expectations.

Thus, an individual in a position to make decisions on behalf of a collective, may have the aim and desire of making decisions that will provide greater opportunities for the members of the collective. We may also imagine that his aims and desires are instead purely selfish, as the standard utilitarian is assumed. In both of these specifications we have not resorted to any psychological analysis, or resorted to any "mechanism" of "human nature." We have stated objective aims, desires

and expectations that can motivate a course of action against the constraints of the problems our individual will face.

1.1.3. Analysis of the problem situation

As the economic approach begins with attention on the individual and his/her behavioral motivations (the maximization hypothesis), the analysis of the problem situation takes into account all those relevant "others" affecting the individual's decision. These "others," or exogenous variables, include a wide range of items such as: the individual's budget, the individual's knowledge and expectations of the behavior of other individuals in society, the physical and technical constraints that the individual is considered to face, all given the particular problem or goal for which the decision is to be made. Generally, economists have sought to examine situations in which there are a sufficient number of constraints to force the outcome of the decision problem to a single, so-called "optimal" result. Accordingly, writers such as S. Latsis (1972) have described the mainstream economic methodology as a methodology that only allows "single-exit" results.

More recently, in the work of "Constitutional Economists" such as Buchanan (1989), (1990), as well as the "negotiation analysis" of James Sebenius (1991), (1992b), there has been a growing recognition that in many situations individuals also choose "among" the constraints they wish to have apply to their future decision making problems.¹ This

¹ An example of individuals choosing which constraints they wish to be binding upon them is the situation of contracts for the international sale of goods. According to the manner in which the 1980 United Nations Convention on Contracts for the International Sale of Goods has been implemented in the United States, contracts may be written such that either U.S. or European standards of liability apply. European

recognition leads to a large range of possible decision outcomes, none having the traditional ascription of being “necessarily” superior to the others, none being an “ideal” optimal choice against which all other are viewed as inferior. The “constitutional” choices “among” constraints generate essentially different “problem situations” each with its own particularly unique, and potentially “optimal” results as judged by its own terms of reference.² In this manner features of social institutions became an important endogenized component of the economic analysis.

1.2 Literature review and review of practitioners

Typically, the economist’s analysis of treaty making has focused, in a case by case manner, on the problem a particular treaty is being designed to address. Economists have rarely focused on the process of treaty making itself as a problem to be analyzed. Chapter Two begins with a general survey of economic literature on treaties, and on the role of economists in international organizations. It then goes on to examine two noteworthy economist-practitioners who have both participated in and analyzed the workings of multi-lateral treaty conferences.

The two outstanding examples are: First, John Maynard Keynes in his well-known contributions at the Paris Peace Conference of 1919.

standards limit liability to the value of the costs of relevant goods sold in the contract, not the overall liability for related damages that may have been caused by the particular goods. See discussion in Ralph Folsom, Michael W. Gordon and John A. Spanogle (1995).

² Buchanan (1989) argues that within the terms of methodological individuals any notion of a Bergson “grand utility function” must be considered “institutional” in nature and therefore open to question, whereas the Wicksellian principle requiring unanimous consent better serves as the defining criteria of what is considered “optimal.”

Keynes' official role in this conference was more on the order of a technical advisor to his government, rather than a higher ranking government official (with decision making powers, such as a plenipotentiary). Yet, his several years of preparatory work on the economic issues addressed in the Treaty of Versailles, and his well developed literary sense gained from his Bloomsbury associations, led him to write what became the most widely published and discussed book on the Paris Conference, the Treaty and its implications for the world economy. Technically, Keynes' 1919 analysis of the economic implications of the reparations problem is considered faulty, mostly notably lacking an understanding of the principle of "effective demand" cogently brought out by John Foster Dulles (1921). It is shown that Keynes' analysis of the conference itself focused on the decisions of the Council of Four is fundamentally economic in its methodology, and therefore useful to developing an economic understanding of the potential parameters of the international treaty making process.

Further attention will be given to Keynes' work as one of the primary architects and instigators of the Bretton Woods Conference which established the International Monetary Fund and the International Bank for Reconstruction and Development (called the World Bank). There are several parallels with, and important improvements over the treaty making practice, that is evident in Keynes' participation at the Paris Peace Conference and his leadership role in the Bretton Woods Conference that will be examined.

Second, James Sebenius, a participant in the Third UN Conference on the Law of the Sea, who wrote an insightful thesis detailing several of the innovative features he discovered as a practitioner. James Sebenius

participated as a technical advisor with the American Delegation to the Negotiating Committee concerned with the financial arrangements for the mining of manganese nodules from the Seabed beyond the limits of national jurisdiction.³ Unlike Keynes, Sebenius clearly did not write a political tract, nor is his rhetoric anything but that of the conventional modern day economist. Sebenius recognized one of the central propositions of what has become central to Buchanan's (1990) notion of "Constitutional Political Economics," that not only do constraints matter, but constraints can be a matter of choice themselves.

1.3 The "market failure" or "public interest" approach

1.3.1. Economics, externalities and "public goods"

To the theoretical welfare economists, markets "failed" in the allocative process; "ideal" government was assumed to be the alternative. ... [and they demonstrated] that observed market processes fail to produce results that satisfy the conditions of allocative efficiency.⁴

Looking at the economics of Alfred Marshall (1892/1920) there is a recognition that public policy should intervene in situations where market organized relationships seemed to have failed to produce sufficient positive social consequences. Situations that required some social organization, rather than uncoordinated individual action, in order

³ The area of the Seabed beyond the limits of national jurisdiction, and the manganese nodule resource are not the only properties defined as "common heritage of mankind." The term also applies to the biological resources of the High Seas, highly migratory fish, as well as to values such as the right to free passage on the High Seas.

⁴ Buchanan (1989) p. 25.

to bring about socially acceptable solutions have commonly been called “externalities” caused by a “failed” or “imperfect” market. While Marshall had left much of his consideration of these situations to footnotes and appendices of his *Principles*, it was his successor A. C. Pigou (1920) whose *The Economics of Welfare* that brought the discussion to the economists front page reading.

1.3.2. Maximizing the objective “public interest”

Since the work of Sir John Hicks (1939) introduced the notions of general equilibrium analysis of Pareto to the English-speaking welfare economists, application of the Pareto optimality criteria was naturally extended to the arena of publicly provided goods in the presence of market failures. Abram Bergson (1938) articulated the notion that the Pareto criteria may not be deemed as serving as the best gauge for the “public interest” as a “social welfare function” would be. This concern raised by Bergson remains with economists, although the work of many have found nothing but impossibility theorems and results. The main conclusion to be taken from the study of this concern for the ideal “social welfare function” is that its justification, analytically, must be based on institutional criteria that extend beyond the preferences of an individual.

Buchanan (1977), and (1989) has repeatedly pointed out that the orientation of economists to gauge their analysis of public policy in terms defined by the ideal conditions of the market models is fundamentally flawed by the contradiction that the policy concern is defined as market failure. The ideal conditions of Pareto optimality originate in the defined situation of an efficient market, any departure from an efficient market therefore can never satisfy the Pareto conditions.

1.3.3. The alliance model and international organization

The work of Mancur Olson and Richard Zuckhauser (1966) represents the popular example of extending general principles of economics to the problems of “public interest” public goods provision at the level of international society. The model developed by Olson and Zuckhauser simply extends the notions commonly found in the theory of “public goods” in an individualistic economy to an aggregate setting where decision makers are individuals representing their national governments and are assumed to be acting in the public interest of their nation. The result of this isomorphism, as we should expect, mirrors the conclusions of standard neo-classical welfare economics: alliance goods will be under-supplied, and if members of the alliance are of differing economic strength, then the burdens and benefits of the alliance may be distributed disproportionately.

Many writers have extended and expanded the technical depth, as well as the breadth of the alliance model to a number of situations of international market failure. This dissertation offers a unique contribution to this literature by applying the alliance model to the topic of international treaty making. The economic theory of alliances, that has developed out of the initial work of Olson and Zuckhauser (1966), is well suited in many ways to consider the topic of conventional international law. Law constitutes one of the fundamental public goods produced by governments.⁵ Governments are the producers, because of

⁵ The word “law” has many different components as it is generally used by economists. Economists most readily consider “law” as meaning “common law.” Common law stems from the spontaneous actions and practice of individuals, conditions familiar to economists. However, the content of “common law” is usually determined by the

the perception of market's failure to provide law in a sufficiently coordinated manner. This is in part, due to the nature of public goods as goods that are non-excludable, and non-rivalrous in production and consumption.⁶ The present day system of laws, norms and rules of behavior established by treaties are only binding on "states party to the convention."⁷ More simply to the point, each treaty establishes a new, and perhaps limited, legal alliance.⁸

Chapter Three further extends the alliance model through the incorporation of Non-Governmental Organizations (NGOs) as unique participants in the traditionally Governmental only alliance of international law making. While the conclusion of the initial application of the model to international treaty making conform with standard results of the model, the extension that includes the unique institutional behavior of agents of Non-Governmental Organizations leads to results that are decisively superior to those of the standard alliance model. This

opinions and ruling of courts. These courts are generally established by governments. This aspect of the determination of "common law" has been analyzed by R. A. Hiener (1986), F. v. Hayek (1973) and G. Tullock (1972). Tullock (1972) and T. Cowen (1985) and (1992) specifically discuss the properties and problems associated with "law" and "judicial decisions" as public goods. My discussion of conventional international law is also considered a "public good" in the same manner as "common law" even though its means of creation are more centralized and deliberate, Hayek (1973).

⁶ Arguments for "private law" generally recognize that its creation and extension fails to be comprehensive without a "public" governmental framework to support it. See D. Schimdtchen and H. J. Schimdt-Trenz (1990).

⁷ That is, binding on states that have agreed to, ratified and implemented the terms of the treaty.

⁸ Of course, the question of our age has been to ask how binding is any "international law" when there is no clear world authority with the independent powers for enforcement of legal obligations.

enhanced model of alliances produces several possible outcomes depending upon the NGO expectations of government behavior. All these outcomes result in larger overall production of public goods than that predicted by the standard model.

Chapter Three has five sections. Section one consists of a review of the alliance model and the development of its literature. Section Two examines the “public goods” nature of conventional international law as produced by governments through the mechanisms available at the United Nations. Section Three applies the alliance model to the production of conventional international law as traditionally conceived of as an alliance of governments. The results of this application conform to the standard model of alliances. Predicting that the public good will be produced in sub-optimal quantities, and that larger countries will bear a disproportionate burden in the allocation of costs. Section Four extends this model to an alternate alliance model, which in addition to government membership, includes in a non-standard fashion, the participation of international Non-Governmental Organizations. The consequences of this alternate institutional environment include a mixed Cournot-Lindahl equilibrium where Alliance output is closer to Pareto optimal than the traditional institutional environment produces. Section Five presents a summary of the Chapter’s main conclusions and presents some implications for future areas of development.

1.4 The “Government Failure” Approach

After many years of economists gaining influence among policy makers regarding the analysis of “market failures” and the economists proposed

ideal governmental intervention, much of the background information about the particulars of social problems and capacities of social institutions fell away from introductory explanations of the whole topic. Immersed in the complexity of policy implementation some economists lost sight of the fundamental economic underpinnings provided by methodological individualism, and attributed independent decision making capacity to institutions themselves, independently of the individuals who actually made the decisions of the organization itself. No longer does it appear that public officials await to learn of the social problems of failing market situations. Now governments have become proactive. They now attempt to prevent externalities from occurring in the first instance with an assumption that "government knows" best.⁹

Returning to the foundation of economics, the sub-discipline of "public choice" was born in the 1950s out of the writings of Buchanan (1954), Ronald Coase (1960), James Buchanan and Gordon Tullock (1962), Anthony Downs (1957), and others. All through these works reality is presented as comprising of self-interested individuals who, whether in business or public office, primarily seek their own personal interests. Public interests could no longer be assumed to be perfectly satisfied, but rather frequently frustrated by the appearance of

⁹ Given such an attitude among the majority of politicians and economists it is no wonder that writers such as Vaubel (1986) would view the "public interest" approach to externalities in the form "without international organizations, international externalities would result in underproduction of international public goods and in over exploitation of common resources." (page 39) While the original premise of economists such as Pigou began "in the presence of underproduction of public goods or over exploitation of common resources, there is a social need to consider the design of some form of compensating action by the broadest based institutions of society - government."

“government failure” and the presence of social externalities that directly resulted from government interventions in economic policy.

The fundamental premise underlying the “public choice” research program is examined in Chapter Four. It critiques a widely cited article by R. Vaubel (1986) on the “public choice” approach to international organizations.¹⁰ He sharply delineates the “public choice” approach from what he calls the “public interest” approach to the analysis of these organizations and the economic behavior related to their origin and operation. His effort to demonstrate the “public choice” approach to international organizations is highly supportive of the methodological individualist element of the research program. Yet, his formulation of hypotheses are unfalsifiable.¹¹ The resulting explanations of situations are uninformative of any systematic behavior of individuals, and therefore useless in terms of utilizing the “public choice” analysis to suggest alternative institutional structures.

The “public choice” research program does cast a strikingly different interpretation of events, the reason for, and functioning of individuals within institutions whose stated purpose is to serve the “public interest.” The “public choice” hard core premise over the

¹⁰ In searching the titles of articles appearing in the journal *Public Choice* there are fewer than a dozen articles that deal with international organizations in general, or in particular (primarily those related to the European Community). Among these Vaubel's (1986) appears to be most commonly cited. Perhaps the second most cited article in this literature is Bruno Frey (1984) which was published in the interdisciplinary journal *International Organization*.

¹¹ i.e., his hypotheses are logically structured to avoid attempts at to be proven false, or at best put beyond question. See Boland (1981), (1997) and Popper (1963/1994) for a similar critique of the maximization hypothesis.

divergence in public and private interests is used to critique the economic theory of alliances examined in Chapter Three. The conclusion is made that the “public choice” research program does not stand well on its own. However, when reviewed in the broader context of the fundamental economic approach, the “public choice” research program can offer some useful insights on the emergence of unintended social consequences of private actions.

1.4.1. The discrepancy between “private” and “public” interests

There is a methodological problem in economics when modeling public institutions, because discrepancies can arise between an individual “private” self-interest, and the “public-interest” an individual may be responsible for when holding public office or employed by a government agency is fundamental. The problem is a matter of theoretical consistency. Does a public policy maker base his/her choices only on self-interest, as individuals are assumed to do in their private market decisions? This problem deserves the continued attention of economists. Even within the setting of working markets, and particularly in the organization of firms, the potential for this discrepancy can produce dramatic harm. Study of the discrepancy can also lead to an understanding of that appropriate incentive and constraint structures that may minimize the potential for harm and improve the likelihood that the greater interests are satisfied.

While there is clearly an important value to economics in the recognition of these discrepancies, there has also been a strong tendency of “public choice” economists to view this importance as complete and absolute. This dissertation’s examination of the widely cited work of

Vaubel (1986) will present a methodological critique of this tendency to over play the importance of the discrepancies, and their actual role in the world of policy making. This criticism centers on the misuse of evidence that suggests the falsity of one theory as positive evidence to support an alternative theoretical perspective. Several authors suggest that too much attention is focused on the potential for discrepancy, and that there is a lack of serious attention given in the analysis of the situational conditions faced by the public decision makers.¹²

1.4.2. A critique of the alliance model

Recognizing the importance of the “public choice” discrepancies Chapter Four re-examines and critiques the alliance model of the previous Chapter, and points to elements that may be explained by the discrepancies, rather than taken as the objective circumstances of the situation. This critical examination is also applied to the alliance model of international treaty making, and it’s extension to the inclusion of NGOs. Here the dissertation explores the history of the formalized relationships that have developed between international-governmental organizations (such as the League of Nations, the International Labor Organization, and the United Nations) as the result of institutional blunders originating from choices made by individuals. Chapter Four concludes with the opinion that, while some of these decisions may have been made with other than the pure “public interest” in mind, the

¹² This criticism is based on the work of Buchanan (1989), (1996), Alan Peacock (1994), and Sir Karl Popper (1963/1994).

cumulative effects of these decisions have resulted in unintended social consequences that have contributed positively to the “public interest.”

1.5 The “Constitutional Political Economy” approach

The distinction is made in “Constitutional Economics” between situations where choices are made among potential constraints, versus situations where choices are made within constraints. Treaty making is an example of this first type of situation. The emergence of the so-called “consensus procedure,” and related innovations at the United Nations, are presented as unintended consequences of government failure to work within certain constraints of the organization. Further it is shown that these innovations are successful methods for dealing with situations of choices among potential alternative constraints.

“Constitutional economics directs analytical attention to *choice among* constraints.” “... [It] contains the important principle of spontaneous coordination... ..[regarding the] choices and actions taken by individuals. The emphasis on explaining nonintended aggregative results of interactions [of these individual choices].”¹³

Chapter Five focuses on the issue of voting as an institutional means for coordinating choice among constraints. The economic theory of voting has two main branches: (1) the analytical and game theoretic branch¹⁴ and (2) the transaction costs branch.¹⁵ As will be mentioned in

¹³ Buchanan (1990) p. 3, and Buchanan (1989) p. 60, 61.

¹⁴ The analytic and game theoretic branch was developed by writers such as Kenneth Arrow (1951/1963), K. O. May (1952) A. K. Sen (1970), L. S. Shapley and M. Shubik (1953).

Chapter Two, several economists have addressed problems related to international treaties from both the game theoretic analytical approach, and the incentives-discrepancies approach of “public choice” where transactions costs play a role.

Chapter Five reviews the cost theoretic approach to voting developed by Buchanan and Tullock (1962). It points out how this approach has been applied to international organizations in general in the work of Bruno Frey (1984). It goes on to demonstrate Zane Spindler’s (1990) notion of optimal voting within a “rent seeking” society, with what I believe is a more accurate formulation of the distribution of “rent seeking” costs as a function of the required level of voting. The results concur with the multiple-equilibria outcome originally found by Spindler. It also presents empirical support for this multiple-equilibria result in the various decision settings found in practice at international treaty conferences.

Following this excursion into the economic theory of voting, I go on to examine and discuss some of the unintended consequences that have arisen when institutional rules, such as voting rules, fail to achieve the objectives of a collective organization, such as an international treaty conference. In particular, we will examine an institutional arrangement that has emerged in the process of treaty making at the United Nations, as examples of selecting incentives and constraints that may minimize the harm produced by the “public choice” discrepancies. Attention will

¹⁵ What I am calling the “transaction costs” branch of the economic theory of voting was developed by writers such as Buchanan and Tullock (1962), D. W. Rae (1975), W. H. Riker and S. Brams (1973), D. Mueller (1978) and has predominantly focused on the potential government failures of the “public choice” school.

be given to the so-called “consensus procedure,” a method that is less formal than voting. It will be shown that the “consensus procedure” has led United Nations’ practice to an organizational form often called the “open-ended” working group or committee. The “consensus procedure” has also led to an increased participation of NGOs in the deliberations of government representatives.

Each of these elements of the “consensus procedure” has emerged and evolved over the last 50 years of the United Nations’ existence. As the “public choice” approach allows, we will introduce the origins of the “consensus procedure” as an unintended consequence arising out of incidents of “government failure” within the “alliance” of the United Nations. When the “consensus procedure” is practiced in its fullest it appears to provide both incentives and the selective application of constraints that dampen the harmful effects of the “public choice” discrepancies, and re-enforce efforts to gauge and address the “public interest.”

1.6 Conclusions and contributions

This dissertation makes significant contributions in four areas: (1) an excursion in the history of economic practice; (2) the application of the theory of alliances to a previously unexplored topic, and extensions of the model’s formulation reflecting new production and evaluation criteria; (3) the methodological critique of “public choice” economics points to its unique but limited usefulness, and (4) the examination of the notion of collective choice “among” constraints is examined in the context of UN treaty making conferences, and an economic interpretation of the so-

called "consensus procedure" is presented. Thus, this work is shown to have implications on a number of specific topics relating to the creation of international treaties. These implications have not been previously derived by either the "market failure," the "government failure" or the "constitutional economics" approaches to the study of political economy.

Chapter Two

Economists as Practitioners and Analysts of International Treaties

Typically, the economist's analysis of treaty making has focused, in a case by case manner, on the problem a particular treaty is being designed to address. Economists have rarely focused on the process of treaty making itself as a problem to be analyzed. This chapter shall begin with a general survey of economic literature on treaties, and on the role of economists in international organizations. It then goes on to examine two noteworthy economist-practitioners who have both participated in and analyzed the workings of multi-lateral treaty conferences. The two outstanding examples are: First, John Maynard Keynes in his well-known contributions at the Paris Peace Conference of 1919, and the Bretton Woods Conference. Second, James Sebenius, a participant in the Third UN Conference on the Law of the Sea, who wrote an insightful thesis detailing several of the innovative features he discovered as a practitioner.

2.1. Analysts and commentators: a survey of economic literature

2.1.1. ECONLIT "treaty" search

Searching in ECON LIT¹ for the words Treaty (316), Treaties (128), International Law (648), GATT (691), IMF (2489), World Bank (4405),² and other such words we find a good deal of work by economists and professionals from related disciplines. The orientation of this dissertation is at the overall treaty making process, as it has generally been practiced at the United Nations during the last 50 years. This dissertation departs from much of the economist's approach that provide a case by case analysis of particular treaties, or that focus on a particular type of economic problem (such as common pool resource management). Rather the approach of this dissertation is to apply the economic method to the problem of multilateral treaty making practice in

¹ There are several limitations that should be noted here. First, ECON-LIT only contains reference from the *Journal of Economic Literature* from 1969 forward. Therefore, all economic literature before this date are excluded. Second, searching for a key word such as "treaty" will only turn up a reference when that word appears in the title, keyword list, any description or review attached to the reference. Therefore, an article that deals with, say, the GATT treaty, but does not use the word "treaty" in the title, keyword list, or description, will not appear in the citations of ECON-LIT "treaty" search. Likewise, errors in the opposite direction may also appear. By this I mean the word "treaty" may appear in the title, keyword list or description, yet the contents of the article may have nothing to do with conventional international law. For example, a recent book of essays on the economics of organizations is titled *The Firm As a Nexus of Treaties*, edited by M. Aoki, B. Gustaffson and O. E. Williamson (1990).

² It should be noted regarding GATT, IMF and World Bank, that ECON-LIT identifies authors by their affiliated institution. Therefore any article written by economists from these three institutions will register a citation count. However, without sorting through the nearly 8000 articles in question, it does make intuitive sense that economists would write more about trade treaties and international financial treaties that most any other type. As will be noted below under Bi-lateral treaties, the most common article deals with tax treaties.

general, with specific treatment of institutional patterns that have emerged from the United Nations' experiences.

To sort through the "treaty" references of ECON-LIT I will classify the citations as Bi-lateral, related to European Union, and Multilateral, then within these groupings I will sort by treaty topics such as regional trade agreements, human rights, pollution, standards of international conduct and so on. From the Multilateral treaty articles I will further make note of the nature of the economist's treatment of the issues, e.g., game theoretical analysis of the outcome, of the negotiation process, public choice analysis of the decision makers, public goods analysis of treaty regimes product or services, and so on.

The table below is comprised primarily from searches on the key words "treaty" and "treaties," and not on particular treaties or international organizations, such as GATT, IMF or World Bank.

A brief description of the contents of the over 400 citations identified in Table 2.1 is in order. First, under the category of Bi-lateral Treaties, the overwhelming majority of this literature concerns reciprocal tax treaties and the various rules and procedures associated with the waiver or acceptance of particular expenses and taxes paid in one country against one's tax liability in the other country. These articles are technical in relation to tax law and tend not to examine the process of the treaty making, nor the general principles of tax theory. Within the listing of miscellaneous Bi-lateral treaties many different topics are addressed including issues of water rights, pollution, investments and labor migration.

Table 2.1

Search finding of ECOLIT by treaty category.

Focus of the treaty being addressed:	Number of articles found:
Bi-Lateral Treaties Tax Treaties [115]; Misc. [50]	165
Treaty of Maastricht and related treaties EU - General [32]; Money [35]; Tax/Fiscal [17]; Trade & Competition Policy [17]; Social Policy [7]; Labor [6]; Voting [4]; Political Org. & Security [3]; Pollution [2]; Intellectual Property Rights [2]	125
Multilateral Treaties Trade [30]; Pollution [29]; Security [23]; Taxes [16]; Monetary [7]; Intellectual Property Rights [7]; International Organization and Law of the Sea [7]; Negotiation theory & Voting [3]; Competition Policy [4]; Human Rights [2]	129

The second category - the Treaty of Maastricht and related treaties - focuses on almost all potential treaty topics, but is set wholly within the European context of the past 40 years. Most numerous among these citations are articles related to the monetary arrangements prior to the 1979 creation of the European Monetary System through to the requirements of Maastricht for the creation of a single monetary authority and single currency by 1999. The second most numerous topic regards the Treaty of Maastricht itself, and the general scope of processes

relating to the European Union. The third most numerous citations fall under the headings of tax/fiscal policy (which plays an importation role in the plans for monetary integration), and trade/competition policy. The citations then move on to include questions of social policy, including human rights standards (and exceptions); labor standards and conditions; the voting arrangements within the political structures of the EU (both issues of electing members of the European Parliament, and the decision making of the European Council); the political organization and security; pollution regulations and problems; and lastly the issues of intellectual property rights.

As was the case with the Bi-lateral treaties category, few articles are to be found in the Maastricht category that specifically focus attention on a comprehensive description, let alone a critical analysis, of the treaty making process. One of the more notable exceptions is an article by Gerald Schneider (1994) in which he explores the problem of European integration as a multilevel multistage game, played among citizens and governments of several countries. By recognizing the many stages in the processes associated with integration, Schneider brings attention to the dynamic interplay between citizens and governments, both prior to treaty making, and concluding with the citizen's direct participation in the ratification stage.

The final category - multi-lateral treaties - includes most all of the same topics as the Maastricht literature. What distinguishes these articles, however, is the global or near global scope and diversity of the political participants. The largest number of citations in this category concern Trade (primarily GATT, but also trade between regional regimes such as NAFTA and EU). The articles cited here do not represent the

complete literature on international trade, since publications like the *Journal of International Economics* publishes nearly as many articles in a single year. Nor does this listing represent the complete literature on the GATT treaty, and the establishment of the World Trade Organization. Again, publications such as the *Journal of International Trade Law* and *World Economy* produce more than thirty articles a year on this topic. It is rather a short coming of the key word search process that makes these citations so small in number.

Under the multi-lateral category, the second most highly cited topic concerns pollution. Here the literature has been largely dominated by the issues of “global warming” and the associated Ozone Treaty. This has been followed by literature on issues of transboundary air pollution, and pollution of the oceans and seas. Much of this literature focuses on the economic problem of common pool resource management. Several articles address aspects of the treaty making process in a theoretical manner. J. Black, M. D. Levi and D. De Meza (1993) apply game theoretic analysis to examine the question of the “optimal” number of treaty ratifications needed to make the Ozone Treaty effectively achieve the goal of reduced emissions. T. Sandler and K. Sargent (1995) focus on “treaty formation when efforts must be coordinated among a minimal-sized group so as to make cooperation worthwhile.”³ Their study examines the ozone problem, and notes that their approach would be applicable to other problems such as tropical deforestation. Both of

³ Sandler and Sargent (1995) p. 146.

these studies give little or no attention to the actual institutional circumstances operating in UN treaty making practice.

The third most highly cited topic concerns security, a subject that has received a great deal of attention (both within the economics and interdisciplinary literatures) following Olson and Zeckhauser's (1966) classic - "An Economic Theory of Alliances."⁴ The fourth topic, taxes, extends the Bi-lateral tax literature to the situation where the treaties are multi-lateral. The fifth most cited topics include intellectual property rights (a major component of the Uruguay Round of GATT), international organizations and the law of the sea,⁵ and international monetary arrangements (largely addressing issues related to the IMF). Following these topics are articles dealing with international treatment of national competition policy (primarily between the US and EU, but also including Australia, and the potential involvement of the WTO); negotiation theory and voting,⁶ and lastly human rights.

⁴ This literature forms the basis of discussion in Chapter Three below.

⁵ Attention will be given to particular articles from this area below and in Chapter Four. Again, it should be noted that the limitations of the key word search process fails to make note of authors, such as Dr. Parzival Copes, who have had more than this number of articles published on the economic ramifications of the 1982 UN Convention of the Law of the Sea.

⁶ Attention will be given to particular articles from this area below and in Chapter Five.

2.1.2 The role of economists in international organizations and treaty making

In the mid-1970s A. W. Coats began an extensive research project to write a sociological history of the role of professional economists⁷ in various fields of government service. The initial results of this research were published in a series of articles in the *History of Political Economy* published in 1979, 1981 and 1982. These articles comprised a broad survey from eight countries of the types of jobs that specifically employ the professional economist, the growth of these areas of employment, their career potential, and the perceptions of the influences of professional economists on the activities and policy making of government.

This initial work by Coats addressing the role of economists in national governments was followed in 1983 with a conference of eleven renowned economists presenting and discussing the role of the professional economist in international agencies. The proceedings of this conference was published in 1986 under the title *Economists in International Agencies: An Exploratory Study*. The international agencies examined in this work are the United Nations (primarily focusing on the UN Secretariat, the Economic and Social Council, and regional Economic Commissions), the International Monetary Fund, the World Bank, the

⁷ In Coats' research he defines a "professional economist" as someone trained in economics at the Ph.D level whose job functions regularly involve the application or use of economic analysis. In the context of international organizations this definition when strictly applied would exclude individuals such as the former UN Secretary-General Dag Hammarskjöld, who earned a Ph.D. in economics from the University of Stockholm in 1933, but whose position as Secretary-General was more political or diplomatic than the work of an economist.

GATT Secretariat, and the Organization for Economic Cooperation and Development.

What is of interest to note in the context of this dissertation is that of all these agencies brimming with economists of the highest caliber,⁸ the one most closely tied to an on-going process of treaty making and revision - the GATT - is presented as the least favorable towards the employment or influence of professional economists.⁹ Then too, as will be examined in more detail below, the ultimate economists' club - the IMF - is the one agency whose founding treaty was essential the handy work of two leading economists Harry Dexter-White and Lord Keynes.

2.2. Keynes' *Economic Consequences of the Peace*

It is the opinion of many authors that the two most influential works of John Maynard Keynes are his *Economic Consequences of the Peace*

⁸ Among some of the economists mentioned in these agencies are: Arthur Lewis, Gunnar Myrdal, Nicholas Kaldor, Michal Kalecki, Jacob Mosak, Dudley Seers, Raul Prebisch, Hans Singer, Jan Tinbergen, J. J. Polak, Louis Rasminsky, Alvin Hansen, Johannes Witteveen, Jacques de Larosiere, James Meade, Clair Wilcox, Donald MacDougall, Alec Cairncross, Brian Reddaway, Christopher Dow, among many others.

⁹ One early note of qualification was made in the essay on GATT was that its organization was more simply that of a set of treaty obligations than an independent agency. As such member states to the treaty were expected to under take their own economic analyses and not to seek such work from the minimally staffed supervisory GATT Secretariat. Where economists have been most influential to the GATT Secretariat was in the appointment of a Panel of Experts that included A. Haberler, Jan Tinbergen, James Meade and Campos. The report also noted that Meade and Clair Wilcox played dominant roles in the initial conception and negotiation of GATT. In 1995 upon the formalizing of GATT as a treaty organization into the WTO a standing international organization, there were over 70 openings for professional economists.

(referred to as *ECP*) and *The General Theory of Employment, Interest and Money*.

From the point of view of current treaty making practice, what problems did Keynes try to teach us about that we are still troubled with today? Lack of adequate preparation, too many issues linked at cross purposes, insufficient respect for technical advisors, not enough attention to what the treaty will make us become rather than how it will restrain what we used to do. This section will examine Keynes' participation in the Paris Peace Conference in relationship to his written analysis of its outcome in the *ECP*. First to be addressed is the issue of Keynes' rhetorical approach. The second matter to address is the examination and debate over the *ECP*'s conclusion on reparations, and economists' reactions to its rhetorical style. The third area examines one of the fundamentals about treaty making - treaties change the order of society by changing the nature of existing social and economic constraints. This was clearly one of Keynes' important insights in the *ECP*. Concluding this section is a look at Keynes' depiction of the irrational "rational choice" the Council of Four constrained themselves to make.

2.2.1. Analyzing the rhetoric of Keynes' *ECP*

Alessandra Marzola (1994) provides an interesting analysis of Keynes' rhetorical style, both in the *ECP* and the *General Theory*. She comments that Keynes' approach to his books was one of continual rewriting after others have read drafts. We are all aware of how true this was with the many iterations of the *General Theory*. Marzola suggests that this was true in the Fall of 1919 after Keynes' initial feverish writing of the *ECP*

that July. I think it is important to note, like the General Theory, that Keynes began his writing on the core problems addressed by the *ECP* nearly three years earlier in a memorandum prepared for the Treasury.

Keynes' first study of the reparations problem which was expected to occur at the war's conclusion was made in 1916 in a memorandum jointly prepared with Lord Ashely in the British Treasury.¹⁰ The conclusions of this memo were that prudence was required in this matter, and that the burden should not be too harsh such that the Germans would be unwilling or unable to pay. At this point in time the Americans were not even in the war. This demonstrates not only the kind of advance planning analysis work common among professional economists in government, but also a sense of the level of preparedness Keynes considered important to the eventual work to be done at the Paris Peace Conference three years later.

A further memo drafted entirely by Keynes in October 1918, just weeks before the final armistice on 11 November, Marzola considers to be the first draft of *ECP*. It is evident that much of Chapters Four and Five come directly from this Treasury Memorandum. By the time this Memorandum was written the 14 Point Plan of Wilson was ten months old. The closest mention by Wilson to what became the reparations issue was reference in points 7 and 8, that Belgium and French territory were to be "restored." In the parlance of common law the injured party in a tort is required to be "made whole" by the party liable for the damages. This notion of being "made whole" is generally practiced by an economic

¹⁰ P. V. Mini (1991) suggests that this 1916 memorandum should be considered the first draft of *ECP*. p. 60.

evaluation of damages. Keynes' Treasury Memorandum was just such an evaluation. Its conclusion was that Germany would be unable to pay extensive or punitive reparations, as its economy would require reconstruction as much as that of the Allies.

Despite the essential years of preparations to address the reparations issue, it was what some have described as Keynes' "white heat of passion and rage" at the outcome of Versailles that put the energy and force into the words of the *ECP*. First, as many writers saw, the Treaty of Versailles laid the foundation for an economic and political upheaval in Europe. Second, Keynes was perhaps nationally myopic prior to the spring of 1919. By this I mean that the reception of his memoranda, written from 1916 through early 1919, were received after reaction and debates by Parliament as British policy. Why were the French and the Americans not as rational when he presented his latest version to the Supreme Economic Council in March 1919? Why did it seem as if Wilson had not done his homework on the problem? Keynes obviously felt he had done his.

It is likely that the literary figures of the Bloomsbury group greatly influenced his writing and reworking of the *ECP*. In particular, Chapter Three of the *ECP* seems written as if it were a play, an entertainment for the reader to motivate their commitment to read on to the dryer side of his arguments. Many reviewers criticized him for the apparent literary license taken with the main characters of that chapter. Particularly strong in their reaction were the American reviewers as will be discussed below.

Keynes' rhetorical style in the *ECP* had to redress his own myopic assumption that the Council of Four would treat his proposal as

forthrightly as his own government had during the past several years. But three of the Four were not his government, nor did they view his memo with anything other than glib contempt.¹¹ Keynes' argument was not political, it was not a demand for the "rights of the victors." Because it was not against the "rights of the vanquished," his view was therefore seen as wrong. Keynes' argument was purely one of forensic economics. The court had ruled on the tort and the liability was against Germany. The damages and harm were to be made "whole." While Keynes had worked these figures out, this was only the demand side of the settlement. Keynes had also examined the guilty's ability to make restitution and found him wanting.

The March 1919 meeting of the Supreme Economic Council¹² where Keynes introduced his proposals and forensic economic analysis of the situation, he was countered by the American John Foster Dulles. Dulles argued that American and Red Cross reports on economic conditions, some of which had come to him just the week before, did not suggest that matters were so dire as Keynes suggested.¹³ The lawyer's

¹¹ The French Prime Minister, G. Clemenceau (1919) wrote: "With some knowledge of economics but neither imagination nor character, Mr. Keynes unrelentingly opposed 'the abusive exactions of the Allies'."

¹² As R. F. Harrod (1969) has noted (p.235) Keynes was not officially assigned to the Reparations Commission section of the Paris Conference. He was the leading British delegate to the Supreme Economic Council, and meet in the informal committee of experts on reparations. See R. W. Pruessen (1982) p. 31.

¹³ What is not clear from published records is exactly where all of John Foster Dulles' briefings had come. There exists the interesting network of Dulles family contacts in Paris at this time. Dulles' uncle was the American Secretary of State Robert Lansing, who was however out shadowed by the President's Special Advisor Colonel House. Dulles' brother Allen had worked for the Secret Service during the war in Geneva, and was not assigned to the boundary commission carving up the Austro-Hungarian

approach¹⁴ to the economic disposition of a liability at Versailles was to create institutions to cope with issues where immediate agreement on specifics could not be obtained.

2.2.2. Examining and debating the economics of reparations

This topic has logically been the one issue that economists most readily have addressed regarding the Treaty of Versailles, as many did even prior to Keynes' writing and publication of the *ECP*. In the February 1919 issue of the *Quarterly Journal of Economics* Pigou had published an examination of the general problem of financing the "Burden of War and Future Generations." While in the May issue of the same journal L. R. Gottlieb of the Public Service Commission of New York City presented a detailed tally of the "Indebtedness of Principal Belligerents" without particular reference to the negotiated reparations simultaneously taking place. In the January 1919 issue of the *Economic Journal*, of which Keynes was editor, L. G. Roussin had published "Some Aspects of War Finance" written in Cairo in October 1918 prior to the armistice. In the June 1919 issue, Charles Gide had published "French War Budgets for 1919-1920" which included a footnote from the editor stating that "in

territories. His sister Eleanor, was volunteering with the Red Cross, providing humanitarian assistance at the former Front. See Eleanor Dulles (1980), L. Mosley (1978), and R. W. Pruessen (1982).

¹⁴ I refer here to President Wilson's decision. Perhaps it would be better put as the "American approach" since within the American delegation working on the reparations issues, in addition to those trained as lawyers Bernard Baruch and John Foster Dulles, was the economist responsible for the final institutional revisions of the reparation problem ten years later, Allyn Young.

May after the text was to printer the author offered more suggestions” concerning the problem of reparations. In the December 1919 issue of the *American Economic Review*, E. R. A. Seligman had published “The Cost of the War and How It was Meet” following a similar line of thought as Gottlieb.

The first article to address the reparations issue, as defined by the treaty, was by F. W. Taussig in the March 1920 *Proceedings of the American Economic Society*. It focused on the need for the Germans to make payments in goods, which would cause repercussions among protectionists concerned by the “excessive” imports from Germany. Taussig did not focus as Keynes had on the question of the German’s ability to pay, but did concur with the second level of problems caused by German payments. An article by J. F. Dulles in the June 1921 *Economic Journal*, carried on with this theme started by Taussig, detailing in several major markets where the economic consequences of the reparations were more unpleasant to the victors than they were to the vanquished.

Simultaneously with the publication of *ECP* appeared another, *The Peace Treaty and the Economic Chaos of Europe*, by economist Norman Angell (1919). The reviewer of this work in the *Economic Journal*, states:

Mr. Angell, while he puts his case with great energy, is always reasonable, and is nowhere carried away by the passion which a humane man might not unnaturally exhibit in writing of the terrible suffering which is being endured in many parts of Europe at the present time.¹⁵

¹⁵ H. S. Furniss (1920) p. 84-85.

The book may perhaps suffer a little by its appearance almost simultaneously with Mr. Keynes' *Economic Consequences of the Peace*, as the two cover much common ground. But Mr. Angell's book is in some respects much simpler, and it deals with less technical matters than does Mr. Keynes'.¹⁶

Of the many reviews of *ECP I* shall comment on just three. In the *Quarterly Journal of Economics* of February 1920 Taussig wrote with respect, candor and retort concerning Keynes' and his *ECP*. The opening paragraph contains all three, as "the book shows" "wide interests," "independent judgment," "fine spirit and literary skill," yet "the table of contents is quite inadequate and there in no index." Regarding the economic provisions of the treaty, Taussig finds himself in general accord with Keynes.¹⁷ Yet, then he returns with disagreement over Germany's *ability* to pay. He considers Keynes' advocacy for a "Free Trade Union" in Central Europe as utopian, while not mentioning that this was implied as Point 3 in Wilson's 14 Points. It also is a logical proposal considering the fact that the countries Keynes expected to comprise this Union were, prior to 1919, all within the Austro-Hungarian or Turkish Empires.

In the Review published by Clive Day in the *American Economic Review* in June 1920, he found "Keynes' analysis of the conference" "superficial" on two counts:

...he neglects entirely the work of the conference outside that part of the field in which he is most interested, ... Most noteworthy is his attitude to the territorial settlements which engaged so much of the time and energy of the conference.

¹⁶ Ibid., p. 85. It is interesting to note, however, that while Keynes' was considered for the Noble Peace Prize in 1923 and was not awarded it, Angell was awarded the Peace Prize in 1933.

¹⁷ Ibid., p. 384.

... he gives the impression that the treaty was determined by the three heads of state, Clemenceau, Lloyd George, Wilson.¹⁸

Day agrees with Keynes that the terms of Wilson's 14 Points do not square with the terms imposed by the treaty to the discretion of the Reparations Commission. But following Taussig, and Alan Young (who had published in the *New Republic*), Day disagreed with Keynes on the ability of Germany to pay. Owing to the colorfulness of the characters in the opening Chapters of *ECP* Day notes:

The first three chapters are altogether theatrical.¹⁹

It is a political tract. Like the writings of Daniel Defoe and the *British Merchant on the Peace of Utrecht*, two hundred years ago, it is meant to rouse public interest and to force political action, and to reach that end it follows methods which are far removed from those of the strict scientist.²⁰

When I read in a sober journal like the *Contemporary Review* that Keynes' sketches "will be studied by historians for the next century," I am aghast at the mischief which may be done by a device which I believe to be legitimate in the work of the political pamphleteer, but which is poisonous when it is accepted as a contribution to history.²¹

¹⁸ Day (1920) p. 309. As Day notes on the following page, Day's own participation at the conference "lay almost entirely in the territorial field," and was only present at one meeting of the Council of Four.

¹⁹ *Ibid.*, p. 300.

²⁰ *Ibid.*, p. 301. It should also be recalled Defoe's now more familiar work was the *Adventures of Captain Robinson Crusoe*.

²¹ *Ibid.*, p. 309.

Truly the reaction of essentially all the American economists and lawyers who participated in the conference to Keynes' portrait of Wilson as "slow witted" and "bam-boozled" struck quite a nerve.

The *ECP* was essentially a British book. Keynes did not anticipate the reaction of the Americans, nor did he really understand the half-hearted approval of the Italians.²² I believe it was the Cambridge colleague, and former student, Robertson who best understood Keynes' composition. His review opened by stating he was committing the "double sacrilege of reviewing the work of his master and his editor." Although published in the March 1920 *Economic Journal*, Robertson is in tune with Day by calling the work "a mordant political pamphlet." He also describes the *ECP* as "a masterly technical discussion of the economic provisions of the Treaty," and "an impressive and largely original philosophical *critique* of the economic relations of nations and classes."²³

When the ground is thus shifted on to what people feel and think and will, two consequences follow. First, it becomes of economic interest to know how Mr. Keynes' own mind works, and how he thinks the minds of the Four worked, as well as how he thinks the minds of the common people of Europe will work. And this it is which modifies the impulse to wish that political pamphlet away into a separate cover. Mr. Keynes has seen the picture as a whole, and he can hardly be blamed for presenting it as a whole; indeed, unless he had done so, we could hardly have been expected to form a rational judgment upon it.

But, secondly, the business of forming a rational judgment becomes much more elusive and precarious. These

²² See D. de Empoli (1991) in his essay on the Italian reaction to the *ECP*.

²³ Dennis Robertson (1920) p. 77.

propositions are not such as can be demonstrated by documents and figures. Here is one more quotation, again with my italics. "One could not despise Clemenceau or dislike him, but only take a different view as to the nature of civilised man, *or indulge, at least, a different hope.*"²⁴

Robertson, while not directly addressing any of the strong American criticisms of Keynes' characterization of Wilson concluded his review by saying: "perhaps Mr. Keynes himself is a bit of an old theologian, after all; and not a bad thing to be either."²⁵

2.2.3. Choosing to change constraints

In the *ECP* Keynes wants the reader to realize that the Treaty was creating "new constraints" on the international system. New constraints on Germany as well as on the Allies. Most importantly with these new constraints, the old patterns of behavior in international relations would not survive. These constraints would lead to completely different choices by individuals, and these choices would be incompatible with the desired aim of a stable peace. The kinds of secondary order consequences,²⁶ like

²⁴ Ibid., p. 83-84.

²⁵ Ibid., p. 84. The reference to Wilson as an old theologian generated considerable reaction. It originated from the fact that Wilson's father, a Presbyterian Minister, had wanted his son to become the same. The stronger criticism of Keynes by the American reviewers however, regarded Wilson's slowness at thought and inability to see through the maneuvers of Clemenceau and George.

²⁶ Dulles (1921) describes many microeconomic consequences of the actual reparations payments. One example, being the unemployment of British ship builders owing to the transfer from Germany of its merchant fleet. The excess supply of ships in Britain drove down the price of ships causing ship builders to reduce production. While in Germany, the newly stimulated demand for ships bolstered their domestic price leading German ship builders to increase production. Here the victors became vanquished.

those described by John Foster Dulles (1921) are consistent with the first order consequences analyzed in the *ECP*. Yet, even in the opening remarks of his paper Dulles reminds us that at the conference he himself strongly advocated Germany's ability to make large reparations. What seems odd here, and is perhaps at the heart of what Keynes saw, is that Dulles, at the conference, did not recognize that the constraints of the Treaty to make Germany pay would alter all the economic choices of both victors and vanquished.

Dulles was both shrewd and naïve. Shrewd to try and negotiate sticky details of the reparations off the Treaty, because while he disagreed with Keynes' inability to pay argument, he sympathized with the disruptive consequences argument. Shrewd because to pacify the "Tiger"²⁷ he gave in to the notion that the Treaty created Reparations Commission *could* work the matter out smoothly. Dulles was naïve, perhaps because he optimistically trusted the Reparations Commission to be an instrument that *would* serve the "public interest," which included the restoration of the German economy as well as making "whole" the injured parties. Naïve because he believed the Reparations Commission *would* rationally come to understand the extent of the disruptive economic consequences, and declare the indemnity absolved before the real economic damage became as severe as the "hurricane" that the war itself had been.

The conclusions of Keynes' *ECP* are that clearly there are unintended consequences to constrained choice at the political or

²⁷ A common reference to French Prime Minister Clemenceau.

constitutional realm, as there is in the market.²⁸ Of the Council of Four, within a year of the treaty, the political fortunes of each was lost on their domestic fronts, all save Lloyd George.²⁹ The Peace was contrived, even as the war itself was contrived. Keynes' analysis of the circumstances which lead to the war, did not mention the assassination of the Arch-Duke, or the machinations of the arms merchants in the two years prior to the war. These particular events were merely contrivances, where circumstances changed the economic forces built up since 1870 would have produced similar excuses. They were merely particular symptoms arising out of a vaster, more compelling set of forces, forces of economic opportunities, and individual choices.

2.2.4. Keynes' depiction of irrational "rational choice" in the Council of Four

In this section, I want to extract from Chapter Three of the *ECP* lessons about the practice of treaty conferences, lessons written in the logic of economic analysis. To accomplish this I shall draw heavily from the text with its infamous rhetorical flair that made the lesson more easily conveyed to the general public that was his audience.

²⁸ As Lord Balogh (1982) noted: "Many in Britain thought the 1929 Crash and rise of Hitler were proof of Keynes' original argument! That Keynes was right for the wrong reasons was too subtle a point for most people." p. 120

²⁹ Both Prime Minister Clemenceau of France and Prime Minister Orlando of Italy lost re-election bids owing to sentiments that they had been too soft on Germany in the Treaty. Wilson's famous illness of September 1919, while not completely debilitating, lead to his greatly reduced activities, and the effective running of the White House by his wife until the expiration of his term as President (March 1921). Lloyd George survived re-election.

Keynes opens his description of the Conference in terms that are starkly ruled by the foundation of methodological individualism. While his historical review of the economic events of the 50 years leading up to the war spoke in the broad terms of major economic trends and tendencies, he now focused simply on four individuals.³⁰ His goal is to shed light on the “complex struggle of human will and purpose” which through the organization of the Conference were “concentrated in the persons of four individuals in a manner never paralleled,” which “made them in the first months of 1919 the microcosm of mankind.”³¹ The analysis Keynes was to now undertake did not employ the methodological-holist approach of “class struggle,” nor were issues simply a matter of some “national interest.” The decisions to be made were decisions of individuals, based on their positions in history, they would become decisions of world shaping proportion.

As we find in more recent economic literature such as the *Strategy of Conflict*, or *The Art and Science of Negotiation*,³² Keynes frames his picture of the Conference in terms of “tactic” and “policy,” expectations and strategically anticipated levels of compromise; asymmetries in the knowledge or the information base of decision makers, and a lack of fully

³⁰ The Council of Four, to which Keynes primarily refers in this Chapter, was composed of President Woodrow Wilson, Prime Minister Lloyd George of Great Britain, Prime Minister Clemenceau of France, and Prime Minister Orlando of Italy. While Keynes sets out to tell the story of these four individuals, Orlando is in fact only mentioned as a part of the scenery and in one footnote that also conveys his isolation within the Council. Thus, Keynes story boils down to the decisions of three individuals.

³¹ *ECP* p. 17.

³² Thomas Schelling (1960) and Howard Raiffa (1982) respectively.

congruent interests among the parties in relation to their concern for the terms that would address the Germans. Yet, as most reviewers have commented, the literary style by which Keynes goes about this task is more akin to a novel or play than a work of historical scholarship.

Keynes limits the scope of his decision makers problem to the economic parts of the treaty from which he introduces his central character - Clemenceau. It was Clemenceau's lead to draw the most extreme boundaries to proposals that would be met first with compromises that would suit the allies, and then further compromised with the Germans. In relation to tactics, Keynes cites Clemenceau's generosity in the compromises to proposals often first presented by one of his ministers, as giving the appearance of moderation to George and Wilson. Yet, Clemenceau had his objective, "he knew which points were vital, and these he abated little."³³

Rhetorically Keynes goes beyond introducing the character of the "strategist," by introducing the figure of the man,³⁴ and the setting of the stage and its furnishing. Unstated but perhaps important to Keynes' sense of British mythology, there was no round table. The seemingly informal collegial semi-circle around the open hearth was not in fact conducive to discussion let alone negotiation. The difference of language

³³ *ECP* p. 18.

³⁴ Keynes devotes nearly a full page to describe Clemenceau's clothing, his boots, his gloves, as well as the "square brocaded chair," fireplace, seating arrangements and positioning of secretaries, and others in attendance.

among the four³⁵ created at times a general upheaval and disruption to the Conference proceedings.³⁶ Unlike the diplomatic standard of the nineteenth century, the Council of Four did not adopt a *lingua franca*. Nor did the Council adopt the modern practice of simultaneous translations with electronic earphones allowing for the dialog to proceed without interruption from one speaker to the next.

Economically, Keynes returns to explain the structure and property of Clemenceau's individual preference function.³⁷ It is lexicographic in its orderings, there is no room for marginally substituting a little of this from a bit more of that.³⁸ And to explain this

³⁵ Keynes makes the important note that Clemenceau knew both English and French, George and Wilson knew only English, and Orlando knew only French and Italian. Therefore, Clemenceau clearly had a communications advantage over the others, while Orlando had no direct means of communicating with either George or Wilson.

³⁶ "Not infrequently Mr. Lloyd George, after delivering a speech in English, would, during the period of its interpretation into French, cross the hearthrug to the President to reinforce his case by some *ad hominem* argument in private conversation, or to sound the ground for a compromise - and this would sometimes be the signal for a general upheaval and disorder. The President's advisers would press round him, a moment later the British experts would dribble across to learn the result or see that all was well, and next the French would be there..." *ECP* p. 19.

³⁷ In an interesting examination of "Keynes' analysis of rational behavior" Tony Lawson (1991) draws an account of rationality from Keynes that is broader, and in some sense looser than that of the standard *Homo economicus*, much along the same lines that Buchanan (1989), (1990) and (1996) has recently been calling for. This version of rationality flexibly adapts between situations which seem appropriate to choose among constraints, rather than only choosing within some fixed set of constraints. What Tony Lawson would, I believe, attribute to this dual condition is the particular knowledge of the decision maker, however that knowledge came to be developed. This looser sense of "rationality" is I think essentially similar to what Karl Popper (1963/1994) described in his Harvard Economics Lecture.

³⁸ Clemenceau "had one illusion - France; and one disillusion - mankind, including Frenchmen, and his colleagues not least." ... For him, "Nations are real things, of whom you love one and feel for the rest indifference - or hatred. The glory of the nation you love is a desirable end - but generally to be obtained at your neighbour's expense." (*ECP*)

anomalous preference ordering, Keynes offers an explanation by discussing “the historical causes which had operated during his lifetime” and ingrained through experience so rigid a sense of choice.³⁹

Keynes projected the dilemma of the modern day “public choice” economists. Clemenceau, with his illusion for France, was simply a knave.

Prudence required some measure of lip service to the ‘ideals’ of foolish Americans and hypocritical Englishmen; but it would be stupid to believe that there is much room in the world, as it really is, for such affairs as the League of Nations, or any sense in the principle of self-determination except as an ingenious formula for rearranging the balance of power in one’s own interest.⁴⁰

Obviously this is not what Keynes wants his reader to believe that such an orientation is the way the world “really is.” Yet, by the objectives of Clemenceau, by the implications of his preferences, the conditioning of his experience, the logic of his situation required “the necessities of ‘guarantees’.”⁴¹ Guarantees that would bind the League, condition “self-determination” and restrain the German recovery as far as was possible.⁴² “Hence sprang those cumulative provisions for the

p.20.) Such a frame of mind, although “rationally” developed from the circumstances Clemenceau faced, as Keynes explains as a further historical side-note, had no room for Marshall’s principle of substitution.

³⁹ *ECP* p. 21.

⁴⁰ *ECP* p. 21.

⁴¹ *ECP* p. 22.

⁴² Again, in a picturesque manner Keynes describes Clemenceau’s characterized vision of the future as: “European history is to be a perpetual prize-fight, of which France has won this round, but of which this round is certainly not the last. ...a peace of

destruction of highly organized economic life” which Keynes would examine in the next chapter.⁴³

So much for our first decision maker. Now to demonstrate Clemenceau’s choice was a Stackelberg equilibrium, which although German incorporates more sophisticated expectations of one’s opponent than the French Cournot model.⁴⁴ “By what legerdemain was this policy [of guarantees] substituted for the Fourteen Points, and how did the President come to accept it?” Again, Keynes’ self made reply is essentially individualist, although melodramatic. “[I]f ever the action of a single individual matters, the collapse of the President has been one of the decisive moral events of history.”⁴⁵

Keynes describes the expectations of the European public before analyzing the logic of the situation faced by President Wilson.

magnanimity ...based on such ‘ideology’ as the Fourteen Points ... could only have the effect of shortening the interval of Germany’s recovery and hastening the day when she will one again hurl at France her greater numbers...” *ECP* p. 22.

⁴³ *ECP* p. 22.

⁴⁴ Since in the “economic parts of the treaty” Keynes identified Clemenceau as having taken the lead in the decision making, Keynes moves us on to find out how the “followers” came to rest at an equilibrium, that before the Conference did not fall within their set of feasible alternatives. This leader-follower methodology, although originated by the French economist Cournot, was enhanced by the more sophisticated expectations function attributed to the market leader in the work of the German economist G. Stackelberg.

⁴⁵ *ECP* p. 23. While the metaphor of the President’s moral “collapse” is largely implied here, there was also Wilson’s physical collapse and retirement from the Conference in early April which left him at some distance to the “progress” of the negotiations as they continued to evolve during his absence.

The enemy peoples trusted him to carry out the compact⁴⁶ he had made with them; and the Allies peoples acknowledged him not as a victor only but almost as a prophet. ... Never had a philosopher held such weapons⁴⁷ wherewith to bind the princes of the world. ... The disillusion was so complete, that for some of those who had trusted most hardly dared speak of it.⁴⁸

But, Keynes explains, “the causes were very ordinary and human”⁴⁹ just as they were in the harsh perspective of Clemenceau.

[I]f the President was not the philosopher-king, what was he? ... His thought and his temperament were essentially theological not intellectual, with all the strength and the weakness of that manner of thought, feeling, and expression.⁵⁰

Stepping back from the rhetoric of these descriptions, Keynes returns to some useful comments on treaty making practice. While ideas embodied

⁴⁶ Referring the Wilson’s Fourteen Points, and Notes establishing the armistice.

⁴⁷ Referring to the military and economic strength the United States then possessed relative to the destruction, weakness, and dependence of Europe.

⁴⁸ *ECP* p. 24. These expectations were “rationally” formed on the basis of objective evidence of Wilson’s published “Notes” and speeches, and the powerful position to which the United States had arisen by the close of the war.

⁴⁹ *ECP* p. 24.

⁵⁰ *ECP* p. 26. This notion stems from the knowledge that Wilson’s father, a Presbyterian minister, had sternly trained his son to follow in his ministry, only to have Woodrow abandon this calling while away at college. Concluding this passage Keynes reveals that his intended readership was British, and not international, as the popularity of the *ECP* so quickly became. This, perhaps, explains some of Keynes insensitivity to the reactions to the *ECP* outside of England as described by C. P. Blich (1991) and D. de Empoli (1991).

in Wilson's Fourteen Points were "lofty and powerful," details of their implementation were not well developed.⁵¹

The information asymmetries, mentioned before, were true of both George and Wilson, but Wilson's "mind was slow and unadaptable" when it came to these economic parts of the treaty. The formulation of expectations, and assessment of proposals and their possible alternatives in the heat of negotiations was for the Wilson characterized by Keynes a difficult task. This had dire consequences to the general playing out of the successful strategist, as Keynes prescribes:

A moment often arrives when substantial victory is yours if by some slight appearance of a concession you can save the face of the opposition or conciliate them by a restatement of your proposal helpful to them and not injurious to anything essential to yourself.⁵²

But Keynes paints the President on these parts of the treaty as being "too slow and unresourceful to be ready with any alternatives."⁵³ For "some" damages Germany was clearly liable, the Fourteen Points admitted to

⁵¹ "He had no plan, no scheme, no constructive ideas whatever for clothing with the flesh of life the commandments which he had thundered from the White House." *ECP* p. 27. Recall too, that Keynes had been preparing analysis of the reparations issues for over three years. Clearly, Keynes felt he had a standard by which to gauge effective preparedness.

⁵² *ECP* p. 27. As we will see below, during the Bretton Woods Conference, Keynes attempted to follow this advise in his chairmanship of the Commission concerned with the terms of the International Bank for Reconstruction and Development. Also in the preparatory work leading to Bretton Woods, in correspondence Keynes made concessions to Harry Dexter-White, in preferring Dexter-White's term "Unitas" over Keynes' own invention of "Bancor" as the name of the international currency to be issued by the future IMF. In the end, however, Keynes lost in his proposal for an international currency.

⁵³ *ECP* p. 27.

that. However, the measured impact of these costs on the eventual effectiveness of the League was not considered.⁵⁴ Questions of territorial control, on the other hand, were viewed essential in the Presidents plans for the League.⁵⁵ Consequently, as Keynes admits, Wilson did not budge on the Italian claims for the “return” of Fiume.⁵⁶

Regarding the advisors Wilson had for the “economic chapters of the treaty” few were well equipped for the fast European diplomacy of Clemenceau and George, and even those like Colonel House, whom Keynes appraises as having some strength, fell into the background.

Thus day after day and week after week he allowed himself to be closeted, unsupported, unadvised, and alone, with men sharper than himself, in situations of supreme difficulty, where he needed for success every description of resource, fertility, and knowledge. He allowed himself to be drugged by their atmosphere, to discuss on the basis of their plans and of their data, and to be led along their paths.⁵⁷

⁵⁴ Essentially, here the President's preferences were subject to the “rational” notions of marginal substitution, but by limiting matters of “prices” in the market settling the peace, he did not sense their impact on the efficacy of the market that was creating his cherished League. This has plainly been a failing of Marshall's partial equilibrium comparative statics methodology.

⁵⁵ Perhaps here Keynes' presentation of Wilson contains some sense of the “Framing” of preferences described in J. Kenetch, D. Kahneman and A. Tversky (1986), or A. Tversky and D. Kahneman (1987).

⁵⁶ Curiously, Keynes, who focused only on the economic parts, mentions the incident over the issue of Fiume ever so quietly. This constitutes Keynes' only reference to Italian policy issues in the whole of his discussion of the Council of Four. Tactically, on this issue Wilson was very swift and interventionist. Wilson believed that the Italians would agree with him on the non-return of the territory and against their Prime Minister Orlando. Wilson took direct action appealing to the Italian people through a series of full page newspaper ads. This was followed by Orlando's quick return to Italy where he won an overwhelming vote of confidence from the Italian Parliament. Orlando nonetheless lost to Wilson in the Council of Four and thus in the treaty.

⁵⁷ *ECP* p. 28.

Thus, the cumulative effect of allowing incrementally more and more “guarantees” on the economic, and effectively political, restrictions to be imposed upon the Germans manifested itself in the treaty. The Germans had not been present to comment on the seriousness of the restrictions. No advisors were effectively heard to counsel Wilson on the implicit contradictions to the principles of his Fourteen Points, or the conflicts that would be generated in the political sphere in ways that might seriously impede the future of the League.

But perhaps the most decisive moment in the disintegration of the President’s moral position and the clouding of his mind was when at last, to the dismay of his advisors, he allowed himself to be persuaded that the expenditure of the Allied governments on pensions and separation allowances could be fairly regarded as ‘damage done to the civilian population of the Allied and Associated Powers by German aggression by land, by sea, and from the air’, in a sense in which the other expenses of the war could not be regarded. It was a long theological struggle in which, after the rejection of many different arguments, the President finally capitulated before a masterpiece of the sophist’s art.

... I believe that his temperament allowed him to leave Paris a really sincere man; and it is probable that to this day he is genuinely convinced that the treaty contains practically nothing inconsistent with his former professions.⁵⁸

Thus, too, Wilson was “rational,” as was Clemenceau, but for the differences in their circumstances and their preferences. To be “rational” however, clearly did not make the treaty any better. To be “reasonable,” as the Englishman Lloyd George, was really preferable. To vigorously pursue the game, and to learn when to retreat and change of direction

⁵⁸ ECP p. 33.

was needed; this was the road to moderation. However, George was reasonable only after “checkmate” had been announced.⁵⁹

The tragedy was now complete. Orlando was never fully in Keynes’ skit, Clemenceau the villain, Wilson the fallen hero, and George the prodigal son who returned only after the hero’s house had fallen to ruin. Regarding the exact nature of the economic conflagration that was to emerge as a result of the treaty and the problem of reparations, Keynes analysis in Chapter Four of the *ECP*, as mentioned above, was not wholly correct. Much of what Keynes found wrong in the treaty making practice at Versailles, he worked to overcome (and at times overcompensate for) in the Bretton Woods Conference of 1944.

2.3. Keynes and the Bretton Woods Conference

Keynes did not live long enough to see the Bretton Woods institutions fully off and running, nor was there any time to pause and write reflectively at much length about his experiences at this treaty conference. What we know of his impact on Bretton Woods, the International Monetary Fund, the International Bank for Reconstruction and Development, has at times reached mythical proportions. Yet, the

⁵⁹ “To his horror, Mr. Lloyd George, desiring at the last moment all the moderation he dared, discovered that he could not in five days persuade the President of error in what it had taken five months to prove to him to be just and right. After all, it was harder to de-bamboozle this old Presbyterian than it had been to bamboozle him; for the former involved his belief in and respect for himself. Thus in the last act the President stood for stubbornness and a refusal of conciliations.” *ECP* p. 34.

documentary evidence retains the conclusion that his influence was very great.⁶⁰

There are many elements relating to the Bretton Woods Conference of 1944 and the institutions it created that have their roots or origins in the Conference at Versailles in 1919. Much of the rationale for these institutions was to avoid a repeat of the economic consequences of the peace that was soon to come.⁶¹ Much of the organization and selection of “official representatives” was also undertaken to prevent any repeat of historical failure.⁶² There was, of course, the potential for new failures to be taught as history.⁶³ Three similarities of a disappointing nature are evident: (1) In just a little over a year from the conference Keynes died of a heart attack, like Wilson regarding the League, Keynes had done more than anyone to initiate the vision of these international agencies. (2) Harry Dexter White, who next to Keynes was the co-author of the

⁶⁰ See Van Dormael (1978).

⁶¹ There was recognition that the need for post war credits for infrastructure would extend beyond the countries immediately damaged by the war. This anticipated the UN policies of decolonialization with its real needs for financing development assistance.

⁶² The limited scope of the conference, the technically focused nature of the problems, the lack of linkages to other issues of competing purpose, the extensive preparations, and for the Americans the selection of key Senators and House members as part of the US delegation to foster relations with Congress that would insure ratification. See *Proceedings and Documents of the United Nations Monetary and Finance Conference* (1948) p. 933.

⁶³ Keynes was a hard driving Presiding Officer of the World Bank Commission, and the considerations about “weighted voting” which was seen as “economic statesmanship” now is largely forgotten. See *Proceedings and Documents of the United Nations Monetary and Finance Conference* (1948) pp. 136-137. See also the discussion regarding “weighted voting” and Keynes’ considerations of the relative un-importance of the scheme in Chapter Five below.

International Monetary Fund, was denied being appointed Executive Director of the Fund, in part because of his insistence that the Soviet Union participate in the Bretton Woods Conference.⁶⁴ (3) Like the problem with the size and extent of "German Reparations," the World Bank's initial capitalization fell far short of the anticipated needs of Europe and Asia.⁶⁵ While this shortfall was made up by the US Marshall Plan, it dramatically constrained the growth potential of the World Bank.⁶⁶

2.2.2 Keynesian parallels from Versailles to Bretton Woods

2.2.2.1 Preparing for the transition to peace

In October 1918 Keynes toured Belgium to survey the destruction of the war. The Treaty did not address reconstruction adequately outside the context of reparations, which was never successfully managed.

At the close of the Bretton Woods meeting Keynes recalled his tour of Belgium with George Theunis (also participating at Bretton Woods),

⁶⁴ See A. Van Dormael (1978).

⁶⁵ Ibid.

⁶⁶ It was the intention that the World Bank would dramatically assist the financing needs of the former colonies that were made independent countries under the UN's Trustee Council. The shortage of capitalization meant that, Europe could reconstruct under the Marshall Plan, but the developing countries would be short of international credits. It is also interesting to note that at the 1974 Special Session of the UN General Assembly on what was called the 'New International Economic Order,' the idea that the World Bank should be more extensively capitalized by the Industrialized countries, so that more loans could be made available for development. This was not done by the World Bank. Instead, as economic circumstances would have it, the trouble with Petrodollars was for private banks to make those loans to developing countries.

happy to be “making better preparations for a similar event.” Since the war was not yet a year from ending the creation of the Bretton Woods institutions would be in place when the needs most clearly and urgently arise, hopefully preventing any repeat of the economic convulsions that followed 1918.⁶⁷

2.2.2.2. Management of international financial requirements

Reparations management was so ill-conceived it took many crises to get to the final Young Plan 1929 which created the Bank for International Settlement (BIS) to serve as a clearinghouse for central bank transfers and related balance of payments concerns.

The creation of the International Monetary Fund enlarged to a scope of participation beyond that of the BIS. It further fixed the issue of exchange rate controls, in a manner not addressed by BIS. Although the IMF did not become the world’s central bank, as Keynes’ initial proposals suggested,⁶⁸ it was a far better preparation for the future than the best of outcomes at Versailles.

2.2.2.3 Negotiation style and expedient results

In the *ECP* Keynes criticizes Wilson for his slowness, unpreparedness, and lack of control in the Council of Four, which in turn lead to the conclusion of a seemingly irrational treaty. Keynes’ criticism of how the

⁶⁷ See D. Moggridge (1992) p. 746.

⁶⁸ See Keynes’ (1980) original proposals for an “international clearing union” in *Collected Works of Keynes*, vol. XXV, pp. 33-94.

Treaty left the Reparations issue unsettled and undefined proved to be a major point of contention and crisis in subsequent years.

Criticism has been made by many Bretton Woods participants of Keynes for his fast driving control of the deliberations, his detailed preparedness, and disregard for apparent digressions within the Conference proceedings which he Chaired.⁶⁹

2.2.2.4. Idealism disappointed, piecemeal creations, incremental change
Keynes' idealism and attraction to Wilson's 14 points, and the League of Nations was turned to disappointment by their subversion under the terms of the Versailles Reparations, and non-participation in the League by the United States.

Dennis Robertson's idealism and attraction to early ideas "floated" in the preparatory drafts, of a world central bank, with an ultimate world "public interest" serving the needs of individuals, was met with similar disappointment. Robertson, the lead UK delegate to the IMF Commission, came to realize the resulting compromise only created a clearinghouse club for central banks. Robertson's criticism centered around the fundamental purpose given the IMF, particularly as set out in

⁶⁹ Dean Acheson reported to the Head of the US Delegation, Hans Morgenthau, the following: "The first problem about the Bank is that the Commission meetings on the Bank, which are conducted by Keynes, are being rushed in a perfectly impossible and outrageous way. Now that comes from the fact that Keynes is under great pressure. He knows this thing inside out so that when anybody says Section 15-C he knows what that is. Nobody else in the room knows. So before you have an opportunity to turn to Section 15-C and see what he is talking about, he says, 'I hear no objection to that', and it is passed. Well everybody is trying to find Section 15-C. He then says, we are now talking about Section 20-D. Then they begin fiddling around with their papers, and, before you find that, it is passed." (quoted in Moggridge (1992) p. 745.) Perhaps, Acheson had not reviewed the *ECP* and Keynes' prescription for successful strategist discussed above in Section 2.2.4..

clauses of Article VIII of the Fund's Articles of Agreement. Robertson's critical notes to Keynes, began less than a month after the Bretton Woods Conference. Robertson put the matter as follows: Either (1) the purpose of the IMF is to facilitate private international transactions (perhaps despite the domestic policies of member governments). Or, (2) the purpose of the Fund is to maintain governments monopoly on exchange controls and perpetuate their policies in the face of changing economic conditions.⁷⁰

This criticism Keynes accepted as potentially being as damaging to the Fund as Reparations were to Versailles. Keynes' initial reply was that if he were to accept (1) he should now recommend the government reject the Bretton Woods Articles of Agreement. However, he suggested that (2) was in fact the case, and therefore no rejection was called for. Robertson's reply raised the "public choice" doubt, that having adopted Bretton Woods on the assumption that (2) would serve the "public interest," he suggested that at times this would in fact frustrate the achievement of (1).

2.4. Sebenius and the Third UN Conference on the Law of the Sea

The practice of international treaty making had come a long way from Paris of 1919 to New York of 1973 when the Third United Nations Conference on the Law of the Sea (UNCLOS III) first convened. Preparations, procedures, and precedents all had paved a way for one of

⁷⁰ See Moggridge (1992) pp. 748-753.

the century's longest and most comprehensive systems of negotiations leading to the establishment of conventional international law.⁷¹ Most contentious of the issues addressed by UNCLOS III was the assignment of property rights to certain areas and resources to "mankind," which clearly broke with past's capture theory of property rights.⁷²

James Sebenius participated as a technical advisor with the American Delegation to the Negotiating Committee concerned with the financial arrangements for the mining of manganese nodules from the Seabed beyond the limits of national jurisdiction.⁷³ Following the conclusion of the treaty in 1982 Sebenius returned to Harvard to finish

⁷¹ Preparations were extensively undertaken by many nations, through the holding of policy conferences (as an example see P. Copes (1972)), including the participation of military as well as commerce related branches of national governments. The adoption of a unique and innovative set of procedures that centered on the development by the conference of its own negotiating text that would evolve after several rounds of negotiation into the final treaty text, tied to this was the emerging UN practice of the so-called "consensus procedure" (examined in Chapter Five below). Precedents were a flurry, UNCLOS III was following on the abortive attempt of UNCLOS II held in 1960 to resolve issues not addressed, and other loose ends of the three Sea treaties concluded in the 1958 UN Conference. Further legal precedents arose during the conference itself, as dozens of countries made unilateral declarations of "economic zones" far beyond the traditional three mile limit. The final product of UNCLOS III, which took over 150 countries nine years to compose, and twelve years for the necessary minimum 60 countries ratifying the treaty for it to enter into legal force.

⁷² By "capture theory of property rights" I mean the theory of property stemming from Locke which allows the free "capture" of properties not presently declared "owned" by recognized legal persons. The developed understanding embodied in the concept of the "common heritage of mankind" is that certain areas, resources, values shall be "rationally" managed on an equitable basis under an international regime established by a treaty of universal character. See the *Soule Declaration on the Progressive Development of Principles of Public International Law* made by the International Law Association (1986).

⁷³ The area of the Seabed beyond the limits of national jurisdiction, and the manganese nodule resource are not the only properties defined as "common heritage of mankind." The term also applies to the biological resources of the High Seas, highly migratory fish, as well as to values such as the right to free passage on the High Seas.

his economics dissertation under Howard Raiffa. Writing with both “academic reflection and LOS experience” he produced *Negotiating the Law of the Sea: Lessons in the Art and Science of Reaching Agreement*

I was intrigued by the substance of this innovative outcome [on the financial arrangement for Seabed mining], by the novel procedure for reaching it, by the personalities involved, by the puzzle of how a U.S.-built analytic model could play a prominent role in these politicized deliberations, and by myriad other aspects of the agreement. The controversial U.S. decision not to sign the treaty two years later prompted me to review the origins of the conference and to evaluate the overall U.S. negotiating strategy.⁷⁴

Unlike Keynes, Sebenius clearly did not write a political tract, nor is his rhetoric anything but that of the conventional modern day economist. He summarizes the three most relevant issues of his analysis as:

... first ... the use of a seabed mining engineering-cost model that was developed at the Massachusetts Institute of Technology, the puzzle of its high credibility in such sharply politicized environment, and its implications for the uses of outside technical information in complex, multilateral negotiations. Second, the proposition evolves that *differences* among conference participants - in values as well as in attitudes toward risk and time - allowed the financial negotiations to be concluded successfully. ... Third, the financial arrangement demonstrate how the artful combination of issues can produce a “zone of agreement”

⁷⁴ Sebenius (1984) p. 2. The U.S. position as a reluctant compliant to the terms of the 1982 Law of the Sea Treaty is an interesting one. The U.S. was one of only four members of the United Nations who choose not to sign the 1982 treaty (each of these four based their decisions on very different criteria). The U.S. legal system being based in the common law tradition has led nonetheless applied in its “customary” state practice many of the innovative legal rules embodied in the 1982 treaty. As the treaty neared its entry into legal force in 1994 (after achieving the unprecedented requirement of ratifications by over sixty states), a further agreement was made regarding the implementation of Part XI of the treaty which meet the U.S. concerns and objections. Consequently, on 6 October 1994 the President of the United States recommended to the Senate that they formally accede to and ratify the treaty together with the amending agreement. This matter still remains before the Senate, while the treaty has entered into force with over 75 states participating as of February 1997.

where the same issues, if considered separately, might not admit a settlement. Implications of this analysis extend to agenda creation, "bottom-line" formulation, and the order in which issues are settled.⁷⁵

Prior to the publication of his dissertation in 1984, Sebenius (1983) wrote an article that appeared in *International Organization* on the innovations he discovered during his work at UNCLOS III. He began this article describing the common approach of economics as follows:

A common approach to the analysis of negotiation commences with a given set of parties, a given set of issues, and the parties' fixed value or preference orderings for different possible settlements of the issues. ... I seek to complement such work with an investigation of the proposition that the issues and parties themselves are often important choice variables in negotiation. ... The original issues may change during the course of negotiation, often as the result of conscious moves.⁷⁶

Here Sebenius has recognized one of the central propositions of what was to become Buchanan's (1990) notion for "Constitutional Political Economics," that not only do constraints matter, but constraints can be a matter of choice themselves. Buchanan looks at the individual in the setting of single society, rather than the more complex problem that Sebenius takes on in international negotiations.

Once it is acknowledged that institutions enter as constraints on individual choice behavior, and once we allow institutions to be treated as variables subject to reform or change, the potential for selection from among alternative sets of institutions seems to follow. In expressing a preference for a *general rule*, one that will equally constrain *all* persons in a community, the individual is, effectively, trading off the possible negative value of losing his own freedom of action (of having his choice set constrained) in exchange for the positive value that he expects to secure

⁷⁵ Sebenius (1984) p. 10.

⁷⁶ Sebenius (1983) p. 281.

from the constraints imposed on the behavior of others, behavior that he anticipates may impact his own well-being in a negative fashion.⁷⁷

The choice problem of UNCLOS III, as in most all treaty making situations, is essentially Buchanan's problem of choice "among alternative sets of institutions."

Sebenius (1984) was out to break the mold of the conventional neoclassical treatment of policy makers maximizing only their sense of "national interest." Yet, he was not set solely on the focus of purely self-interest of the "public choice" approach.

Motivations that were quite apart from national interests of the involved parties prompted other individuals and groups to play important roles in the financial negotiations. The chairman of NG-2⁷⁸ and his staff, a Norwegian minister, and external groups including Quaker and Methodist organizations all developed stakes in the success of the conference and were instrumental in bringing about the financial compromises.⁷⁹

The innovative inclusion of external groups⁸⁰ to the negotiating process, is in fact a fairly common practice at UN treaty making conferences (as I

⁷⁷ Buchanan (1989) p.45.

⁷⁸ NG-2 stand for the Negotiating Group 2, which was responsible for the issues of the financial arrangements.

⁷⁹ Sebenius (1984) p. 18.

⁸⁰ The external groups involved in Sebenius' example were not all officially recognized Non-Governmental Organizations (NGOs). The MIT research group was sought out by the Committee's Chairman, as being a facilitator of the negotiators learning, and exploring highly complex alternative financial arrangements. The fact that the Chairman allowed his own proposal to be tested with the result that its simulated outcomes were less profitable for both miners and the Seabed Authority, helped break the ice among other delegates' willingness to experiment with many alternative arrangements. Modeling the role of NGOs in the treaty making process is a central concern of this dissertation. See below Chapters Three, Four, and Five.

will discuss in each of the Chapters below). Subsequent to his writing on the Law of the Sea, Sebenius (1992a) adopted Peter Haas' (1987) concept of "epistemic communities." Sebenius explains that this concept is useful in essentially framing and categorizing individuals from differing sides of an international negotiating situation beyond the more static conceptions of economic "rationality" decision agents.

I argue that an epistemic community can be understood as a special kind of de facto natural coalition of "believers" whose main interest lies not in the material sphere but instead in fostering the adoption of the community's policy project. ... The major contributions of the epistemic community concept, seen through a negotiation-analytic lens, would seem to be that it (1) directs attention toward the conditions under which this distinctive kind of coalition is likely to form and the characteristics of its possible expansion, (2) insists on the importance of perceptions and learning in negotiation, and (3) deepens our knowledge of how various actors come to define their interests.⁸¹

While it may sound at first, that Sebenius is implying a methodological holism, I believe he is not. The concept of the "epistemic community" is a social environment, which itself can be explained in methodological individualist terms. However, "epistemic communities" are unique and diverse, built with differing sets of incentives and constraints that generate differing tendencies in the social behavior of individuals within a given community. Thus the apparent irrationality of some individual's choices will on closer examination of the individual's perceived constraints be rationally explained.⁸²

⁸¹ Sebenius (1992a) p. 325.

⁸² This is consistent with the work of Gary Becker (1962) and Karl Popper (1963/1994).

The notion of “epistemic community” is an embellishment on the specification of the “situation” faced by the decision maker. The logic of decisions and agreements within an international treaty conference is complex since the individuals involved in the negotiations come from different “epistemic communities,” thus making their analysis of the “situation” heterogeneous. The approach to build a mutual respect and understanding of the differing positions, to build a sense of reasonableness in the treatment of others, is the “rational” approach in the circumstance of the international forum.

Buchanan’s (1996) discussion of a “generality in treatment” of individuals of different coalitions is also applicable to Sebenius’ orientation for negotiations among “epistemic communities.”

Under the constitutional requirements of generality in treatment, as between members of the majority and those of the minority, the consideration of alternatives for collective choice may be described as a search for the “public interest.” ... persons may differ on the ultimate definition [of “public interest”]. Nonetheless, so long as the constitution guarantees symmetry in treatment, the argument can proceed without the intrusion of differential distributional interests, as such.⁸³

Buchanan (1990) comments that a further theoretical imperative of his research program that has strong political ramifications to which Sebenius’ “epistemic” program is sympathetic.

All individuals must be presumed capable to make rational choices among alternatives in accordance with individually autonomous value scales. And this generalization does not allow derivation of collective action, whether or not directed toward choices among constraints, from individual evaluations on anything other than an *equal weighting* ... In this sense the whole of the constitutional economics

⁸³ Buchanan (1996) p. 17.

research program rests squarely on a *democratic* foundation.⁸⁴

To Sebenius the requirements of fostering a “creative learning” environment in the context of international treaty conference practice implies elements that are highly difficult to pin down in a mathematical model. Sebenius (1992b) acknowledges many areas related to issues where the game theoretic approach has contributed greatly to our understanding of situations involving negotiation. Yet, his “negotiation analytic” approach finds the rigor of formal game theory to have several drawbacks.

... the dominant game-theoretic quest to predict equilibrium outcomes resulting from the strategic interactions of fully rational players often suffers from a lack of prescriptive usefulness. ... First, on standard assumptions, there are often numerous plausible equilibrium concepts, each with many associated equilibria - and no a priori compelling way to choose among them. ... Second, one's client, for example, may wish to act rationally, but the other side may not behave as a strategically sophisticated, utility-maximizer - thus rendering conventional equilibrium analyses inapplicable. ... Third, the elements, structures, and “rules” of many negotiating situations are not completely known to all the players, and even the character of what is known by one player may not be known by another. Despite some ingenious theorizing, the frequent lack of such “common knowledge” limits - from a prescriptive standpoint - much equilibrium-oriented game analysis.⁸⁵

⁸⁴ Buchanan (1990) p. 15.

⁸⁵ Sebenius (1992b) p. 19.

2.5 Final words

This Chapter has reviewed the economic literature on problems in and related to treaties and treaty making practice. It has reviewed a significant study of the practice of the professional economist in international agencies. It has further reviewed the writings and practice of John Maynard Keynes at the Paris Peace Conference of 1919 and at the Bretton Woods Conference in 1944. As well, it has reviewed the negotiation analysis approach of James K. Sebenius, who participated in the Third United Nations Conference on the Law of the Sea. Many important notes were made regarding the evolving practice at treaty making conferences, and on the thoughts and ideas raised by Keynes and Sebenius regarding enhancing the treaty making and negotiation processes, and the analysis of this type of situation in an “economic” mode.

Chapter Three

Production of Law in the Theory of Alliances: Market Failure Economics

The economic theory of alliances, that has developed out of the initial work of Mancur Olson and Richard Zeckhauser (1966),¹ is well suited in many ways to consider the topic of conventional international law. Law constitutes one of the fundamental public goods produced by governments.² Governments are the producers, because of the perception of market's failure to provide law in a sufficiently coordinated manner. This is in part, due to the nature of public goods as goods that are non-excludable, and non-rivalrous in production and consumption.³ The present day system of laws, norms and rules of behavior established

¹ Hereafter simply denoted as O-Z.

² The word "law" has many different components as it is generally used by economists. Economists most readily consider "law" as meaning "common law." Common law stems from the spontaneous actions and practice of individuals, conditions familiar to economists. However, the content of "common law" is usually determined by the opinions and ruling of courts. These courts are generally established by governments. This aspect of the determination of "common law" has been analyzed by R. A. Hiener (1986), F. v. Hayek (1973) and G. Tullock (1972). Tullock (1972) and T. Cowen (1985) and (1992) specifically discuss the properties and problems associated with "law" and "judicial decisions" as public goods. My discussion of conventional international law is also considered a "public good" in the same manner as "common law" even though its means of creation are more centralized and deliberate, Hayek (1973).

³ Arguments for "private law" generally recognize that its creation and extension fails to be comprehensive without a "public" governmental framework to support it. See D. Schimdtchen and H. J. Schimdt-Trenz (1990).

by treaties are only binding on “states party to the convention.”⁴ More simply to the point, each treaty establishes a new, and perhaps limited, legal alliance.⁵

This Chapter has five sections. Section one consists of a review of the alliance model and the development of its literature. Section two examines the “public goods” nature of conventional international law as produced by governments through the mechanisms available at the United Nations. Section three applies the alliance model to the production of conventional international law as traditionally conceived of as an alliance of governments. The results of this application conform to the standard model of alliances by predicting that the public good will be produced in sub-optimal quantities, and that larger countries will bear a disproportionate burden in the allocation of costs. Section four extends this model to an alternate alliance model, which, in addition to government membership, includes in a non-standard fashion, the participation of international Non-Governmental Organizations. The consequences of this alternate institutional environment include a mixed Cournot-Lindahl equilibrium where alliance output is closer to Pareto optimal than the traditional institutional environment produces. Section five presents a summary of the Chapter’s main conclusions and presents some implications for future areas of development.

⁴ That is, binding on states that have agreed to, ratified and implemented the terms of the treaty within their domestic rules of law.

⁵ Of course, the question of our age has been to ask how binding is any “international law” when there is no clear world authority with the independent powers for enforcement of legal obligations.

3.1. A review of the alliance model and its literature

The original purpose of Olson and Zeckhauser (1966) was to “explain the workings of international organizations, and test this model against the experience of some existing international institutions.”⁶ Their article then emphasizes the defense alliance NATO because of the scale of economic resources devoted to this organization, and the simplicity it presents by having a single and well-articulated objective. Thus was born the economic analysis of the provision of international public goods as an alliance of national governments.

The main components of the alliance model are: (1) a production function created by the alliance for the provision of a public good satisfying the objectives of the alliance; (2) the objective or utility functions of the policy decision makers from member countries of the alliance; (3) the relevant income constraint facing the decision makers. From this simple model normal optimality procedures are applied that define the equilibrium conditions in respect to the decision makers’ perceived objectives. These equilibrium conditions are contrasted with the optimal level of output given the stated objectives of the alliance.

Let us review the general manner in which the components of the model operate with each other to produce the standard results of sub-optimal levels of output due to “free-rider” behavior by alliance members, and disproportionate burden sharing among alliance members.

⁶ Olson and Zeckhauser (1966) p. 266.

Normally, production in an alliance model is a simple additive cost function where the independent expenditures of each alliance member add to the total measure of the alliance good. How much each alliance member spends is assumed to be based on the independent maximization decision of each member. This independent maximization problem needs only three main arguments: (1) the ratio of the marginal benefit of the alliance good⁷ and the marginal benefit of expenditures on non-alliance goods⁸ (i.e., MRS, their marginal rate of substitution) of each decision maker; (2) the budget constraint of each alliance member; (3) the expectations of each decision maker concerning the level of expenditures by all other alliance members. A further simplifying assumption is that the marginal cost is constant and the same for all alliance members.⁹

Whether the alliance members are all of equal or unequal size,¹⁰ the tendency of individual members to “free ride” stems from the independence that is allowed by the alliance. When alliance members are of unequal incomes, there is also a tendency for the bigger members to disproportionately bear the burden of expenditures.

⁷ Measured in dollar value of the alliance good not paid by the national budget, but by other alliance members.

⁸ Measured in dollar values of other expenditures available to the domestic national budget.

⁹ The violation of this assumption has been examined by S. Weber and H. Wiesmeth (1991), whose results are mentioned below.

¹⁰ As represented by their budget constraints.

If the initial aggregate level of expenditures for the alliance is established by adding up what each member would spend independently of the alliance, then the individual maximization problem is the following. Each member must find where their marginal rate of substitution, between the alliance good and other goods, is equal to the marginal cost of the alliance good. When we assume that each ally has a different level of income, it follows that allies with larger incomes would have a larger MRS and thus, should make larger expenditures on the alliance good. This summing up of individually determined contributions to the alliance will be Pareto optimal, in the sense that each member is contributing their “optimal” share (that is, the aggregate level is determined by $MRS_1 + MRS_2 + \dots + MRS_n = MC$ ¹¹).

Pareto optimality is not achieved because of the nature of “public goods,”¹² and the expectations alliance members have about the contributions of all others in the alliance. The aggregate level of the alliance good exceeds the level each member would optimally provide. Each member perceives the marginal cost of supplying their share of the alliance good to be greater than their marginal rate of substitution between the alliance good and private consumption. Accordingly, each member has an incentive to reduce their actual level of expenditures for the alliance good until the aggregate level of the alliance good is equal to

¹¹ Where marginal cost is measured in the dollar values of additions to the total level of the alliance good being produced.

¹² Public goods are non-excludable and non-rivalrous in consumption. Therefore, regardless of the contribution each member will benefit from consumption of the level of the public good that is produced.

their independently chosen optimal level (i.e., where $MRS_i = MC$). This incentive behavior is often referred to as “independent-adjustment,” or “Nash” behavior, because of its obviously non-cooperative and independent nature.¹³ For the smaller income members this implies that they are willing to allow the alliance level to fall below the optimal level of the largest member. The largest member, however, would have the incentive to not allow the aggregate level of the alliance good to fall below his/her independent optimal level of expenditure. Here the behavior among alliance members is sounding more like a cartel than benevolent producers of “public goods.”¹⁴

Hence, public goods will be under-supplied relative to the alliance’s optimal, by the “free riding” behavior of the individuals comprising the alliance. Further, as raised by O-Z, when countries are of different income levels, those with higher incomes will bear a disproportionate share of the alliances’ expenses. Then, too, those with small incomes will pay proportionately less.

These results show that in a decentralized economy, without enforcement or other compulsion, the net wealth maximizing individual will make policy evaluations about the economy that would be non-optimal for the economy as a whole. The general conclusion of economists to insure optimal output of public goods has been, “in the

¹³ See R. Cornes and T. Sandler (1984a). The particular conditions used in this alliance model are similar to those originally specified by John Nash (1950) in his treatment of the bargaining problem.

¹⁴ Noting this secondary cartel-like behavior in the alliance model, M. McGuire and C. Groth (1985) began describing the equilibrium conditions of this model as having Nash-Cournot behavior.

production of alliance public goods,” to insure that the burden sharing rule centers on true marginal cost assessments. The level of “true marginal costs” is determined by the alliance satisfying level of production. But this prescription begs the question of determining that level of production.

3.1.1. Developments in the literature

There are three main lines of development of the literature on the economic theory of alliances. They address developments that focus on issues relating to: (1) the production function and the nature of the public good; (2) changes in the specification of decision maker; and (3) the expansion of the field of application to international problems other than defense.

The production issues have focused attention on the formulation of the alliance production function; the decentralization of its organization; assumptions about the homogeneity or heterogeneity of its marginal costs; and the concept of joint products. Joint products embody the notion that in the international arena production of certain public goods for the alliance may also address related demands domestically (and vice versa). This matter was first raised by J. van Ypersele de Strihou (1967) and has received a great deal of formal attention. One of the consequences of the notion of joint products is that there exist various degrees of “publicness” and “privateness” to the consumption of alliance produced goods. This has given rise to the distinction between “pure”

and “impure” public goods introduced to the alliance literature by Todd Sandler (1977).¹⁵

There have also been three main areas of development within what could be described as “decision maker issues.” They include changes in the formulation of who the policy makers are, and what their decision criteria are most likely to be. Policy strategies have also been adopted as the decision criteria originating in interpretations of alternative production strategies. Further, there has been an examination of the allocation processes adopted within the alliance that impact the policy maker’s decision criteria and behavior.

Specification of policy maker as a representative median voter was first introduced to the alliance model by L. Dudley (1979) in his examination of foreign aid as an alliance produced public good. But it has been more popularly referenced to L. Dudley and C. Montmarquette (1981) in their application to military expenditures. In the desire to model the defense alliances of Eastern Europe and the Soviet Union, the specification of the policy maker as a member of an oligarchy was introduced in J. C. Murdoch, T. Sandler, and L. Hansen (1991).

Policy strategies focus attention on specifying particular “institutional” strategies as the criteria faced by the policy maker in his/her utility function. These strategies also manifest themselves in the policy makers view of the “effective” production technologies. The “best

¹⁵ The distinction between “pure” and “impure” public goods centers on the actual extent of non-excludibility exhibited by the good in question. The public goods literature also describes the notion of “impurity” as being defined by the quality of its’ “localness.” In the case of defense this has been associated to the fact that increases in military personnel may benefit the alliance objective, it may also provide domestic employment and forces for maintaining civil order that are not objectives of the alliance.

shot, weakest link” strategies introduced by J. Hirshleifer (1983) are examples of this specification of the policy maker as a follower of particular strategies. This has received several empirical examinations, the most recent being J. Conybeare, J. C. Murdoch and T. Sandler (1994).

The examination of allocation strategies among alliance member was first theoretically explored by M. McGuire and C. Groth (1985). They examined a variety of allocation behaviors, most notably Nash-Cournot, Lindahl, as well as a mixed and sequenced set of these strategies. The idea of the Nash-Cournot behavior begins with the standard “independent-adjustment” evaluation by each alliance member, then a further level of oligopoly-like reactions is added into the determination of the members’ final actions. The Lindahl allocation strategy is most compelling. It models the institutional notion that the alliance members communicate their objectives and budget constraints openly¹⁶ and arrive at an agreement over the “fair share” apportionment of alliance expenses.

The fields of application of the economic theory of alliances have been numerous. The most outstanding examples where the alliance has been conceived of as international in scope include: Defense Alliances which has received the greatest amount of attention in the literature beginning with O-Z;¹⁷ foreign aid which was briefly mentioned in O-Z

¹⁶ In the original work of Lindahl, the agents react to a *tâtonnement* process that determines their simultaneous willingness to contribute their “fair share” to the unanimously agreed to budget expenditures. See also L. Johansen (1963), and C. V. Brown and P. M. Jackson (1990) for a further treatment of Lindahl’s work. This process will be addressed further, below.

¹⁷ For the most recent survey of this literature see Todd Sandler (1993).

and most fully examined by Dudley (1979); international monetary regimes was briefly treated as an alliance arrangement in K. Hamada (1985); and UN funding was briefly treated in O-Z, but has not be fully examined within the alliance model.

3.2. The “public goods” nature of conventional international law

The production of law, within the theory of alliances, differs markedly from the types of “public goods” most commonly examined in this literature. With a “public good” like defense, it is easy to conceive of hiring and training more military personnel, building and buying more weapons. In the case of law, what can be done? Hire more police, build more jails, hire more judges. These efforts work only for enforcing existing rules of law and behavior.¹⁸ What do we do to effectively produce more legal rules, where none have existed before? Much work has focused on the precise production distinctions that exist between such actions as an increase in military spending due by an alliance member, due to non-alliance concerns; the compatibility-substitutability of weapon systems, and so on. Such tangible, physically dimensioned, and easily cost quantifiable variables have made discussion in this field of application very fruitful. But what ingredients can we identify in the production of treaties, of conventional international law?

¹⁸ And even these kinds of expenditures have not always been found as cost effective as improved education and employment opportunities.

3.2.1. The characterization of conventional international law and its relation to notions of public goods

The conventional international law created by the United Nations Organization, including its Specialized Agencies, now stands at over 450 treaties.¹⁹ In addition to these treaties there is a growing body of General Assembly resolutions exhibiting a law creating character (although not formally constituting a binding treaty), that now stands at over 200 resolutions.²⁰ Both of these kinds of legal instrument are considered “conventional international law” because of their explicit written nature and the formal manner in which they were created and agreed to by governments.

How these classify as “pure” or “impure” public goods in the context of the alliance model centers around the specific membership of the alliance that created the document, and whether the application of the legal rules in the document apply only to the alliance members (making it a “pure” public good); apply to only a sub-set of alliance members (making it an “impure” public good); or when they apply to more than just the alliance members but to all governments universally (making it a “pure” public good with spillover effects). This later classification is common among treaties and almost universal among the

¹⁹ See *United Nations Document ST/LEG/SER.E/7* “Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1995.”

²⁰ In the study by the 13th Commission of the Institute for International Law (1987) 124 of these Resolutions were identified as having a normative legal effect in the international community. They acknowledged in their report that there has been extensive development of this type of international legal instrument produced outside of the General Assembly. However, their study was limited only to the work of the GA.

special GA resolutions. It embodies the effects international lawyers describe as the “codification of customary international law.”²¹ Table 3.1 below presents 287 of treaties and special resolutions created by the United Nations General Assembly in the last 50 years,²² that would be classified as being “pure public goods” with spillover effects, “pure public goods” with no spillover outside the treaty alliance, and “impure public goods” that affected only a subset of the treaty alliance.

²¹ Generally, the notion of “conventional international law” implies rules that have been explicitly written and agreed to by states, such as in a treaty or other instrument. On the other hand, the notion of “customary international law” is meant to include those norms, customs and practices that have been recognized by states and in the course of adjudication, as rules of law. From a national perspective these two forms of law are analogous to civil law (i.e., legislation) versus common law.

²² In limiting this study to only those treaties created by the GA and ECOSOC main Commission only 94 treaties have been examined. If the scope were widened to include all the Regional Commissions of ECOSOC and all Specialized Agencies, many more treaties of the “impure public goods” classification would be identified.

Table 3.1

Distribution of treaties and other forms of international law possessing the various “public goods” characteristics

Pure Public Goods with global spillover.	Pure Public Goods with no spillover.	Impure Public Goods within the alliance.
The GA and ECOSOC have produced 36 treaties of this type.	The GA and ECOSOC have produced 42 treaties of this type.	The GA and ECOSOC have produced 14 treaties of this type.
The GA has produced 144 such resolutions.	The GA has produced 15 such resolutions.	The GA has produced 36 such resolutions.

3.2.2. Production of conventional international law

As noted above, the conventional international law produced at the United Nations is of three types: (1) Pure Public Good with global spillovers outside the alliance, (2) Pure Public Good with no spillovers, and (3) Impure Public Good within the alliance. This fact suggests that the full specification of production technologies in the alliance model ought to be of the joint product type and possess a flexible form.

Bear in mind that while the United Nations is a “universal international organization” (i.e., its membership is essentially universal (all independent countries except Switzerland)), the formal process of treaty making may involve only a subset of UN members. For example, the Economic Commission for Europe is a regional commission within the Economic and Social Council designed to address matters of concern primarily among the 30 or so countries of both eastern and western

Europe. One problem faced by these countries was the need for standardization of road signs for improved traffic safety.²³ A standards establishing treaty was created in 1949 in a conference of essentially only European nations present. Yet, the problem this treaty addresses is faced by much of the world. Consequently the number of countries that have ratified the treaty and adopted its rules exceeds 90.²⁴ During a periodic review of the treaty, in the form of a conference to reform and update the road sign standards, more non-European nations participated than the total number of European nations.²⁵ The treaty now has been adopted by countries from every region of the world.

In this type of situation the notion of a “free rider” must take on a new understanding. Clearly, states that did not take part in the production of the treaty (either in its original form in 1949 or in its revision in 1968), yet, nonetheless have ratified and adopted its rules, have taken a “free ride.” However, when we look at the implementation and enforcement side, there are clearly costs that are borne by the

²³ The Convention On Road Traffic, was concluded at a Conference organized by the UN's Economic Commission for Europe, in Geneva 19 September 1949. *United Nations Treaty Series*, volume 125, page 3.

²⁴ According to *United Nations Document ST/LEG/SER.E/7* “Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1995” a total of 91 countries have ratified the 1949 Convention on Road Traffic.

²⁵ At the 1968 Conference, again organized by the Economic Commission for Europe, the attendance and participation was 66 states, 5 states with observers only, 7 intergovernmental organizations, and 19 international non-governmental organizations. This Conference both generated broader support for the 1949 Convention as well as extending it in the texts of the 1968 Convention on Road Traffic and the 1968 Convention on Road Signs and Signals. *United Nations Treaty Series*, volume 1042 page 17 and volume 1091 page 3 respectively.

“states party to the convention” whether those states participated in the formulation of the convention or not. This example is more closely akin to what might be referred to as “easy riding” behavior.²⁶

In cases where a state may choose to not ratify this treaty but, nonetheless adopt its rules, bears the costs associated with the implementation and enforcement of these rules. The effect of such acts of “state behavior” have, within the theory of international law, is to begin the move toward transforming the “conventional international law” into “customary international law.”

3.2.3. Externalities and the full costs of treaty making

3.2.3.1. *Spill-ins to the alliance process*

In addition to the costs born directly by a member government in its domestic preparations for the delegation it shall send to conference, there will be many more costs incurred by private firms, private-interest groups, and the legal and academic community most closely associated with the subject matter under consideration. All or most of these costs will be born by society in such a decentralized manner that it would be difficult to consider a full accounting (particularly in large population settings). Yet, these decentralized, private activities will have a great deal to do in bringing success or failure of a treaty, or their country’s participation in that treaty regime.

²⁶ See a fuller discussion of “easy riding” behavior in Cornes, R. and Sandler, T. (1984b).

The production of law, as opposed to its “spontaneous evolution,” does require specific centralized social costs.²⁷ The general philosophy of the emergence of common law, or “spontaneous order” is that its social costs are highly decentralized among all members of society, and importantly, these costs are borne by individuals in proportion to their perceived benefits derived by such “order.”²⁸ The questions that are generally raised concerning the centralization of social costs in the production of law, are often formulated analogously to the social problems associated with monopolies.²⁹ Yet, might it not also be viewed as the concentrations of costs associated with very large market processes such as those played out on Wall street every day?

3.2.3.2. *A simple utilitarian choice of treaties*

If treaties were characterized in general terms, rather than the terms specified by their content, it would be that the behavioral constraints the treaty embodies, generate more benefits than the costs it imposes. By this reasoning every treaty could be indexed according to its ratio of benefits to costs (BR).

$$BR = \$\text{value of expected benefits} / \$\text{value of expected costs.}$$

²⁷ See F. v. Hayek (1973), R. Sugden (1989) and D. Schmidtchen and H. J. Schmidt-Trenz (1990).

²⁸ However, even in the practice of common law through the centralized decisions of judges Gordon Tullock (1972) raises concern that the judges rulings are an externality imposed on society, which may make the perceived benefits, even of a winning plaintiff, less than the costs.

²⁹ See again F. v. Hayek (1973), R. Vaubel (1986) and R. Holcombe (1994).

Here a policy maker responsible for deciding on acceptance of a treaty would possess some utility function that includes the argument for the Benefits Ratio of the treaty in question.

Generally speaking, we expect a country's policy maker would adopt all treaties where $BR \geq 1$, and reject all treaties where $BR < 1$. While this simple model produces some evaluation, yet it raises questions such as: "How does this expectations variable enter the decision maker's utility function?" "How does BR relate to the contribution (cost) by country A to the alliance in its production process?" "What constraints exist for country A to accept, ratify and implement the treaty?"

3.3. An alliance model of conventional international law

3.3.1. Why countries support and participate in a treaty conference

First, a country's policy makers must decide whether they expect the total (social and private) current costs that are incurred will be reduced under the terms of a finalized treaty text. If they think that current costs without the treaty are greater than the expected costs under the future condition of the treaty then there will be support for holding a treaty conference.³⁰ If they think the current costs without the treaty are less

³⁰ One example of some costs associated with such a decision is the holding of government-industry policy conferences. Dr. P. Copes, of Simon Fraser University participated in such a conference sponsored by the Fisheries Service, Environment Canada (P. Copes (1972)) in preparation for development of Canada's position toward the Third United Nations Conference on the Law of the Sea that began the following year.

than the expected costs under the future condition of the treaty then there will not be support for the holding of the treaty conference.

Second, once the country's decision maker has agreed to the holding of a treaty conference, he/she must evaluate his/her country's willingness to participate in that conference. Accordingly, his/her evaluation is now contingent on the expected benefits from the presence of his/her country's delegation at the conference. If he/she finds that the expectations of costs under the treaty will be greater when his/her delegation participates, than when his/her delegation does not participate, his/her decision will be to not participate. If, however, he/she finds that the expectations of costs under the treaty will be less when his/her delegation participates, then he/she will conclude that his/her delegation should participate.

Since the expectation of the treaty's Benefits Ratio ($BR^*(t)$ i.e., expectations at time t) before the treaty conference concludes the treaty's text may differ from the actual Benefits Ratio ($BR(t+1)$) once the text is final and the conditions precisely defined. Thus, we cannot say that $BR^*(t) = BR(t+1)$ with any certainty.

Since country A's decision maker (1) has decided to support the treaty conference, and (2) has decided to participate in the conference, then we are left to address his/her determination of the extent of his/her conference participation. In other words, how do we characterize the contribution of country A to the treaty negotiations? One central and obvious measure of participation is the amount and quality of the staff delegated to the tasks. Another, related measure would be the urgency placed on the conclusion of the treaty text (although this is at least

implicit in the staff measure).³¹ Costs associated with the hosting of domestic and international forums for the research, discussion and promotion of the ideas the treaty is expected to address could also be considered. Many of these costs will vary depending on the size of the country, its political openness, and relative price level.

Most multilateral treaties are complex in that they address many topics or sub-issues simultaneously.³² In treaty making conferences such complexity is generally managed through the organization of a series of committees. Every country participating in the conference is eligible to have “representation” in the entire work of the conference. Logically, then a policy maker desiring to have his/her country effectively represented in the deliberations of the conference would consider a staff of “official representatives” large enough to cover each sub-committee, and a large enough support staff to serve their needs for technical, advisory and clerical assistance. This logic, however, ignores a country’s ability to afford such a desired expense. It is particularly true for small countries.³³ Such a lavish coverage by a delegation’s staff may create

³¹ For example at Versailles, because of the importance placed on the idea of the League, President Wilson insisted on direct participation. This, minimized the work that might otherwise have gone to his Secretary of State Lansing.

³² See E. McWhinney (1984), S. Rosenne (1989) and *Review of the Multilateral Treaty-Making Process*, UN Document ST/LEG/SER.B/21 (1985).

³³ For example, during the Bretton Woods Conference that created the treaty “Articles of Agreement” for the International Monetary Fund and World Bank, 6 of the 44 countries participating had only one official representative, while Canada and the United States each had 12. The case of Guatemala is interesting owing to the fact that the official representative came as a “postgraduate student in economics sciences, Harvard University,” and had no other diplomatic standing.

externalities to the conference by imposing burdens on the conference expenses, and the efficiency of the conferences deliberations if all committees end up being large replicas of the plenary.

3.3.2. Counter strategies for efficiency and cost minimization

Owing to matters relating to the inefficiency of large committees, delegations are often constrained to an upper limit on the number of “official representatives” that may attend the conference. While only “official representatives” may speak before the conference and its committees, other “official staff” of a delegation are allowed to observe committee proceedings.

In the practice to keep the size of committee smaller than the plenary of the conference, the issue of assignments to committees becomes a problem. The assignment of country “representatives” on a regional basis has for many years been viewed as an equitable and egalitarian solution to this assignment problem. However, it has met with a number of occasions where strongly “interested” countries were excluded for participating in sub-committees whose issues were of particular importance. To address these types of concerns a practice of appointing so-called “open-ended” committees or working groups has become common place.³⁴ The solution these “open ended” committees provide is an initial appointment of regional representativeness, augmented by the right for other “representatives” to participate in the

³⁴ See S. Rosenne (1989), and my discussion in Chapter Five below.

deliberations on an *ad hoc*, but voting basis, when topics of extreme interest are being addressed. The efficiency and effectiveness of this committee model deserves further study, and will be examined more closely in Chapter Five below.

3.3.3. A characterization of treaty production by the alliance

We must begin, as mentioned above, with the question: What ingredients can we identify in the production of treaties, of conventional international law? And as indicated in the discussion of the last two sections it seems that the best single indicator we should consider are the costs associated with the size of the staff, both in terms of the “official representatives” and the various levels of support staff assigned to them. This would most conveniently be measured as a cost expended by governments.

For the sake of comparison to the standard alliance model let us assume that the cost is a function of the size of staff, which will be assumed to be proportional to country size, where country size is measured in terms of GDP, population, (or per capita GDP).³⁵ We should specify a lower limit of one, the plenipotentiary, that is required to qualify the country’s attendance. We will place no assumption on the upper

³⁵ We should also note that the proportionality assumption is arbitrary, as maybe the proxy for country size. Some very small countries (in terms of either GDP and population) may place a very high value on a particular treaty’s issues, and accordingly send a disproportionately larger staff. Another situation where small countries may have assigned large staff is when their country serves as host to the conference, or when the conference is very close geographically. In either of these cases it would be assumed that the country’s government had evaluated the benefits of such expenses as being greater than their costs.

limit of the staff size by noting that “unofficial” and support staff may not be limited by the conference rules of procedure.³⁶

This characterization of production inputs allows us to define production as a simple linear cost function, similar to that in the defense alliance literature. Clearly it is not the case that treaties have an obvious continuum of measurable value that is generated purely by a measured value of labor input. Certainly there have been cases where large measures of staff have been supplied, yet, have produced the ineffective likes of the Treaty of Versailles. It was argued in Chapter Two that the technical arrangement of this staff, and particular decision rules were more to blame than the staff input for the failure at Versailles. For the present, however, we shall leave aside the realism of this “production” relationship to examine the general principle of participation.

We could think of the staff as performing a filtering function to the decisions that will be made at the treaty conference about the composition of the treaty’s constraints on future state behavior.³⁷ More

³⁶ As an example of the actual number of “official representatives” sent to a treaty conference, let me summarize the distribution sent to the Bretton Woods Conference. There was a total of 44 countries represented, as well as 4 specialized agencies of the League “observing.” Among these 44 countries, two countries sent 12 representatives, one country sent 9, 1 country sent 7, 4 countries set 6, 3 countries sent 5, 9 countries sent 4, eleven countries sent 3, seven countries sent 2 and six countries sent 1 representative. See *United Nations Monetary and Financial Conference* (1948) p. 927-935.

³⁷ R. A. Hiener (1986) has discussed the role of “precedent” and judicial review as a “filtering” process that minimizes the risk of “imperfect decisions” in common law courts. This is a matter highly related to the concern of making “imperfect decisions” in the creation of conventional international law.

staff provide more filtering,³⁸ and hence a higher quality treaty (measured in terms of the Benefits Ratio described in the previous section).

Therefore, like the alliance model, the criteria for the Pareto optimal level of cost of staff to spend on the treaty conference would be defined by the sum of the individual country evaluations of the marginal rate of substitution (between the cost of staff sent to the conference and spending their budget elsewhere) relative to the marginal cost of sending the staff (which the alliance model generally assumes is the same for all governments). The optimal treaty conference participation would be defined where³⁹

$$(1) \quad MRS_1 + MRS_2 + \dots + MRS_n = MC, \text{ for countries } 1, 2, \dots, n.$$

However, this level of output is greater than what generally occurs for the reasons analyzed in the case of defense alliances. The decision by the individual policy maker regarding his/her country's level of participation considers the expectations concerning the expenditures on staff participation by all other alliance members, and the fact that at the

³⁸ We shall also ignore any considerations of specifying this relationship further. The work of R. K. Sah and J. Stiglitz (1988) assert that the relationship is non-linear, based upon the stochastic epistemology. Addressing their problem must be left for another situation.

³⁹ Here, more explicitly, the MRS for each country is measured in pure units defined by the ratio of dollar expenditures on treaty staff to dollar expenditures on other government activities. While the MC is the marginal cost, in dollars, for all governments to devote additional staff to the treaty conference.

Pareto optimal level of expenditures for staff participation his/her marginal rate of substitution is far less the marginal cost.⁴⁰

(2) $MRS_i = MC$, for country i .

Therefore, the policy maker has the “independent-adjustment” incentive to not supply the alliance-optimal level of expenditures on staff, but some amount less. In some cases the policy maker may wish to “free ride” entirely on the alliance by not sending any staff participation to the treaty conference, yet agree to and ratify the treaty once it has been produced.⁴¹

However, the effect of this option for the alliance may be an overall lower level in the quality of the alliance produced public good, the treaty. This result is the standard “public goods” inefficiency argument.

Further, if members in the alliance vary in size (i.e., net wealth) it can be assumed that the marginal rate of the substitution (the trade off between more domestic spending or paying for more treaty conference staff) is smaller for small countries, and larger for large countries. Then, it must be true that larger countries must bear a larger and disproportionate share of the burden.⁴²

⁴⁰ Here too, we are abstracting from the realism of desiring a “manageably” sized level of conference participation, as a partially pointed out in the previous section.

⁴¹ Recall the example of the Convention on Road Traffic mentioned above.

⁴² This can explain the perception by many legal scholars that the orientation of international law is predominantly Euro-centric, or Anglo-European. It is because these countries contributed disproportionately to the general production of international law during the past 300 or so years. The case of Canada’s participation in Bretton Woods is an obvious exception to this result; where we could say that Canada has played a disproportionately great role in the establishment of the Bretton Woods institutions. Then again, Bretton Woods is closer to Ottawa than Washington D. C.. Perhaps the Canadians only come in large numbers for the party.

This result of O-Z does depend on whether the aggregate level of output is determined by the constitutional commitment to the alliance, as in equation (1) or through separately evaluated contributions as in equation (2). It holds true when alliance production is determined by equation (2). It does not hold true when alliance production is determined by the constitutional commitment of equation (1).

3.4. An alternate alliance model

3.4.1. Introduction of NGOs to treaty conferences

Under Article 71 of the United Nations Charter, arrangements are to be made for "consultation" with Non-Governmental Organizations in matters falling within their competence. These arrangements are unique compared to the standard organization of "governments."

For the purposes of the present work, Non-Governmental Organizations (NGOs) are restricted to those recognized by the United Nations as such. These are organizations whose "aims and purposes . . . shall be in conformity with the spirit, purpose and principles of the Charter of the United Nations";⁴³ who "support the work of the United Nations";⁴⁴ and who are of a "representative character and of recognized international standing"; whose membership comes from "a substantial

⁴³ See *UN Document E/RES/1296 (XLIV)* of 25 June 1968, paragraph 2.

⁴⁴ *Ibid.*, paragraph 3.

number of countries in different regions of the world.”⁴⁵ These organizations hold one of three categories of "Consultative Status" with the Economic and Social Council. The purposes of this "Consultative Status" are twofold: (1) To enable [ECOSOC] or one of its bodies to secure expert information or advice from organizations having special competence in the subjects for which consultative arrangements were made; (2) To enable organizations which represent important segments of public opinion to express their views.⁴⁶

When treaty production is based on participation of staff (as in the last section), the introduction of NGOs is difficult to clearly integrate into the production function. Particularly because NGOs (unlike “observers”), are allowed to speak to the relevant committee or plenary. However, NGOs are not allowed to vote on any matter of procedure or substance.⁴⁷ Therefore, to add in the size of NGO staff, and the number of NGOs participating in a conference we should do so in a partitioned manner.

⁴⁵ Ibid, paragraph 4.

⁴⁶ See *UN Document E/C.2/661* of 7 May 1968, page 4.

⁴⁷ One partial exception being the Executive Council of the International Labor Organization (ILO), which is comprised of an equal number of “representatives” from both Governments and NGOs. All members of this Council, which is chaired by the Director-General of the ILO, have equal voting rights on all matters up to, but not including the “Conclusion of the Text,” and its “recommendation to governments.” This last stage is left to the Director-General to perform on behalf of the Organization. This is done because the constitution of the ILO, which was created as an international treaty exclusively by governments, allows only the Director-General or decisions made solely by governments who are members of the Organization to make such recommendations. See *Review of the Multilateral Treaty-Making Process*, UN Document ST/LEG/SER.B/21 (1985).

Because of their non-voting status the behavior of NGO staff must be different from the staff of governments. In their “presentations” to conference plenaries, and the “consultations” they may be allowed in subcommittees, NGOs must seek to build a level of agreement that is of a character different from standard coalition building. They must aim for the collective support of the government policy makers toward the aims of the United Nations as they articulate them.⁴⁸ This means that in many cases their “consultation” will focus on matters of underlying principle, rather than a more narrow discussion of procedural specifications. Thus, the efforts of the NGOs often behave with the appearance that they are working for the alliance as a whole.

The extent to which NGOs display such cooperative behavior in their participation in a treaty making conference, they are certainly not “independent-adjustment” or Nash, in character.⁴⁹ Among the forms of non-Nash behavior discussed in the alliance literature, the more often discussed is the so-called Lindahl behavior.⁵⁰ What this behavior implies is that individual policy makers have, through some institutional

⁴⁸ Because of the NGOs “invited” participation, as opposed to membership, in United Nations fora, behavior that aims at divisively organizing support from minimally decisive coalitions of member states is met with a withdrawal of such “invitations.”

⁴⁹ For several accounts of the perceived character of NGOs see R. Charlton and R. May (1995), David Forsythe (1976) and C. A. Meyer (1995). In Chapter Four below I will examine some elements of criticism that can be directed toward the more idealistic view of NGO participation described here.

⁵⁰ R. Cornes and T. Sandler (1984a) also discuss Kantian behavior where agents act on what they perceive as the ‘categorical imperative’ to behave as they would want others to behave. However, this discussion was more directed at public goods in general and not the behavior within an alliance.

forum resembling the Walrasian *tâtonnement* process, arrived at a set of unanimously agreed to “budget cost shares” to a corresponding aggregate budget. Because the process is supposedly unanimous, its resulting decisions are deemed to be “fair” and voluntarily arrived at. Therefore, the Lindahl “fair shares” are “Pareto optimal.”⁵¹

Knowing that there are additional participants at the conference who can add to the discussion, but not directly affect the decisions of the conference will necessarily change the evaluation function of our government decision makers. The policy maker remains concerned foremost with the decision variable under his/her control, the level of expenditures on his/her country’s staffing contribution to the treaty conference. The expected contributions of all other alliance members and the expected contribution of NGO participants will be combined in his/her evaluation. Here the NGO contribution is counted as if there were an increase in the alliance membership.

The results derived by this change in the “production technology” (institutional arrangements) of the alliance and of the government policy maker’s utility function will differ only slightly from the standard O-Z result or so it will appear at first glance. Our policy maker, who does possess voting authority within the alliance conference, will make his/her maximizing decision based on independently setting his/her marginal rate of substitution equal to the marginal cost of the treaty production. This MRS is conditional on his/her expectations of the other

⁵¹ See C. V. Brown and P. M. Jackson (1990), L. Johansen (1963), and R. R. Cornwall (1984) for general discussion of the features of the Lindahl process. For application to the alliance context see M. McGuire and C. Groth (1985), and T. Sandler and J. C. Murdoch (1990).

countries in the alliance and conditional of his/her expectations of the NGO contribution. The individual maximization level of treaty production will be the same as equation (2) in the previous section. Only now the policy maker is “free-riding” on the NGOs, as well as fellow alliance members.⁵²

In order to identify the new Pareto optimal conditions, for the alliance, we need to specify the NGO policy maker’s utility function, as well as his/her expectations of the governments’ contributions. We must articulate within this decision function the fundamental differences in the aims of NGO policy, and behavior, as compared to that of government policy makers.

NGOs are voluntary organizations with international membership, the organization’s aims and purposes being to promote particular aspects of social well-being at a global scale, rather than focusing on a single national territory⁵³ and the constituency that resides there. Accordingly,

⁵² At this point in my modeling of the NGO participation at the United Nations, the asymmetry in the free-riding behavior between government policy makers and NGOs stems from their “Nash” versus “Lindahl” behavior. It should be borne in mind that the NGO augmented alliance as an organization incurs larger aggregate costs simply owing to the NGO participation. Further, if and when suggestions raised by NGOs are adopted by the voting membership of the alliance (the governments), additional costs are being incurred by such suggestions. Whether such an increase in alliance produced goods or services (initially suggested by NGOs) may be considered a form of free-riding behavior of the NGOs.

⁵³ Note that since the NGO is more single-purposed than governments, NGO income has been established to serve that purpose. Thus, if the organization determines that UN participation accomplishes this best it will devote its entire income to that participation. Of course, there are other avenues for the NGO to direct its resources beside directly at a UN Conference. As they are grassroots voluntary organizations, grassroots educational champagnes are a common activity. When deemed more cost effective, funds may be devoted to public awareness champagnes aimed to influence governments through their constituents, as well as at the UN Conferences. Such a mixed output arrangement is generally more cost effective since it utilizes directly the volunteer labor of its membership and like minded individuals,

their reaction functions, or behavior will tend not to be Nash-Cournot (“independent-adjustment”), but Lindahl cooperative, or even altruistic. This feature suggests the “*Ad Hoc Mixed Cournot-Lindahl Allocation*” articulated by McGuire and Groth (1985).

3.4.2. The expectations of the NGOs

1. If NGOs assume that Governments will “fail” and produce a sub-optimal level of treaty law, then NGOs may compensate for such expected behavior.
2. If NGOs assume that Governments will reach the Pareto optimal level of treaty law, then NGO participation need only bring their “fair share” to the conference as they believe is expected of them by the decision makers.

According to these two expectations formulas the NGO level of participation can be determined as (1) compensating for the non-optimal government provision, or (2) participating to insure the optimal level is

rather than relying on efforts that require the expenditure of incomes raised. (NOTE this is a feature of the efficiency of decentralized costs. Note two problems here: First, it is difficult to compute the NGOs effective full income when so much is in-kind contributions of labor over a vast decentralized arena. Second, regarding the revenues raised by the NGOs. They are restricted by UN admissions policy not to be government supported organizations. This policy does allow for grants to particular projects. Such project financing cannot be the organization's sustaining source of income. Thus, the sustaining source of income must be through voluntary contributions of its membership. This income may suffer from non-optimal free-riding behavior on the part of its contributors, or maybe generated by a sense of Lindahl “fair share” contributions. The pattern of membership behavior will likely influence the organization's abilities to satisfy its stated objectives as effectively as possible. This matter will not concern me for my present purpose, which is to introduce the general pattern of NGO behavior into the treaty making process. Studies such as Charlton and May (1995) and Meyer (1995) discuss the extremes from minor opportunism to probity, and extreme virtue as norms of NGO behavior.)

obtained. First, consider the NGO expectation of “government failure.” Note that because of the very small, but dedicated, budgets of NGOs we can expect that they will have large marginal utilities for both expenditures on staff sent to treaty conferences, and other activities. Since the NGO’s expectations may be that “governments fail” to supply the Pareto optimal level, they can compensate for the government inefficiency with relatively small increments of increased staff contributions. Only a slightly larger staff than what they would provide under the assumptions that governments are acting in the optimal interests of the alliance.

This implies that the expectation of Nash-Cournot allocation among government leading to sub-optimal contribution, and a Cournot-Lindahl allocation behavior among and by NGOs will compensate for the expected government failure. It is important here to note the sequence of behavior in the NGOs. As identified by McGuire and Groth (1995) where the initial contributions by governments to sub-optimal levels this may lead to a compensating reaction by the NGO.⁵⁴ Therefore, NGO involvement will produce closer to Pareto optimal levels of output for the alliance. If the actual NGO involvement extends far enough to fully compensate for the sub-optimal levels of governmental contribution their action should be noted as altruistic.

⁵⁴ This condition may also be seen as bringing in to the model a Shackleberg sequential equilibrium condition. This has been recently explored by Hal Varian (1994), with similar results found separately by G. Torsvik (1994). Both of these papers examine the pure public goods models with both public and private provision. The conclusion these authors reach, is that when the sequence begins with the public provision decision first, followed by the private sector larger aggregate supplies of the public good will result than if the sequence was reversed.

Second, is when the NGO expectation is that governments will supply to the alliance Pareto optimal. The NGOs will be able to complement the alliance members with their expected “fair share” level of participation. This situation implies the expectation of a Lindahl allocation among governments leading to their “fair share” optimal level of contributions, and a Lindahl allocation among NGOs. Thus resulting in the Pareto optimal level of treaty law.

The complete production basis of the alliance’s optimal level should also include the actual contribution from the NGOs, as well as the governmental contributions to the treaty making process. Since the aims and purposes of the NGOs are identical to the alliance (the United Nations), the Lindahl allocation would determine their level of contribution. When the NGO expectations assume government’s failure to contribute “optimally,” the NGO contribution would be greater than that determined, in order to compensate for the governments’ inefficiencies. This would be altruism beyond their “fair share,” yet consistent with the NGO’s self-interest (identified with the alliance).

3.5. Conclusions and implications for future areas of development

This Chapter has applied the economic theory of alliances to the previously unexplored field of conventional international law, and arrived at the standard conclusions concerning the non-optimal provision of public goods, and the disproportionate burden sharing. The powerful “public choice” critique that the alliance model makes is that the government officials (being self-interested individuals) attempt to provide

public goods (which may not be supplied owing to the failure of private market mechanisms to produce them sufficiently), but the government also fails by its “independent-adjustment” behavior to provide them optimally for the “public interest” as defined by the alliance.

This Chapter has further extended the standard model of alliances to include a unique institutional agent (the Non-Governmental Organization), whose aims are more related to the alliance’s purpose than to particular members, and who have non-standard behavioral characteristics. The outcome of this NGO-augmented alliance model was improved relative to the Pareto optimal, as a result of the mixed Cournot-Lindahl allocation behavior, that arises in this type of alliance. Further, when NGO policy makers adopt expectations that the collective choice of governments will fall short of the Pareto optimal level of treaty production, they may act to compensate for the expected government failure.

These are both new and important additions to the alliance literature. The NGO-augmented alliance model should be readily applicable to several increasingly important fields where these organizations are becoming more and more involved, such as; foreign aid and development projects, environmental protection and sustainable development, human rights standards, and their unexplored role in peace building as opposed to defense maintenance.

A further direction for extending these alliance models of conventional international law, would include the examination of spillover effects caused by the joint production of public goods with varying degrees of “purity and impurity.”

3.5.1. Important implications and future areas of development

An important implication of my NGO-augmented alliance model is to the analysis of foreign aid, international development assistance, and the general problem of United Nations financing. There are four reasons why this implication of my model should be pursued.

First, it is increasingly being reported that NGOs have a high rate of effective productivity in the implementation of development aid projects.⁵⁵ Second, there has been a growing trend by many government development agencies such as US AID, and Canada's CIDA, to fund projects initiated by NGOs (this is different from the more business like practice of contracting out projects to "commercial" development contractors).⁵⁶ Third, is that in efforts to "de-politicize" the issues that arise when donor governments are viewed as domestically self serving in the award of development contracts. Governments such as Norway have chosen to place the decision authority over their budgeted aid moneys to the International Red Cross, thereby preserving their governments image of "public trust." Fourth, these notions have significant implications concerning the understanding of UN financing, both the general assessments (currently at 2.7 Billion \$US), and the extraordinary budgets, derived on a voluntary basis, that deal primarily with

⁵⁵ See L. Gordenker and T. Weiss (1995), this entire issue of *Third World Quarterly* was devoted to examinations of NGOs in the field of development.

⁵⁶ See both Charlton and May (1995) and Meyer (1995).

development and peacekeeping programs (currently about 65 Billion \$US).⁵⁷

The United Nations' Assessment budget is structured more on the lines of explicitly agreed to membership dues, and as such does not fit with the standard alliance kind of questions. Then too, the "extraordinary budgets" of the United Nations are either "pure" public goods provision in times of war (well at least a standoff from a war situation), or are "impure" public goods because they fund development projects that are highly localized in their benefits and potential spillover effects. Thus, here too, the standard assumptions and conclusions of the alliance model do not fully explain the situation present at the United Nations.

⁵⁷ Regarding these last two points see the report of the Nordic Council (1991), and the S. Ogata and P. Volker report (1993), as well as L. Officer (1994).

Chapter Four

The Hard Core of the Public Choice Research Program

This Chapter takes a methodological look at the “hard core” premise of the “public choice” research program, as a sub-discipline of economics. It critiques a widely cited article by R. Vaubel (1986) on the “public choice” approach to international organizations.¹ He sharply delineates the “public choice” approach from what he calls the “public interest” approach to the analysis of these organizations and the economic behavior related to their origin and operation. His effort to demonstrate the “public choice” approach to international organizations is highly supportive of the methodological individualist element of the research program. Yet, his formulation of hypotheses are unfalsifiable, and their resulting explanations of situations add little to our overall understanding of how policies and institutions should be designed to avoid the harmful consequences they predict.

The “public choice” research program does cast a strikingly different interpretation of events, the reason for, and functioning of individuals within institutions whose aims are to serve the “public interest.” The “public choice” hard core premise over the divergence in public and private interests, is used to critique the economic theory of

¹ In searching the titles of articles appearing in the journal *Public Choice* there are fewer than a dozen articles that deal with international organizations in general, or in particular (primarily those related to the European Community). Among these R. Vaubel's (1986) appears to be most commonly cited. Perhaps the second most cited article in this literature is Bruno Frey (1984) which was published in the interdisciplinary journal *International Organization*

alliances examined in the previous Chapter. The conclusion is made that the “public choice” research program does not stand well on its own. However, when reviewed in the broader context of the larger economic approach, the “public choice” research program can offer some useful insights on the emergence of unintended social consequences of private actions.

4.1. The “public choice” hard core discrepancies

At the hard core of the “public choice” research agenda are two fundamental discrepancies about human actions and the structure of political organizations. The first discrepancy concerns the private interests of the elected officials (or hired or appointed bureaucrats) and the “public interests” he/she was put in a position to serve. A second discrepancy concerns knowledge. It notes that the general public may be poorly informed about most of the issues decided by public officials, but that special interests are motivated to be highly informed about matters most important to them. As a result special interests will find it worth knowing how and when the public official will impact their interests. Therefore, special interests are more likely to seek to influence and gain benefits from the public official. This discrepancy also manifests itself at another level. In the organization of most representative democracies, where representatives are chosen on a geographic basis, they are designed to serve the special interests of those who elected him/her.

These discrepancies are intrinsically potential to the economic problem situation of government and institutions designated to serve the

“public interest.” At a purely analytical level, hypothesizing these discrepancies as “givens” (rather than merely potentials) to the problem situation guarantee to produce outcomes that are “inefficient” by standard economic criteria. In “public choice” there is always someone to blame. The logical task for economists is to gauge what additional incentive structures, or what constraints are needed to overcome the “natural” tendency or propensity of this problem situation to produce inefficient results. These discrepancies we cannot avoid, but we can learn to live with them and minimize their harmful effects.

We should move on to review the exact nature of the standard “public choice” concern over the effects of these discrepancies in the context of international organizations. We shall begin by critically assessing one of the more commonly cited “public choice” articles that address international organizations.

4.2. International organizations, one “public choice” view

Vaubel (1986) decisively picks up the “public choice” premise that the discrepancy between private and “public interest” always leads to government failure. He addresses this premise to the appearance of international organizations. He formulates three specific “positive” hypotheses consistent with the “public choice” research program. Then he moves on to seek corroborating evidence, in plenty. The hypotheses he examines are:

In many cases, international joint decision making of national governments must be viewed as collusion at the expense of a majority of voters.

In many cases, the division of labor between international agencies and national governments serves to hide the cost of concessions to pressure groups.

For several reasons, international agencies tend to supply more favors to pressure groups than the national bureaucracies would have done.²

While Vaubel points to his hypotheses as “positive,” as opposed to “normative,” he fails to make any analysis sufficiently persuasive that such particular situations **always** fail. Nor does he identify particular conditions or circumstances that would warrant some “normative” considerations, that would suggest corrective policy solutions.

Both Alan Peacock (1994) and James Buchanan (1989), (1996) have expressed concern over the style of approach taken by many economists writing in the area of “public choice.” In particular, Peacock has framed the matter in the following words:

One of the striking contributions of public choice analysis has been the analytical transformation of the government bureaucrat from being a guardian of the public weal into a common-or-garden rent seeker or, at least, a mean, sensual maximizer like everyone else.

“...Why should economists analyse the behaviour of bureaucrats, often concluding that they are “rent seekers” rather than dispassionate guardians of the public interest, without recognizing that the pot may be calling the kettle black?” (cited as A. Peacock (1991)).³

If it is the task of the economist merely to call the kettle black, then surely Vaubel and others have succeeded. However, if the task of economists is to gauge what additional incentive structures, or what

² Vaubel (1986) p. 44.

³ Peacock (1994) p. 191.

constraints are needed to overcome the “natural” tendency or propensity of this problem situation to produce inefficient results, then, in this paper Vaubel has not accomplished the task. Buchanan (1989) echoes that “if we accept this model [referring to the general “public choice” focus on only “individual net wealth” maximization], we may wonder that government works at all.”⁴ Instead, Buchanan prescribes the following:

I suggest that we cease and desist in any attempts to model man, either in his market or in his public choice behavior, as seeking exclusively or even predominantly to maximize the value of his net wealth. I suggest that we restrict ourselves methodologically to a more limited model of *Homo economicus*, one that allows the argument for economic value to enter into the individual utility function, in market or public choice behavior, but to enter as only one among several arguments, and not necessarily as the critical influencing factor in many cases.⁵

4.3. A methodological criticism of Vaubel

As one reads Vaubel’s formulation of hypotheses above, one ought to question: ‘Is he really being scientific in his research program?’ ‘Or are all his “hypotheses” unfalsifiable statements?’ By framing his hypothesis with qualifiers such as, “In many cases,...” “For several reasons...,” it seems clear that he is not being very rigorous.

In one sense, this approach to hypothesis formulation is endemic to the basic premise of the “public choice” research agenda. It stems from a dogmatic use of a very narrowly defined set of arguments in the

⁴ Buchanan (1989) p. 31.

⁵ Ibid.

maximization function of the individuals. A result of this there is a very real limitation of the set of, and specification of, the alternative choices the individual's are given to face. One strict limitation that serves the "hard core" basis of the research program, that "private interests **in many cases never** correspond to public interests in any systematic or predictable way." This is merely a special case of the economic maximization hypothesis, which is unfalsifiable by the logical nature of its' construction as an "all-and-some" statement.⁶ However, this does not mean we give up testability or the rigor of constructing what we hope are falsifiable hypotheses.⁷

In the recently published⁸ lecture by Karl Popper to the Economics Department of Harvard University in 1963 we can see both Popper's keen understanding about the economics research program and the methodological debates within it. Popper also presents a clear and constructive methodological prescription concerning the approach to internal criticisms about economic theory. What we now commonly refer to as the "maximization hypothesis," Popper, in his lecture, called the

⁶ See L. A. Boland (1981), (1992) and (1997) concerning various attempts to criticize the neo-classical maximization hypothesis, and explaining the reasons for their failure.

⁷ P. Mongin (1986) believes that, even after Boland's (1981) explanation, the maximization hypothesis is unfalsifiable. But what Mongin is really getting at is what I show Popper (1963/1994) has already recommended. That we should be more specific about our problem situation and seek to refute our assumptions about this aspect of our analysis. See also Boland's (1997) correspondence with Mongin and with Herbert Simon on this matter.

⁸ See Popper (1963/1994).

“rationality principle.” Speaking to the then still current debate over the “truth” of assumptions Popper remarked:

...a principle that is not universally true is false. Thus, the rationality principle is false. I think there is no way out of this. Consequently, we must deny that it is *a priori* valid.⁹

Popper does argue that we should use our theories “instrumentally”:

Tests, when available, are used to test a particular model, a particular situational analysis - but not the general method of situational analysis, and not, for this reason, the rationality principle: to uphold this is a part of the method.¹⁰

In the penultimate section of his lecture Popper gives the following methodological prescription, a prescription well worth taking.

My thesis is that it is sound methodological policy to decide not to make the rationality principle, but the rest of the theory - that is, the model - accountable. ... In this way it may appear that in our search for better theories we treat the rationality principle as if it were a logical or a metaphysical principle exempt from refutation: as unfalsifiable, or as *a priori* valid. But appearances can be misleading. ... I hold, however, that it is good policy, a good methodological device, to refrain from blaming the rationality principle for the breakdown of our theory. For we learn more if we blame our situational model. The policy of upholding the principle can thus be regarded as part of our methodology.¹¹

So what we should conclude from Popper’s lecture is that we should spend more time examining, and criticizing the assumptions we have made in our models about the constraints and expectations employed, rather than attempting to evaluate the maximization hypothesis. What

⁹ Ibid., p. 172.

¹⁰ Ibid., p. 171.

¹¹ Ibid., p. 177.

this means for the “public choice” research program, is a redirection of much attention that focuses almost exclusively on the “private-public interest” discrepancy of the public decision maker, and not enough focus on the elements of the situation that promote or constrain the opportunity to act on the discrepancy. Peacock (1994) provides further support for this call to emphasize the role of situational constraints as his comment on a recent paper by P. R. Jones and J. G. Cullis (1993) recasts their propositions in a more constant conscious light.

4.3.1. Empirical analysis of example-giving?

In a characteristically “rent-seeking” manner, Vaubel, in his (1986) publication credit for his CV, avoids the scientific prescription for hypotheses testing with the following retort:

Is the ‘collusion-hypothesis’ supported by empirical evidence? Our subject prescribes the methodology (rather than the reverse). It confines us to the methodology of example-giving.¹²

The methodology of example-giving is logically valid only in cases of seeking to falsify a particular theory, not to corroborate an alternative theory. Yet, Vaubel is asserting that simply by giving one example he not only has demonstrated a shortcoming in the conventional theory, but asserts that the ability to make such a demonstration proves the alternative theory to have greater “explanatory power.” It is not within the ability of one or two examples to demonstrate a more comprehensive theoretical scope. It requires a systematic demonstration that “public

¹² Ibid., p. 45.

choice” theory can explain everything that is explained by the conventional approach, in addition to providing explanation to issues the conventional approach does not answer.

After giving several examples of collusive behavior in the organization and annual continuance of the meetings of the G-7 heads of state, the most profound collusion Vaubel cites is the establishment of the European Monetary System (EMS). He ignores any reference to the extreme volatility in the foreign exchange markets and the economic uncertainties this caused. He ignores the official end of the initial Bretton Woods policy framework after revisions in the 1978 Jamaica Accords. He explains the decision of the European Council as if it were merely the decision of Prime Minister Schmidt and Prime Minister D’Estaing.

According to Vaubel, Schmidt chose the EMS because he wanted to edge away exchange rate control from the Bundesbank and into the hands of the Federal Government. D’Estaing chose the EMS in order to dampen inflationary expectation and limit the generally superior monetary performance of Germany. While there may be some truth worth considering in this interpretation of events, a lot more is left unaddressed that played, I believe, a much greater role in the final outcome. Vaubel gives no space to consider what “public interest” may still have been served by the outcome of the choices made by Schmidt and D’Estaing, even given their supposed rationale. Such example-giving can only serve as margin notes to economic history, not the main text.

After more example-giving regarding his second hypothesis, that international organizations are used to hide the costs of concessions to

pressure groups, Vaubel returns to the question of the worth of the “public choice” agenda:

Does our hypothesis explain phenomena which the alternative hypothesis, the public interest view, does not explain? ... to show that our hypothesis does have excess explanatory power, it is sufficient to prove the case in one instance.¹³

It is a very tall order to “prove” the superior explanatory power of an entire research program by the presentation of a single “instance.” In Popperian terms Vaubel must be referring to a fundamental “crucial experiment.” At least this is what it sounds like Vaubel is implying. We should be careful to understand what such a challenge should look like.¹⁴ It should consist of at least one clearly stated falsifiable empirical statement. We will know if “not-X” happens, then his theory is false. Knowing only that “X” happens, does not tell us anything decisive about the truth of the theory in question. By this criteria Vaubel fails to make such a challenge.

Vaubel’s one instance is the inconsistency in the originally declared purpose of the EC common agricultural policy. The policy was to “compensate France ... for ... concessions to ... Germany in the trade of manufactured goods.”¹⁵ Given this policy as a combined system of incentives and constraints on circumstances in the economies of France

¹³ Ibid., p. 50.

¹⁴ See K. C. Jensen, S. J. Kamath and R. Bennett (1987) and the subsequent replies, and replies by S. J. Kamath, K. C. Jensen and R. Bennett (1989), (1990), and (1991).

¹⁵ Vaubel (1986) p. 50.

and Germany it should not be a surprise that firms would respond to take the relative advantages available to them. However, Vaubel finds the growth in French manufacturing and German agriculture as evidence of the failure of the conventional economic approach.

How should we reply to Vaubel's question on relative "explanatory power" of the "public choice" approach? We can not answer categorically, but rather tentatively and pluralistically. Yes, the "public choice" hypothesis does explain some actions the "public interest" hypothesis, such as the alliance model in the previous chapter, do not. Further, the "public choice" hypothesis places an alternative interpretation on the phenomenon explained by the "public interest" research program. The "public interest" economist can find that many of the empirical out-liers of their models are often explained by the "public choice" interpretation of the world. There are also many out-liers, and unintended social consequences coming from the hypotheses of the "public choice" research program that also go unanswered. Some of these can be answered by the "public interest" models.

Our conclusion should be that the "public interest" and the "public choice" research programs are neither superior to one another, nor are they mutually exclusive. Rather, it is the general economic research program that has been appropriated by both "public interest" and "public choice" to specifically narrower sets of "problem situations" and explanatory objectives, that is methodologically and scientifically superior.

The "public choice" research program has taken an overbearing application of the cautionary statement of David Hume:

In constraining any system of government, and fixing the several checks and controls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest.¹⁶

In its caution, and its real concern for the “public interest” the assumption that “all men are knaves” is meant to be a limiting condition for the risk-averse design of public institutions and policies. It is not meant to imply “everywhere and always” all men “ought to be supposed knave[s].”

The “hard core” of the “hard core” of the “public choice” research program, is the Hobbesian condition of the “state of nature,” before any civilizing social contract has been defined. By this the “public choice” economists partially or completely suspend whatever semblance of civilizing social contract principles on which all modern societies have some base or foundation. It is effective and useful to re-examine the circumstances society has come to under its present evolution of the social contract, by questioning its “state of nature” impediments. Those characteristics present within our social institutions that remind us, or return us to conditions inherent in the Hobbesian “original position.” Yet, we need to keep such an exercise in consideration, and not take it as the prevailing state of affairs.

4.4. “Public choice” critique of my alliance chapter

The economic theory of alliances is firmly grounded in the notion of providing a governmental solution, in the “public interest,” to the pre-

¹⁶ D. Hume (1985) p. 42.

existent “market failure” cause by externalities, or the lack of adequate incentives for private production. The theory adheres to the practice of methodological individualism by focusing all decisions on individual policy makers. It finds inefficiencies in the aggregate consequences of the “independent-adjustment” decisions made by the alliance members. Although the purpose in creating the alliance was to achieve benefits the market failed to provide, the government provided solution *qua* the alliance may also fail to achieve this goal.

Even though each policy maker was presumed to be following faithfully his/her country’s “national/public interest,” their actions failed to be the “best”¹⁷ course as evaluated by the alliance’s stated goals. We noted that under the Lindahl behavior, attributed to the NGOs in accord with their organizational purposes, Pareto superior outcomes resulted relative to the government only alliance outcome.

The review we have just concluded about the fundamental premise of the “public choice” approach, can lead us to understand that when individuals are placed in positions of public service the discrepancy between “private” and “public interests” will create some measured “government failure.” The alliance model *per se* does not present us with any direct framework to examine this fundamental problem of the “public choice” approach.

The “public choice” approach would begin by explaining the existence of the alliance as an outcome of the “private-public interests” discrepancies. This approach taken by the “public choice” literature

¹⁷ I.e., Pareto optimal.

attempts to deny the notion of “market failure” as a cause for the existence of any form of government or governmental action. Yet, if “markets” always succeed, in the “public choice” notion, there need be no governmental organization at all from which the “private-public interest” discrepancies arise from. Therefore, it is only logical if we consider the “public choice” discrepancies after a “market failure” situation has been identified and some collective decision has begun the process of organizing a non-market solution.¹⁸ This implies adopting the standard problem situation approach of Popper discussed above and in Chapter One. At this point of formulating “some collective decision” the discrepancies can logically set in, not before. And this point is the place of “government,” of “public choice.”

I will show how developments of the alliance literature several instances where the fundamental “public choice” premise manifests itself in the behavior of individual alliance members. A cartel is after all simply another form of an alliance. In the next section I will examine some of these instances. The final section of this Chapter I will examine the interpretation the “public choice” premise would have on my alliance model of conventional international law, and my NGO-augmented alliance model.

Recall that I have classified the developments of the literature on the economic theory of alliances into three areas: (1) changes affecting the specification of production related issues; (2) changes affecting the specification of the decision maker’s utility function and expectations;

¹⁸ I concur with Mancur Olson’s (1986) logic on this point.

and (3) extensions related to topics of application of the theory. For obvious reasons, I shall only address the first two of these extensions, before examining my extension to the topic of conventional international law.

4.4.1. Production related extensions

The case of the joint product extension of the alliance model is a means by which, the “public choice” view comes into play. The proposition about joint products is focused on the difference and potential deception among the allies about the actual production conditions.¹⁹ Such deceptions can provide the policy maker with acceptance within the alliance, and enhancement of the policy maker’s perceived success from his domestic constituents who benefit from the deception.

The deception is created when the allies are given the impression of a commitment by country A’s representative to increase contributions towards the alliances’ defense goals, through increases in country A’s domestic defense spending. Yet, the actual implementation of this spending by country A may be applied to areas that, in fact, only enhance country A’s individual defense position (both for internal and external threats) and for the perspective of enhanced domestic spending aimed at appealing to domestic constituents for re-election purposes.

The success of the deception depends on a lack of monitoring by the alliance and the fact that the production of defense is a function

¹⁹ See Todd Sandler (1977), R. Cornes and T. Sandler (1984). See also T. Cowen (1985) concerning the general problem of defining “public goods.”

internally specified by alliance members. Thus, when a policy maker reports to the alliance his/her country's contribution of \$X on defensive equipment and personnel, the alliance members express their approval. Yet, when the substance of the expenditures proves to be on technologies that only enhance the domestic defense capabilities, and the economies of the domestic special interests who benefit from this government expenditure, then the policy maker is more strongly assured of re-election or re-appointment.

The alliance is made worse off. Future rounds of alliance evaluations may discover the deception. More often this discovery will be after the fact not before. In the case where such deceptive practice is wide spread among the representatives to the alliance, there is a likelihood that the deceptive practice will be allowed to continue rather than be restrained by others alliance members. In this sense the alliance is functioning more as a cartel, with members (the government representatives) serving their own interests and neither the cartel's official aims or the member governments' "public interest."

4.4.2. Heterogeneous production costs and technologies

Also within the production related extensions of the literature is the examination of variations in costs and marginal productivities of defense among alliance members.²⁰ This appears largely as a technical extension

²⁰ See S. Weber and H. Wiesmeth (1991) who demonstrate that an alliance-wide switch to standard technologies (having uniform costs) may have negative effects on a particular member. They conclude that this may help explain the reluctance among NATO members to adopt standardization practices. page 190.

of the production circumstances, with the common economists' concerns for the variety of inputs and production technologies examined in the market centered activities of private firms. Yet, the opportunity created by such technical differences in production can provide the self-interested policy maker with another means to deceive the alliance about his/her country's contribution to the alliance goals, and enhance the benefits to his domestic interest that perpetuate his position and advancement in public office.

This opportunism can be seen more obviously in the extension of the defense alliance model when incorporating elements of international trade and investment between alliance members into the model.²¹ The domestic employment enhancements created by, say, an American defense contractors' investments into production facilities in Spain, will appease the special interests that support the policy makers in both countries. Whether such investments, or trade and production decisions actually serve the alliance most effectively is the point open for critical examination. But to directly engage in this type of critical economic evaluation the "public choice" is abandoned for the more traditional tools of economics. For the "public choice" economist the full income effect of alliance-based agreements between policy makers involves accounting for such shared benefits to domestic private interests, and that is all that matters to the research agenda.

²¹ See Todd Sandler (1993), K. Y. Wong (1991) and M. A. Boyer (1989).

4.4.3. Extensions relating to the policy maker

In the case of the characteristics of the policy maker in the alliance model, he/she was initially described as the purveyor of the “public interest” of individual alliance members. The extension of the model to incorporate the “median voter” as decision maker appears at first glance as a very democratic method of restating the “public interest” that the policy maker is supposed to fulfill.²² Rationalized, the policy maker is merely the transparent, selfless, transmitter of the public weal embodied in the “median voter.” Such a presumption directly contradicts the hard core of the “public choice” research program, to not recognize the discrepancy between private and “public interests” of the decision maker and the decision circumstances.

Lost from view, however, this “median voter” is the self-interested motivation of the actual policy maker to enhance his/her appeal to his/her (median voting) constituents in order to stay in office.

The case of the policy maker represented as a member of an oligarchy, is more straightforward an appeal to the “public choice” premise of the discrepancy of private and “public interests.”²³ Yet, the remainder of the model does not tend to focus discussion on the additional potential effects of this discrepancy.

²² See L. Dudley (1979), J. C. Murdoch and T. Sandler (1991), and R. D. Congleton (1992).

²³ Congleton (1992) treats this in a very interesting manner regarding international environmental law. Oligarchy behavior was also addressed in H. Starr (1974) and Murdoch, Sandler and Hansen (1991) regarding the Warsaw Pact.

4.5. Critique of conventional international law alliances

How does the “public choice” critique apply to the application of the alliance model to conventional international law? Collusion (conspiracy) theories abound when it comes to “international treaties.” Collusion is the very heart of the matter, agreement between two or more heads of governments bartering away the wealth of “their” countries. Treaties of economic and social “friendship” and “goodwill” clearly have reeked havoc on countless individuals not truly “represented” by the “public interest” proclaimed by political leaders.

Here we can follow on Vaubel’s general search for the pattern “us (political leaders) against them (the general public).” This is the story of conventional international law. This is perhaps an easy task when dealing with bi-lateral treaties, or multi-lateral treaties when only small numbers of countries are involved. It was particularly rampant in the bad old days before 1919 when treaties were often kept secret. “Open treaties, openly arrived at” was Point One in President Wilson’s Fourteen Point Program. This Point was aimed at stopping the practice of “secret treaties” as a source of collusion against some “public interest.” However, it did not fully constrain the creation of “open treaties” that included collusive agreements between governments to effect some exploitation of “their” citizens or citizens of a third country. This principle did not guarantee that the Treaty of Versailles or subsequent treaties would always be in the “public interest.” Nor was this principle strong enough to prevent such deceptions as the German Russian non-aggression pact from being more than one leader’s rouse.

The principle of “open treaties, openly arrived at” has become a strong enough principle to rule in large scale multi-lateral treaty making since the 1920’s. This principle allows for improved monitoring of the content and practice contained in international treaties. The cost of such monitoring may at times be effectively high, yet the cost is certainly lower than in the days of “secret treaties.” Because the potential for monitoring exists, there is an incentive to risk averse political leaders to co-opt their potential conspiratorial behavior.

Collusion is always a harder task when the number of participants required for the agreement is large. This is a fact well understood in the literature on oligopoly behavior. It suggests that in situations, like the United Nations, where multi-lateral treaty conferences involve large numbers, cartel-like collusion is not as likely to be found. In this large numbers case, the notion of ‘logrolling’ or vote trading to build coalitions (which might lead to more government spending on special interests), is the theoretical means to explain collusive agreements among legislators against the public. However, the notion of coalition building requires a greater degree of homogeneity in preferences among legislators, than is generally found among delegates at the United Nations.²⁴

Bolstering the principle of “open treaties,” which now is also associated with the phrase “transparency,” are two further constraints on official state practice within the international arena. The first

²⁴ J. Williamson (1985) points this out in his attempt to examine international organizations in light of the “public choice” critique. R. Holcombe and R. Sobel (1995) examine roll call voting behavior in the United Nations General Assembly to assess the “logrolling” hypothesis and find, unlike tests of national legislatures, the data do not support the hypothesis.

addresses the concern by states of becoming the negatively affected third party to a bi-lateral agreement. This constraint is called the principle of *Jus Cogens*, which means imperative principles of international law that shall not be violated as a matter of state policy or practice.²⁵ The necessary machinery required to enforce violations of *Jus Cogens* are clearly evolving and increasing in their application and effectiveness. The admission into the corpus of international law of *Jus Cogens* certainly did not arise because political leaders were widely adhering to them in their conduct of international relations. The repeated violation of *Jus Cogens* by political leaders is being viewed as acting against the international public interest. This has given rise to the recognition of *Jus Cogens*.

The second constraint, is a series of issues related to the building of trust and confidence in international relations. These issues fall under the classical principle of contracts - *pacta sunt servanda* - good faith agreements must be honored. These issues have been incorporated into a large number of procedural arrangements with the United Nations, and the general practice of international organizations. Taken together these two additional sets of constraints have fostered an increased tendency to develop international agreements based on principles of public policy and conduct, rather than based on particulars which may encumber the natural evolution of social and economic relations internationally.

²⁵ Perhaps the most noted and pronounced example of *Jus Cogens* is the policy of genocide, and other crimes against humanity. But it also includes such matters as the violation of the territorial integrity of a country.

4.5.1. Critique of NGO-augmented alliances

The nature and behavior of representatives of NGOs, as they were introduced in the last Chapter, was presented as distinct from government representatives. The distinction was based not on any difference in the individuals, *per se*, but rather from the constraints placed on the different types of organizations they represented and the rules of participation these organizations are granted in the UN Charter. Most distinctively they are constrained within the context of UN treaty making conferences through their lack of voting rights from insuring any directly measurable impact on the decision outcomes of the conference. This constraint clearly does not exhaust all possible avenues of influence, otherwise the participation of NGOs would not be forthcoming.

That some avenues of influence do exist motivates individuals working within NGOs to gain for their organization recognition by the UN to participate in such conferences. Such efforts clearly must further the goals of the NGO as well as it furthering the prestige and reputation of the individuals who serve within the NGO as its representative.

The early literature on NGOs, such as J. J. Ledor-Lederer (1962), David Forsythe (1976), and up to recent articles, such as R. Charlton and R. May (1995), project a very rosy and optimistic picture of the character of the accomplishments of NGOs, and the behavior of those individuals working within these organizations. Lofty attributes, such as “integrity and efficacy,”²⁶ “probity,”²⁷ and “representative of the

²⁶ See David Forsythe (1976).

grassroots”²⁸ are frequently used to describe the work and stature of NGOs. It seems as if the efforts of all NGOs, at all times, is universally worthwhile and in the “public interest.” Such an exaggerated and some say, naïve view of NGOs is clearly contradicted by experience.²⁹

Tensions perpetually exist between certain governments (and their representatives) and particular NGOs (and their representatives). At times these tensions stem from government policies regarding the NGO in question, or the particular work the NGO has carried out. Matters have been particularly touchy over questions of human rights conduct.³⁰ NGOs for their part have contributed to these tensions, at times, through “undiplomatic” conduct.³¹

These tensions can also be seen as a result of the constraints placed on individuals, whether from governments or from NGOs, within the diplomatic context of the United Nations. The notions of *persona non grata* and *persona grata* are active categories and place individuals under constant review. While the recognition of an NGO by the inter-

²⁷ See R. Charlton and R. May (1995).

²⁸ See C. A. Meyer (1995).

²⁹ See L. Gordenker and T. Weis (1995).

³⁰ See Forsythe (1976).

³¹ Many of the procedures related to the Commission on Human Rights specify a high degree of confidentiality in reporting prior to the conclusion of the Commissions hearings and determinations. Yet, some NGOs have at times gone “public” with issues before the Commission, and this behaviour is seen as undiplomatic. See Hurst Hannum (1992).

governmental club is one requirement for participation at the UN, acceptance of the particular individuals the NGO selects to represent it is not as automatic as it tends to be regarding the diplomatic agents sent by governments.

Efforts by some in the NGO community, at the UN, to independently initiate international law through treaty like documents has recently raised both negative and positive reactions among member governments. In particular, a coalition of NGOs circulated a number of draft treaties during the NGO forum at the 1992 Conference on the Environment and Development.³² This raised some concern that NGOs were trying to become “governmental” in character, usurping the authority of national governments as defined in the UN Charter. Such concern, as well as much positive reaction to other NGO input at the Conference, led to the creation of E/AC.70, an *Ad Hoc* “Open-ended Working Group” of the Economic and Social Council to review the arrangements of the UN system for the proper and effective participation of NGOs.³³ Following three years of hearings and consultations, the final report of the E/AC.70 was adopted by the ECOSOC in its substantive meetings of July 1996.

The recent decisions of the ECOSOC regarding arrangements for NGO participation largely exhibit a recognition of the positive role these

³² The so-called “Alternative Treaties” have been posted on the Internet by Robert Pollard of the International Synergy Institute (URL: <http://www.igc.apc.org/habitat/treaties>) viewed 30 August 1996.

³³ Its initial terms of reference are contained in *UN Document E/RES/1993/80* of 30 July 1993.

organizations have played within ECOSOC and at UN Conferences.³⁴ The decisions include a strong recommendation to the General Assembly that it consider making permanent consultative arrangement with NGOs in all areas of the UN.³⁵ Within the revision of operational procedures for NGO participation a sharpened note of restraint was expressed regarding participating in treaty making conferences:

50. In recognition of the intergovernmental nature of the conference and its preparatory process, active participation of non-governmental organizations therein, while welcome, does not entail a negotiating role.³⁶

What is meant exactly by the term “negotiating role” seems clearly to be related to the decision making authority granted to states under the UN Charter. This term does not abrogate the “consultative,” “advisory” or even the *ad hoc* “mediation”³⁷ role that NGOs have traditionally played.³⁸

³⁴ See the annual report of the Economic and Social Council to the General Assembly, *UN Document A/51/3* part II.

³⁵ *UN Document E/Decision/1996/297* of 25 July 1996.

³⁶ *UN Document E/RES/1996/31* of July 1996.

³⁷ In particular, here I am thinking of the report of Sebenius (1984) of what he described as the critical role played by NGOs in the deliberations on the financial clauses of the 1982 Convention on the Law of the Sea. As L. Antrim and J. K. Sebenius (1991) also reiterated, the involvement of the NGOs in sessions of this negotiating committee, were *ad hoc* and totally instigated by the Committee’s Chairman Jens Everson (who now serves as a Judge on the International Court of Justice), and subsequent Chairman Tommy Koh.

³⁸ In what might be viewed as a clearly self-seeking affair, the International Chamber of Commerce was able to stimulate the creation of the UN Convention on Enforcement of Foreign Arbitration Awards, the participation of the ICC in the treaty conference was clearly “advisory” and “consultative”, not “negotiative.” The initial draft text used as the basis of negotiation was prepared by the ICC. The purpose of the treaty was to effect an means to ensure that private arbitration awards, such as those made under the

Speaking about NGO participation with the development field, Charlton and May (1995) suggest that viewing the government-NGO relationship as symbiotic is simply a matter of perspective:

Ironically, all that is involved in advancing this alternative interpretation is a change of perspective, viewing the structural positioning of NGOs as project implementers within the interlocking policy cycles of governments and the programme cycles of donors not merely as a technical or administrative activity, but rather as an inherently political process with potentially identifiable, perhaps even measurable, political effects.³⁹

Yet the constraints of “consultative status” clearly restrict what the NGO representatives could rationally exploit to their personal advantage. After all participation in treaty making is generally not where any money is found.

4.6. Conclusion

If there is any “public interest” being served, the “public choice” approach fails to draw much constructive or “positive” attention to it. The work of Adam Smith was to show that while we might devise an analysis of the behavior of “knaves,” the outcome of this analysis was to discover the “unintended social benefits” (as well as acknowledging the costs) of such behavior. This orientation of Smith is generally lacking in the “public choice” literature.

auspices of the ICC, would have legal enforcement outside the context of the private arbitration chambers.

³⁹ Charlton and May (1995) p. 239.

This Chapter has examined the fundamental “boundary condition” that is identified by the “public choice” discrepancies (i.e., that one corner solution exists where individuals are in positions intended to serve the “public interest,” yet make choices and take actions that are more clearly fulfilling “private interests” instead). This Chapter also raises some methodological concerns that this “corner solution” should not be excessively emphasized, that the general economic approach involves the individual rational maximization hypothesis within situational problem settings. It argues that there is more to learn by focusing on the elements of the situation than on the narrow specification of the maximization postulate.

Nevertheless, the “public choice” discrepancies do provide some unique interpretations to situations. This “public choice” critique was therefore applied to the economic theory of alliances, and to the extension of that theory to the field of conventional international law, and to the NGO-augmented alliance model. What this application found does explain some interesting facets to the circumstances of the evolution of conventional international law. From this I feel economists should conclude that often times when individuals do violate the “public trust” that has been invested in their appointment to public office, such violations eventually lead to unintended consequences that are quite socially beneficial. I also feel compelled to support the notion that the international arena has more constraints in many matters that tend to

limit the potential harmful effects of public servants pursuing “private interests.”⁴⁰

⁴⁰ See Holcombe and Sobel (1996), and Williamson (1985).

Chapter Five

Constitutional Political Economics: Some Unintended Consequences of Government Failure

“Constitutional economics directs analytical attention to *choice among constraints*.” “... [It] contains the important principle of spontaneous coordination... ...[regarding the] choices and actions taken by individuals. The emphasis on explaining nonintended aggregative results of interactions [of these individual choices].” ~ J. M. Buchanan¹

This Chapter will focus on the issue of voting as an institutional means for coordinating choice among constraints. The economic theory of voting has two main branches: (1) the analytical and game theoretic branch² and (2) the transaction costs branch.³ As was mentioned in Chapter Two, several economists have addressed problems related to international treaties from both the game theoretic analytical approach, and the incentives-discrepancies approach of “public choice” where transactions costs play a role.

This Chapter begins by reviewing the cost-theoretic approach to voting developed by James Buchanan and Gordon Tullock (1962). It

¹ Buchanan (1990) p. 3, and Buchanan (1989) p. 60, 61.

² The analytic and game theoretic branch was developed by writers such as Kenneth Arrow (1951/1963), K. O. May (1952), A. K. Sen (1970), L. S. Sharpley and M. Shubik (1953).

³ What I am calling the “transaction costs” branch of the economic theory of voting was developed by writers such as J. M. Buchanan and G. Tullock (1962), D. W. Rae (1975), W. H. Riker and S. J. Brams (1973), D. Mueller (1978) and has predominantly focused on the potentials government failures of the “public choice” school.

points out how this approach has been applied to international organizations in general in the work of Bruno Frey (1984). It goes on to demonstrate Zane Spindler's (1990) notion of optimal voting within a "rent seeking" society with what I believe is a more accurate formulation of the distribution of "rent seeking" costs as a function of the required level of voting. The results concur with the multiple-equilibria outcome originally found by Spindler. The results also present empirical support for this multiple-equilibria result in the various decision settings found in practice at international treaty conferences.

Following this excursion into the economic theory of voting, I go on to examine and discuss some of the unintended consequences that have arisen when institutional rules, such as voting rules, fail to achieve the objectives of a collective organization, such as an international treaty conference. In particular, we will examine an institutional arrangement that has emerged in the process of treaty making at the United Nations, as examples of selecting incentives and constraints that may minimize the harm produced by the "public choice" discrepancies. Attention will be given to the so-called "consensus procedure," a method that is less formal than voting. It will be shown that the "consensus procedure" has led United Nations' practice to an organizational form often called the "open-ended" working group or committee. The "consensus procedure" has also led to an increased participation of NGOs in the deliberations of government representatives.

Each of these elements of the "consensus procedure" has emerged and evolved over the last 50 years of the United Nations' existence. As the "public choice" approach allows, we will introduce the origins of the "consensus procedure" as an unintended consequence arising out of

incidents of “government failure” within the “alliance” of the United Nations. When the “consensus procedure” is practiced in its fullest it appears to provide both incentives and the selective application of constraints that dampen the harmful effects of the “public choice” discrepancies, and re-enforce efforts to gauge and address the “public interest.”

5.1. The economic cost theory of voting

5.1.1 Methodological individualism and collective choice

Before any direct discussion of the economic cost theory of voting can begin we must establish a sound understanding of the basis, in our methodological individualism, from which certain conditions logically follow. First, the maximization principle presumes that every individual is capable of rationally determining his/her own set of consistent preferences over various alternative social states of affairs. Second, while in matters of private economic decisions individuals may be presumed to possess income or wealth inequalities, in matters of social choice there is no reasonable criteria that would suggest that individuals should be treated unequally. Therefore, in matters of social choice, each individual should be treated with equal opportunities to participate in whatever arrangements are made for the processes of making social choices. When such arrangements involve the notion of voting, strict equality requires the principle of one person one vote. While it logically follows that the arrangements for choosing the fundamental elements of social decisions that are not made unanimously are in some manner in

violation of methodological individualism. So it appears that our methodological orientation has strong normative implications.

Unanimity logically appears to be the one voting rule that satisfies methodological individualism. Yet, there are difficulties with this rule when it comes to the notion of applying it to situations with large numbers of individuals. Since the organization of any forum for taking a vote on particular social issues requires time and the sacrifice of private consumption of time, we begin to see that voting is an “economic” activity in which the trade-offs between competing preferences and limited resources play a predominant role.

5.1.2. Economic costs inhibit unanimity in social choice

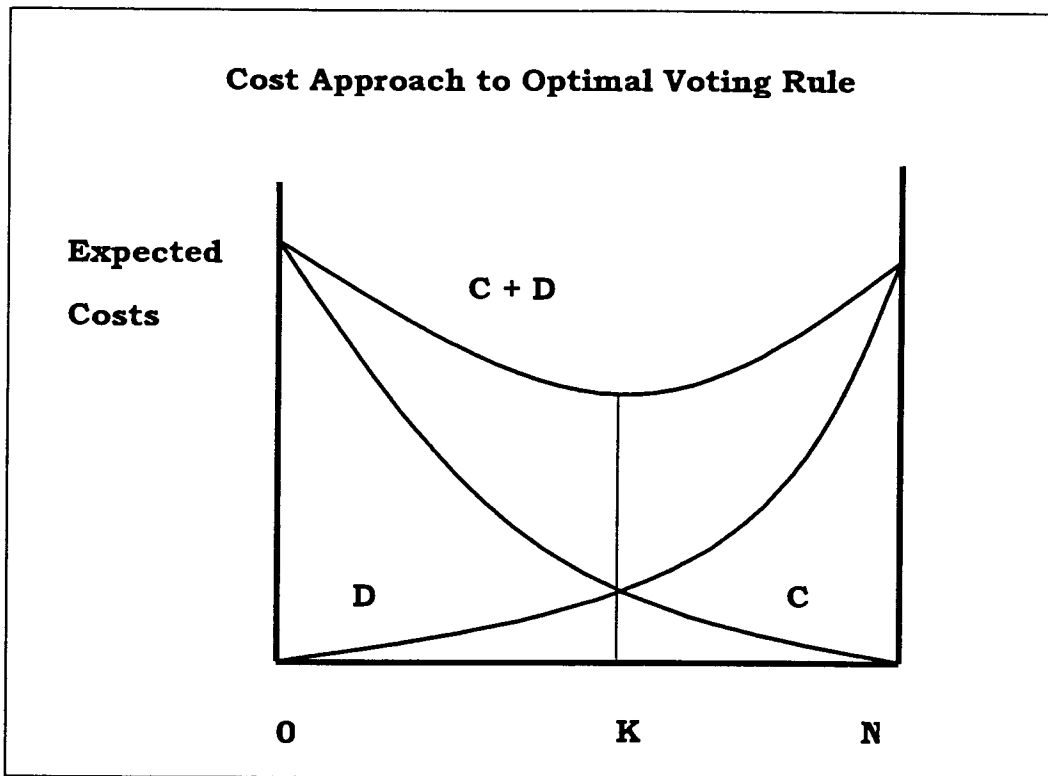
Buchanan and Tullock (1962, Chapter 6) have identified two main types of off-setting costs that individuals would consider when choosing a voting rule to be used in matters of social choice. First, the individual recognizes that the actions and decisions of others will impose costs and constraints on his choices. These costs and constraints are effectively “externalities” that individuals will seek to minimize. Under the unanimity rule these “externalities” are fully minimized by the individual’s right to veto decisions that would produce these negative consequences. When the voting rule falls as a percentage of the number of individuals in society, the value of the externally imposed costs will rise. These costs have been referred to as “external costs” and are depicted as curve C in Figure 5.1 below. Here the horizontal axis measures the number of individuals in society from 0 to N, and the vertical axis measure costs.

The second type of cost that an individual and society face has been called the “decision-time costs” (depicted as curve D below). These are the real and effective costs of organizing the other individuals in society to the voting forum. In addition to the common notions of the administrative costs of polling, “decision-time costs” also include elements of informing voters of the issue in question. When unanimity is the voting rule, these “decision-time costs” would be at their highest level. While at the other extreme, when decisions are made by individual rule, these costs fall to zero.

Given these two cost functions that are each dependent on the number of individuals to be involved in the decision, the problem of what proportion of society should rule, short of unanimity, is now a simple matter of cost minimization. Aggregating the two costs into curve C+D clearly identifies a minimum cost point that corresponds to the “optimal voting rule,” with the voting proportion K.

The exact value of K will depend on the relative steepness of “external costs” versus “decision-time costs.” If the absolute value of the slope of the “external costs” is greater than that of the “decision-time costs,” then K will approach unanimity. If the absolute value of the slope of the “external costs” is smaller than that of the “decision-time costs,” then K will approach the individual rule position.

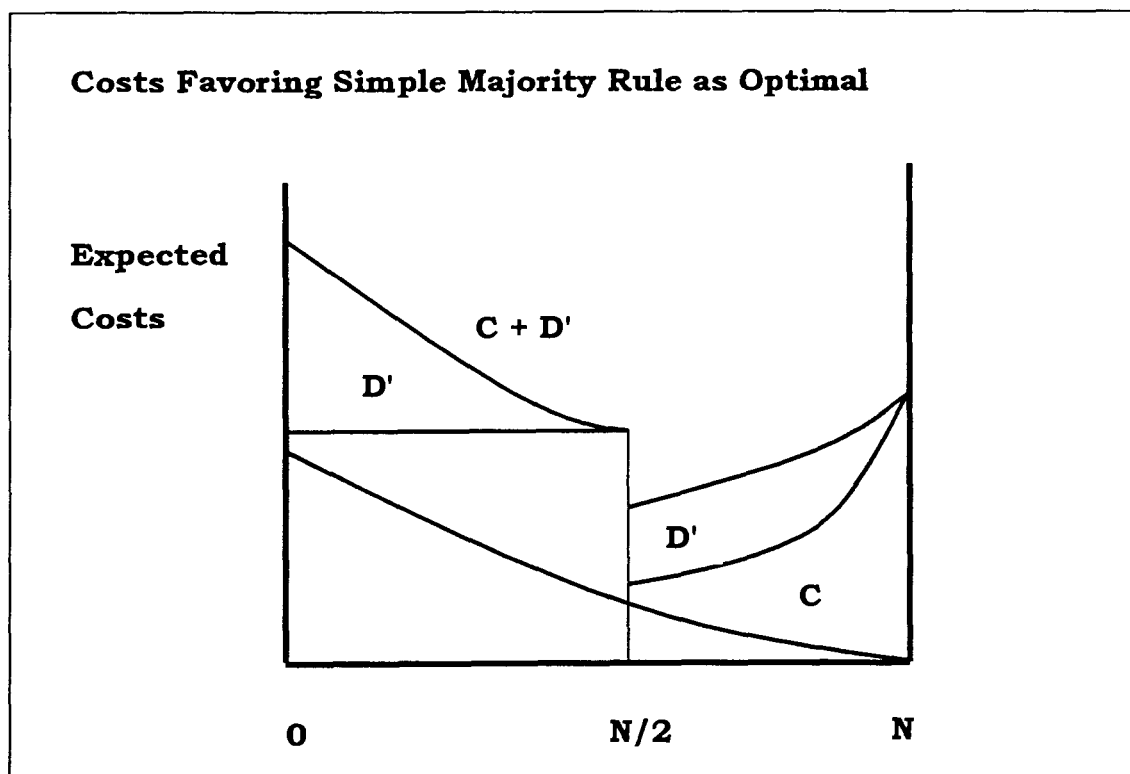
Figure 5.1



The analysis just presented does explain, in a manner consistent with our methodological individualism, both why individuals would accept any voting rule less than unanimity, and given the cost specification, what proportion of the social population would be “optimal” to rule the social decision. It does not, however, explain the preponderance of the practice of simple majority rule. Buchanan and Tullock (1962) give further consideration to the nature of what decisions could be made for society when the decision rule is for a proportion less than 50%. If the “optimal voting rule” was one individual less than 50% then two competing coalitions could approve mutually exclusive social policies (such as raising taxes by 10% and lowering taxes by 10%). There would obviously be significantly greater “decision-time costs” related to settling such an infeasible set of social policies.⁴ This condition would imply that the “decision-time cost” function would be discontinuous at the proportion 50% plus one, with these costs being higher for all voting rules less than simple majority. These higher “decision-time costs” as curve D’ are depicted in Figure 5.2 below (where 50% plus one is indicated by “N/2”). Given this discontinuity in that results in the aggregate cost function, the cost minimization problem now uniquely identifies simple majority rule as the “optimal voting rule.”

⁴ A further consideration to consider, from the perspective of the state of nature argument, is that voting is a substitute for “decision by combat” where the outcome among equals is determined by superior numbers. Here 50% plus one wins out. I appreciate the attention of Zane Spindler to this explanation.

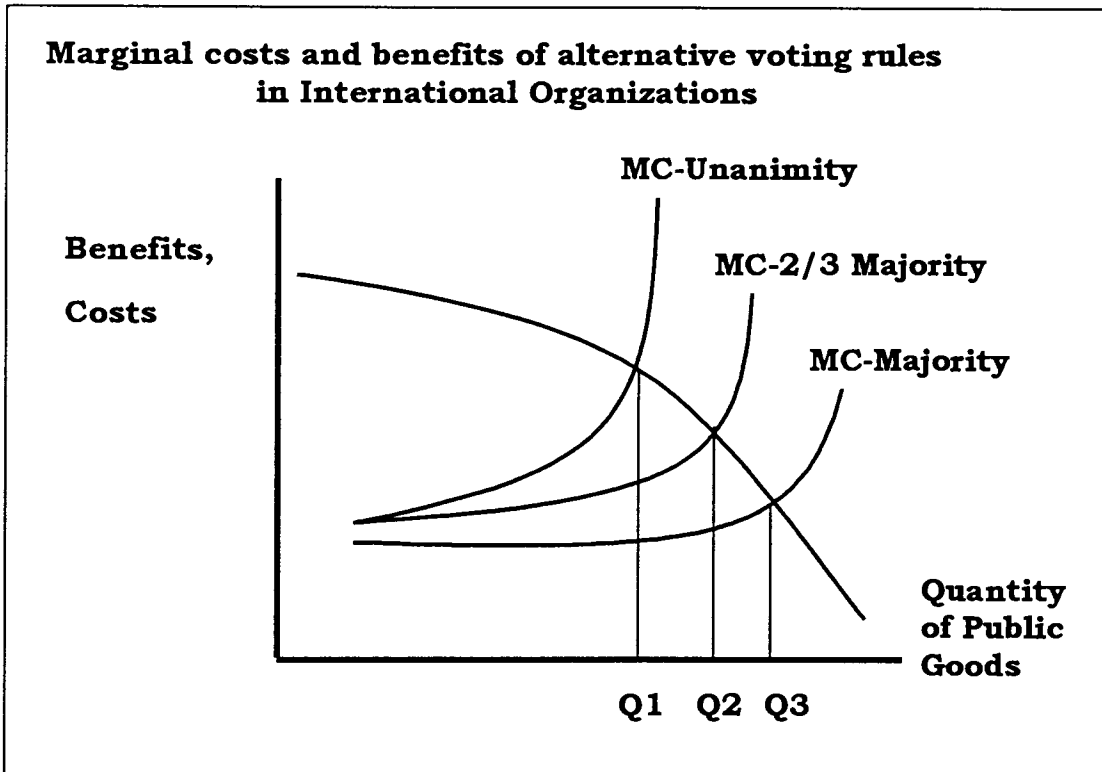
Figure 5.2



5.2. A “public choice” model of voting for international organizations

Bruno Frey (1984) presented a survey of several lessons from the economic analysis of public choice, which he felt could be usefully adopted by the interdisciplinary scholars who frequent the journal *International Organization*. Frey begins with the important practice by economics of methodological individualism, which allows a clearer focus of the “institutional” nature of “public interest” as separate from the individual agents or decision makers all of whom possess their own “self-interest.” Following some discussion regarding the potentials for conflict among such a field of competing interests, Frey turns to the economic theory of voting. Rather than presenting the Buchanan-Tullock model of the “optimal voting rule,” Frey speaks in terms of the common institutional procedures of “unanimity rule,” “qualified majority rule,” and “simple majority rule.” He further translates the implications of the general economic theory of voting in situations of collective choice, to demonstrate the effects of these three voting rules on the relative level of marginal costs and marginal benefits from policy creation. This demonstration is depicted in Figure 5.3.

Figure 5.3



In Figure 5.3, the horizontal axis measure the level of policy output by an international organization, while the vertical axis measures the level of marginal costs and marginal benefits associated with that output. The curve labeled MB indicate the marginal benefits from additional policy creation, while the three upward sloping curves indicate the marginal costs associated with voting via “simple majority rule,” “qualified majority rule” and “unanimity rule.” Clearly, these are intuitive results that conclude that it is costlier to set policy making by the “unanimity rule” than by “simple majority rule.” However, the marginal valuation of that policy created by “unanimity” may also be sufficiently greater as well.

5.2.1. Actual voting rules within international organizations

International law has evolved from a “law of princes” in a world ruled by kings and princes, to Blackstone’s notion of the “law of nations” and by his student Jeremy Bentham to the notion of “international law” in a world of democratic parliaments.⁵ The practice of unanimous approval in multilateral treaty making (constraint choosing) conferences came to an end during the 1920s as the consequences of the Versailles Treaty became fully evident. Within the operations of intergovernmental agencies, such as the International Postal Union (formed in the 1880s),

⁵ See M. W. Janis (1984).

the practice of majority rule for establishing or changing operational policies became increasingly common.⁶

The move away from the decision rule of unanimity in international treaty law to the use of simple or 2/3's majority⁷ was most evident in a series of treaty conferences organized by the League of Nations in the early 1930s. By the 1969 Vienna Convention on the Law of Treaties the 2/3's majority rule has become a codified rule of international law. The precedents set by state actions prior to and including the establishment of the UN Charter in 1945 played a significant role in setting this voting rule as "normal" and "acceptable" international practice.

Article 9 of the Vienna Convention on the Law of Treaties states, regarding the adoption of the text of a treaty, that:

para. 1 The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

para. 2 The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

However, for the treaty to enter into legal force Article 24 states that:

para.1 A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

Thus, while the adoption of the text of a treaty requires a two-thirds majority of the States participating in its drawing up, the treaty itself

⁶ See S. Zamora (1980).

⁷ See also L. Sohn (1975) for a historical review of voting practice in international treaty conferences.

may become legally binding (enters into force) under whatever terms the agreed text specifies. Further, this article is also viewed as having some legal status beyond the treaty, as customary international law, since its rules have become “standard” practice in most multilateral treaty conferences. However, as will be noted below, this practice is being superseded by the so-called “consensus procedure.”

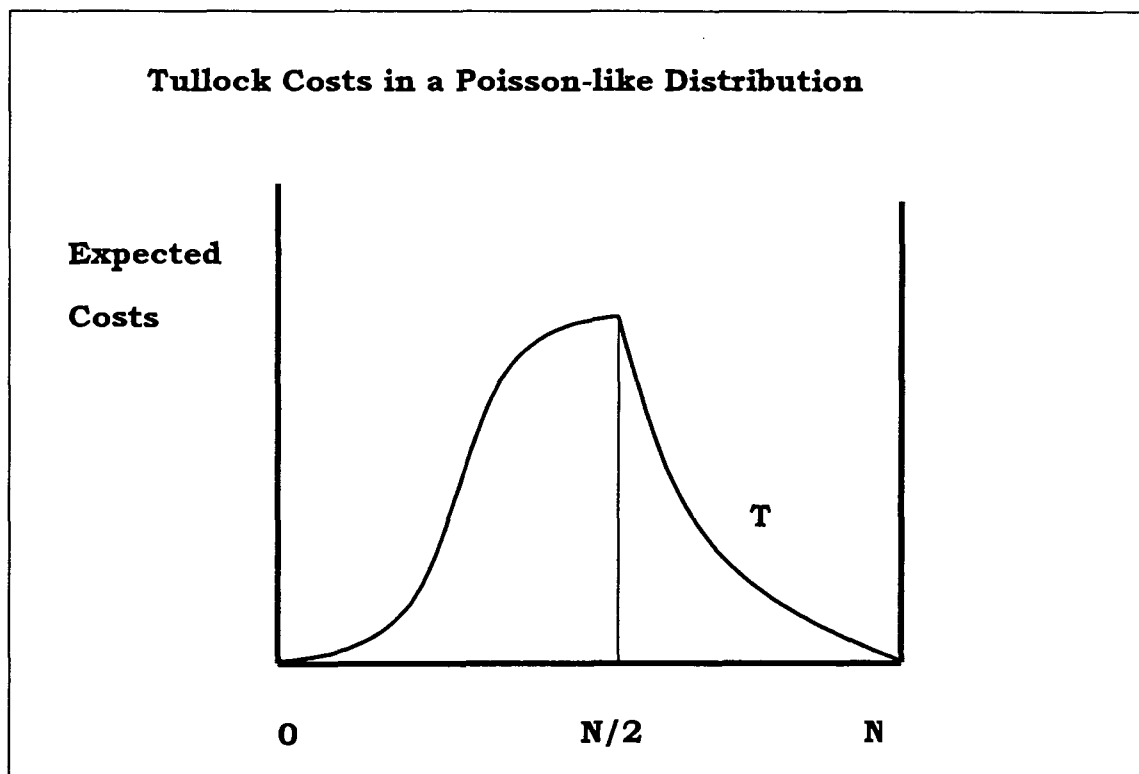
5.2.2. Just one more voting cost - “Rent Seeking”

Zane Spindler (1990) has modified the Buchanan-Tullock cost theory for optimal voting rules. In his model Spindler incorporates the “rent seeking” or “Tullock costs” of special interest pressure groups imposed on the decision forum in an explicit manner that is endogenous to group size. The result of these lobbyist influences is to cause the model to produce multiple optimal voting rules. While Spindler introduces the “Tullock costs” as a simple hemispheric distribution around the mean of the decision forum’s size, he admits that other specifications should also be admissible. His explanation for his distribution of “Tullock costs” is threefold. First, is the competition between “rent seekers” under various decision rules. While we would expect none under unanimity or individual rule, we would expect more competition increasingly as we approached the simple majority. Second, is that real resources will only be expended as the likelihood of benefits out-weighs the expected costs. Third, is simply that as long as the distribution of “Tullock costs” is non-linear, a larger range of potential results will be demonstrated.

With Spindler's openness to alternative distributions,⁸ we shall propose a refinement, where these "Tullock costs" form a Poisson-like distribution around the median voter. While accepting Spindler's rationale, we shall place a greater emphasis on the propensity for greater favor seeking when the voting rule is less than simple majority. Because with less than majority rule, "rent seeking" is a cheaper or more cost effective means of obtaining favors when fewer agents require bribes. Thus, the general propensity of the population will be to spend more on this effective form of transaction. To the right of the median voter, these "Tullock costs" should decline more rapidly than they initially rose owing to the fact that a superior number of voters has already been obtained, and additional "rent seeking" costs would not significantly alter the outcome. This emphasis implies that the distribution of "Tullock costs" will be skewed to the left of the median, similar to the well known Poisson distribution.

⁸ As he suggests in the text on p. 76 and again in comments made in his footnote 11 on p. 79.

Figure 5.4



As Spindler demonstrated, when the aggregate costs of voting include not only the “external costs” (curve C), and the “decision-time costs” (curve D), but also the “Tullock costs” (curve T in Figure 5.4), we end up with two relative minima. The specification of Poisson “Tullock costs,” produce similar results. However, the distinguishing feature of this asymmetric cost distribution is that among the two relative minima, we are more likely to have a global minimum⁹. These results can be seen in Figures 5.5 and 5.6 (which correspond in interpretation to Figures 5.1 and 5.2 above).

In Figure 5.5, like Spindler, we have two relative cost minimization point on the aggregate cost curve (C + D + T). These two relative minima, denoted as PO and QN, indicate a very small sub-committee like decision rule and a large “Qualifying Number” of votes respectively. In the context of United Nations treaty making practice these two positions could be interpreted as corresponding to the situations where a sub-committee of the conference Presiding Officers decide procedural questions, and where the plenary of the conference determines matters of substance with large qualifying majorities required.

In Figure 5.6 (like Spindler, but unlike Figure 5.2), the simple majority rule is not identified as the global minima, and therefore does not result in the “optimal” voting rule. As noted above this rule has had a larger role within multilateral treaty conferences after the 1930s. It is

⁹ More exacting results require complete knowledge of the nature of the “external costs” and the “decision-time costs,” that theoretically could balance the level of the two relative minima, or even reverse my prediction.

of interest that this model should produce three relative minima. In correspondence with the arrangement for various types of decisions that are made during a treaty conference. Initial decisions concerning matters, such as the sequence of speakers on the agenda are often made by the Presiding Officer of the Conference or a quorum of Committee Chairs together with the Presiding Officer.¹⁰ Procedural issues at a conference are less likely to raise any interest of “rent seekers” and is institutionally addressed by simple majority voting.¹¹ While matters of substance before the Conference, such as the conclusion of the final text of the treaty, generally require a qualified majority of 2/3s. Now with this theoretical analysis as background let me continue on to a discussion of adopting voting rules for choosing “among” constraints for institutional operations versus rules that might be adopted for choices “within” a given set of institutional constraints.

¹⁰ While there are limits within an existing treaty conference to the amount of agenda control the Presiding Officers have, the role of the “agenda setting” that frames the conference is clearly of importance. Perhaps, “agenda setting” is more important than voting on agenda items given the “voting paradox.” I wish to acknowledge the attention raised to this issue by Zane Spindler.

¹¹ It should be recalled that during the 1919 Paris Peace Conference many matters of both procedure and substance were decided not according to such rules, but rather by the Council of Four and not by all governments participating in the treaty conference. While such oligarchic behavior was perhaps logical for the treaty of peace, it was clearly an obstacle to the creation of the League of Nations, as I have mentioned in Chapter Two above.

Figure 5.5

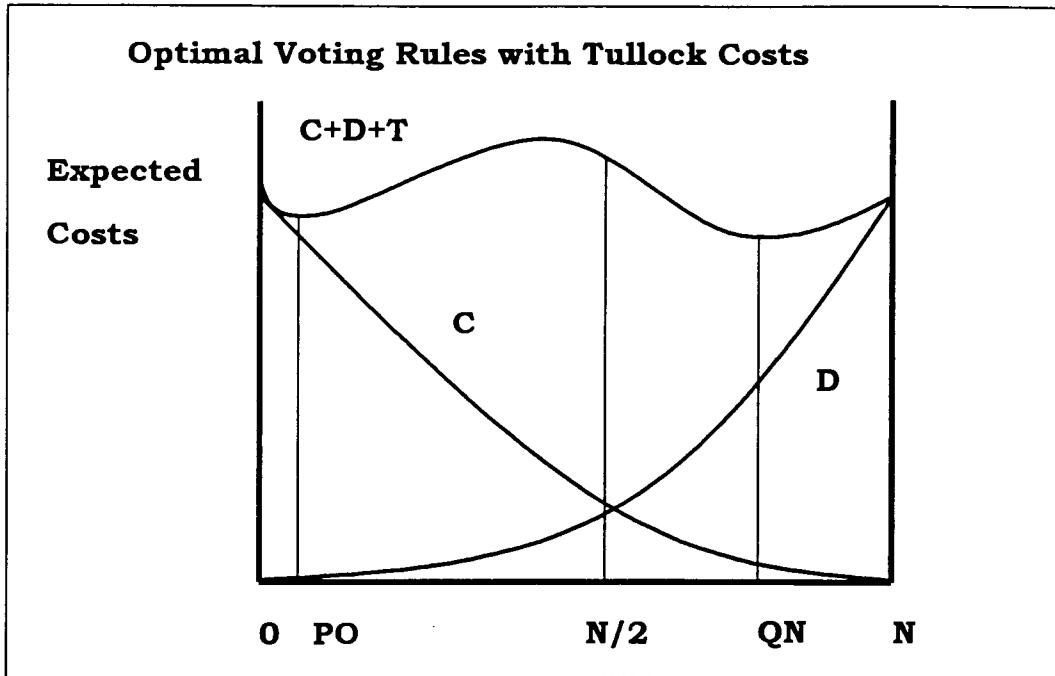
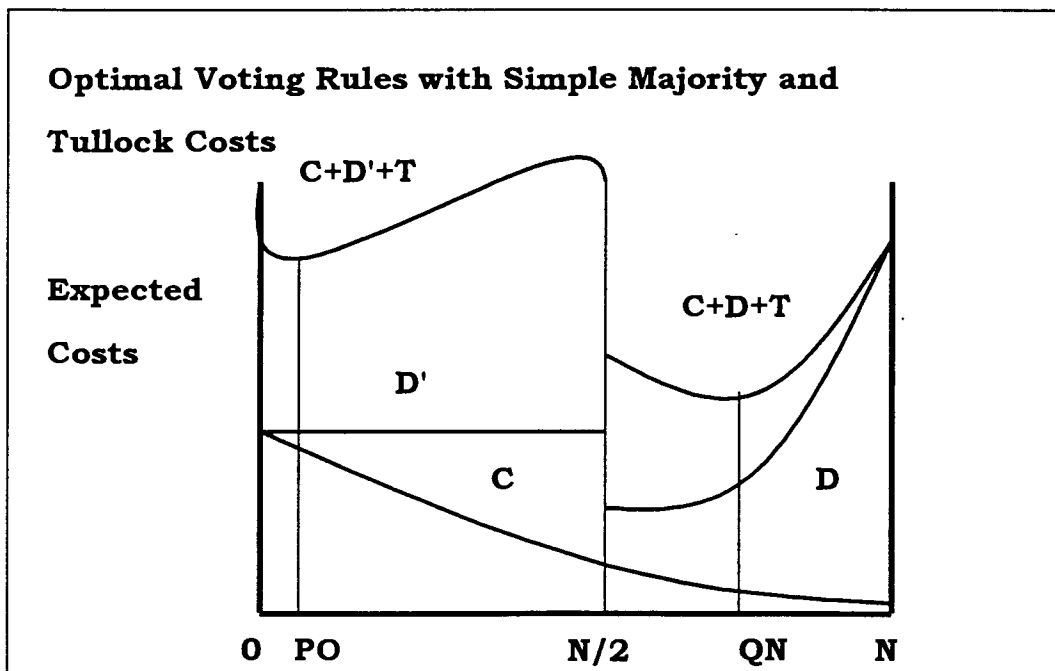


Figure 5.6



5.3. Voting to choose “among” constraints vs. “within” constraints

James Buchanan (1989) and (1990) draws our attention to the difference in the treatment of the distribution of voting rights during “constitutional choices” like those that are made in international treaty conferences, and the voting rights “constituted” within a given treaty regime. Within the treaty conference we are in a decision setting to choose among constraints. Here, generally, the equality principle has determined the distribution of voting strength. Accordingly, the principle of gaining unanimous consent has played a strong role. However, during the 1930’s the need for the complete reliance on the unanimity principle at treaty conferences declined markedly.¹² This can be seen as the result of two failures in government action. The first, directly relating to the practice of the unanimity rule was the failure of the League of Nations to produce successful international policy. Here unanimity retarded the progress of potential treaty developments as well. Accordingly, the rules under which the League actually functioned were gradually modified, including an amendment to the League’s Covenant.¹³ The second

¹² See L. Sohn (1975) for the historical practice in treaty conference on voting procedures to choose “among” possible treaty constraints. See S. Zamora (1980) for the historical practice of treaties creating international economic organizations to adopt voting rules for decisions to be taken “within” the constraints created by the terms of the treaty.

¹³ See Riches (1933) for a thorough, yet, contemporary analysis of this voting rule in the League, and Burton (1974) for providing a more historical overview of the rules’ effects and its modifications throughout the life of the League. Both authors focus on the notion that unanimity did not “paralyze” the League into inaction, but that compromises and revisions of procedure allowed the general conduct of the organization to proceed. However, Burton points out regarding some events after Riches had written, that unanimity on several occasions did prevent actions that a large and strong majority

failure, which became a recognition of the nature of the modern hierarchy of governmental approval of treaties, was most predominantly characterized by US Senate's failure to ratify the Treaty of Versailles negotiated by the President. The ratification process that takes place domestically, both outside of and after the treaty making conference, is now recognized as of equal importance to decisions made within the conference.¹⁴

5.3.1. The IMF: choosing "among" constraints and "within" constraints

Inside the operation of the treaty-created regime, such as the International Monetary Fund, we face a very different decision setting. Now the decisions to be made are focused on the work of the organization to achieve its aims and objectives. There has been an increasing practice within international economic organizations, whose aims and purposes

believed were important. Further, Burton pointed out that one effect of the rule, and even its compromises, did not have the effect of proposals being defeated. Rather, they were withdrawn or never raised in anticipation of likely veto in the League's Assembly.

¹⁴ This was strongly evidenced at the Bretton Woods Conference in 1944, when President Roosevelt appointed two Senators and two Congressmen, some of whom qualified as technical advisors, to the seven member US delegation. The President had also been keeping several other key members of Congress informed throughout the preliminary negotiations and draft proposals from 1942 onward. Roosevelt did not want to face the same situation Wilson did with regard to the Treaty of Versailles, and its appended Covenant of the League of Nations. This general practice of congressional involvement in executive treaty negotiations has been formalized in the US since the mid 1970s as the so-called "fast-track" procedure, primarily employed in trade related treaties. See *United Nations Monetary and Financial Conference Proceedings* (1948) p. 933.

are of a technical nature, to distribute voting rights on an unequal basis (i.e., not on the basis of one-country-one-vote).¹⁵

This dichotomy between the voting rules used at a treaty conference, and the voting rules chosen for the operation of an institution created by the treaty conference was clearly demonstrated in the Bretton Woods Conference which established the International Monetary Fund, and International Bank for Reconstruction and Development (known commonly as the World Bank).

The Bretton Woods Conference, as we noted in Chapter Two above, consisted of 44 nations, each with a single vote to cast on matters before the Conference. The Conference further followed, what had been emerging during the past fifteen years as, the general practice of an absolute majority rule, qualified by two-thirds of the states represented at the conference being present.¹⁶ The constraints chosen for the operation of the IMF and World Bank included voting rules not based on membership equality.¹⁷ Instead, the so-called weighted voting rules were adopted which allocate voting rights on a basis of equality in wealth (thus, these rights may be unequally distributed among its members).

¹⁵ See S. Zamora (1980) for an excellent survey of voting practices in international economic organizations spanning the last 100 years. See Sir Joseph Gold (1981) for an insightful description of the origins of the weighted voting practice of the International Monetary Fund.

¹⁶ See Sohn (1975) p. 311.

¹⁷ However, there is acknowledgment to the equality principle in the form of a minimum value for each member.

Buchanan (1996) made the point that the practice of majority rule, means the minority knows in advance it is likely to “be ruled,” rather than to “rule” with its social preferences. Votes cast against the majority in large qualifying majority settings may not be attempting to “decisively rule.” We should stop looking for behavior as always strategically striving for “decisive” influence, and consider instead what information or signals the minority is trying to convey.¹⁸

In 1943, during some preparatory meetings between Keynes and White on the plans that formed the basis of the Bretton Woods treaties, the American press became rather vocal in their anxiety over the impact of the weighted voting scheme in the draft proposals. It does seem somewhat odd that the press would accuse the British of manipulating the voting scheme, when it originated in a commentary attached to the April 1942 White Plan. What makes much more sense is White’s use of the word “investment,” rather than what is now referred to as the member country’s “subscription” or “quota” to the IMF. By phrasing the payment as an “investment” the notion of the weighted voting scheme has the perfect analogy in the stock market. Investors are each allowed one vote per share, therefore bigger investors own more shares and have a greater percentage of votes and thereby control as principal to the firm. In one of his reports back to London Keynes wrote:

¹⁸ I specifically refer to the game-theoretic literature, such as J. S. Dreyer and A. Schotter (1980) who have measured the so-called “power index” values of the voting distribution of the IMF. The focus of such studies is on the head of a pin, when the reality of much of the effect of the IMF voting practice is more on the order of a steamroller. Recall the critique or limitation raised by Sebenius of the game theoretic approach mentioned in Chapter Two above.

It never crossed my mind that we were under an accusation of having tried to rig this [weighted voting scheme]. Indeed, so little attention was paid to it that we had not even examined how it would work out in practice.¹⁹

Many “public choice” economists might love to catch Keynes’ in his admission that so vital an element of decision making within a public institution had “so little attention paid to it.”²⁰ Keynes’ overall objectives regarding the voting rules for what became the IMF were stated:

The management of the institution must be genuinely international without preponderant power of veto or enforcement to any country or group; and the rights and privileges of the smaller countries must be safeguarded.²¹

Yet, we can understand Keynes’ “economic” rationale more clearly, when two months later in a letter to Jacob Viner, he made the following pragmatic conclusion:

I most strongly agree with you that in actual working voting power is not likely to prove important. If the organization begins voting about everything, it will not be long before it breaks down.²²

For Keynes, then, the organization should be getting on with its vital work, proceeding “without a vote” until deemed necessary.

¹⁹ See Keynes (1980) volume 25, page 241. Letter to Sir Fredrick Phillips dated 16 April 1943.

²⁰ Actually, Keynes had paid some attention to the matter of the weighted voting proposal of White and had contrasted its general effects with his own proposal of proportional voting in a report comparing the two plans dated 7 March 1943. See Keynes (1980) volume 25, pages 223-224.

²¹ Ibid., page 234-235.

²² Ibid., page 322. Letter dated 13 June 1943 to Jacob Viner.

5.4. Emergence from the fray... “without a vote”?

The notion that to proceed by constantly taking votes would break down the whole work of an organization certainly didn't originate with Keynes. The method of “proceeding without a vote” is really a quite common practice. In diplomatic settings such a practice has often, loosely been called “consensus.” Judge P. C. Jessup (1973), interpreting “consensus” as any time when “silence gives consent,” identifies the role of the presiding officer, in an international organization, as crucial to the process of finding and articulating an agreement to which no vote is taken and no opposition voiced.²³

Jessup finds that this type of “consensus” first appeared at the UN in a 1946 Security Council meeting that concerned a Soviet complaint regarding British troops in Greece. Following an informal negotiative session between the US, British and Soviet delegates outside the Council, the President of the Council announced that it was the “sense of the Council” that . . . (reading from a prepared statement composed by the US and Soviet delegates) . . . and that the Council therefore considered the matter closed. Here the role of the presiding officer was merely to present the Council with a trilateral *fait accompli*

What now has happened in terms of the cost theory of voting? The UN Charter specifies the voting rules for the function of the Security

²³ Recall above in Chapter Two my discussion of Keynes' “tactical” behavior at Bretton Woods, and his critical evaluation of Wilson on this point of moving the conference forward. It is also interesting to note that Jessup acted as the Assistant Secretary General at the Bretton Woods Conference, and was therefore a witness to Keynes' behavior in the role of ‘presiding officer.’

Council, and does not mention the notion of “consensus.”²⁴ Clearly, what we must say is that the preference intensities of the issue mentioned above, were so great between the British, US and USSR (all of whom hold the right of veto on any matter before the Security Council) that unanimity among them was essential. Further, that the preferences, and their intensities, of the other six members of the Security Council (two of whom also held the right of veto) were directed more at the resolution of the problem among the three, than the conclusion of decisions that might have taken longer in reaching this effect.

In terms of the representative member of the Council (from among the majority of the six) the “external costs” of the decision were perceived to be low, while for the three these costs were perceived as very high. The “decision-time” costs were perceived by the three as being relatively low, while the representative member of Council perceived these costs as relatively high. According to these perceptions the three saw the optimal vote as effectively unanimity (see Figure 5.7), while the other Council members saw the optimal vote required in this matter as only three (see Figure 5.8).²⁵ By these differing perceptions the Security Council as whole unanimously accepted the agreement of the three.

²⁴ The UN Charter was drafted under conditions of majority rule and sovereign equality in voting (i.e., one country one vote). The final text of the Charter was adopted unanimously, and without reservations by all states participating in the San Francisco Conference.

²⁵ Note that since this example took place in 1946 there were only nine members of the Security Council, five permanent members with veto power plus four rotating members. The number of rotating members was raised to ten in the late 1950s giving the Council its current size of fifteen members.

This style of quietly negotiating a settlement behind the scenes is often an example of a powerful minority dictating or negotiating terms of an agreement, thus excluding the participation of a weaker majority. The Chinese delegation to the UN Security Council pointed out repeatedly during the late 1970s that they did not consider such action as being truly a “consensus” of the Council when they and other members have been excluded from the negotiation process.²⁶ In such instances, Chinese delegation has insisted, at times, that a vote be taken as a matter of record, even when agreeing with the resolution’s content. They wished to voice their lack of consent to the “procedure” that created the agreement by voting an abstention.²⁷ Although the circumstances were often similar to those described in the Jessup example, it seems apparent that what the Chinese delegation wanted to note was that this “consensus” was not, strictly speaking, the same thing as unanimity (See again Figure 5.7). It also seems that the full participation of the Security Council in the decision making process is part of what the Chinese saw as important.

²⁶ The lack of full and equal participation by all members of the Security Council was the basis of China’s concern. In terms of A. O. Hirschman (1970) the Chinese strategically asserted their “voice” in this instance.

²⁷ See S. Kim (1979) p. 212.

Figure 5.7

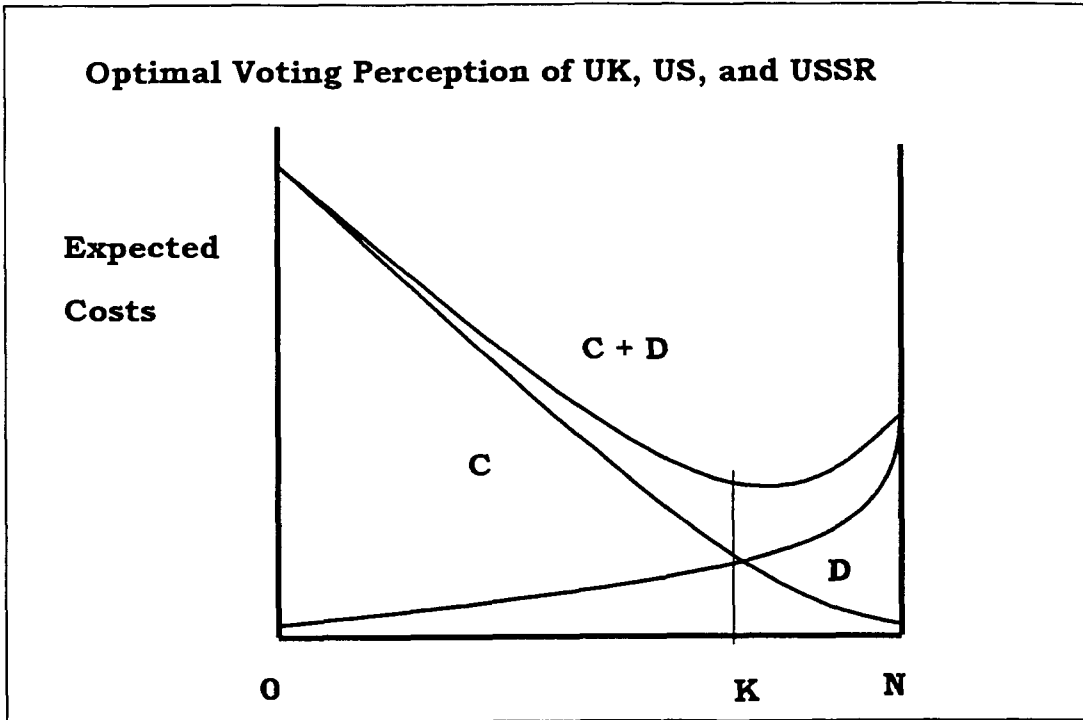
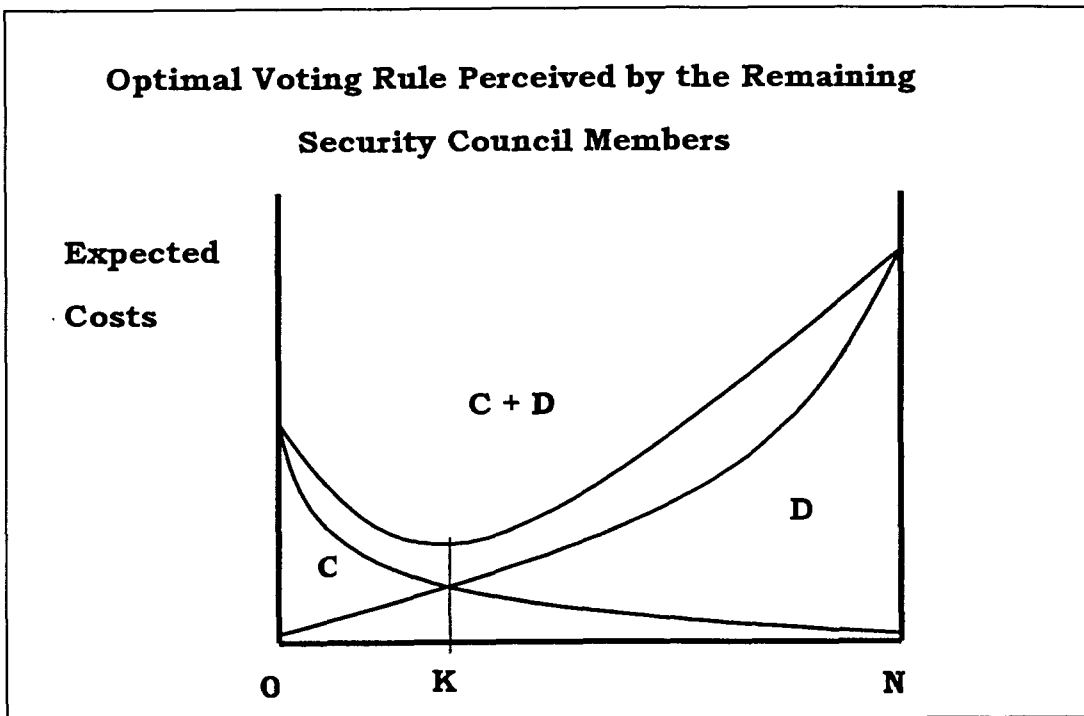


Figure 5.8



5.4.1. History of emergence of the “consensus procedure:” out of the muck

The definition and character of what is now called the “consensus procedure” as a method of decision-making in the international forums has been evolutionary. The purpose of the section is to clearly distinguish the common place notion of consensus (as described above) from the “consensus procedure” as it has evolved in the United Nations.

The first appearance of the “consensus procedure” in substantive issues at the UN was in 1961 in the work of the United Nations Committee on the Peaceful Use of Outer Space.²⁸ The crucial element of the “consensus procedure” at this point in its development was not merely the issue of reaching agreement “without need of voting.” The issue now focuses on the opportunity for participation. It was now more important than in the cases mentioned above, because one task of this Committee was the formulation of legal principles regarding the use of outer space.

The concern of many delegates was the fact that outer space was, at that time, only accessible by two States (the US and the USSR). Any decisions that relied solely on the procedure of majority vote could easily exclude the interests and the views of the small minority of States to whom the decisions would directly apply. The unanimity rule was not

²⁸ See K. Zemanek (1983) p. 862. It should be noted that the Committee on the Peaceful Use of Outer Space (known as COPUOS) is the only Subsidiary body of the GA that has made regular arrangements for NGO consultation. As stated in the records of the Committee, decisions would be reached by having all members “work without the need for voting.” See *UN Document A/AC.105/PV.2*.

chosen by this Committee, because it would effectively extend veto power to every member whether or not they had access to space. The bilateral “consensus” of the space-states was not likely to be accepted either as this might limit future opportunities of all others. So given this prisoner’s dilemma, someone jumped outside of the traditional game to build a new reality. The “consensus procedure” as development in COPUOS was clearly meant to be a procedure, an “agreement-discovery” process, not simply a voting rule.

After the initial innovation of COPUOS, the practice of UN “consensus procedure” soon spread to other Committees and to the GA as a whole.²⁹ It was increasingly recognized that influential minorities might be at least partially supportive of decisions if they were arrived at by negotiative procedure. The negotiation could provide the concerned minority with the opportunity to better assert its views, and the opportunity for others to condition their views in reference to expedience and uncertainty over future conditions. Such a situation could again be depicted by the cost considerations presented in Figure 7. There the optimal vote is very near unanimity, but not completely to the point where any party has a true veto over the decisions of the Committee.

²⁹ See C. W. Jenks (1965). It is also interesting to note that Jenks, also participated in the Bretton Woods Conference, as legal advisor to the Observer delegation of the International Labour Organization.

5.4.2. Economic interpretations of the “consensus procedure”

Cautious attempts were made during the mid-1970s to codify the exact organizational methods of the “consensus procedure.”³⁰

It has been stressed that the objective sought by the “consensus procedure” was that “every effort should be made to achieve a consensus before a vote is taken.”³¹ Clearly, then the “consensus procedure” is something more than merely “proceeding without a vote.” The economic interpretation of the “consensus procedure” includes the notion of *ex ante* commitment by agents to act cooperatively in the building of broadly acceptable policy solutions.

The issue of actively building the general agreement was stressed in the rules of procedure adopted by the Third Conference on the Law of the Sea (UNCLOS III). Under Rule 37 of that Conference, commonly referred to as the “Gentleman’s Agreement,” on the “Requirements of voting,” the relevant passages are as follows:

1. Before a matter of substance is put to the vote, a determination that all efforts at reaching general agreement have been exhausted shall be made by the majority . . .
2. (c) . . . the President shall make every effort . . . to facilitate the achievement of general agreement, having regard to the over-all progress made on all matters of substance which are closely related . . .

³⁰ For example, the rules of procedure for the World Population Conference in 1974, specified that “decisions on the important matter of substance shall be taken, if possible, by consensus,” and that “consensus is understood to mean, according to United Nations practice, general agreement without vote, but not necessarily unanimity.” See *United Nations Judicial Review* 1974, pp. 163-164.

³¹ *United Nations Judicial Review* 1974, p. 164.

2. (d) If by the end of a specified period of deferment the Conference has not reached agreement and if the question of taking a vote is not further deferred . . . the determination that all efforts at reaching general agreement have been exhausted shall be made in accordance with paragraph 1 of this rule.³²

Here in the UNCLOS III procedures we find further elements that contain unique economic interpretations. First, in paragraph 1 we find again the notion of the *ex ante* commitment to build agreement. Now, however, the procedures add the notion that this commitment implies an interdependent cooperative bargaining framework. This framework often allows the negotiations to include issues and exclude issues that would be more likely to lead to a broader level of agreement.³³ Economically we would assume that cooperative behavior would be consistent with a lowering of “Decision Costs.” Yet, the “commitment” to exhausting “all efforts at reaching general agreement” could entail very high “Decision Costs,” even in the presence of the cooperative interdependence.

Second, in paragraph 2. (c) we find that the conferences require truly “entrepreneurial” qualities of leadership from the presiding officer. For this officer to “make every effort . . . to facilitate the achievement of general agreement” certainly involves elements of “risk taking” when dealing with delegates who may be acting intransigent towards the progress of the conference, as well as with the government policy the

³² See *UN Document A/CONF.62/30/Rev.1* of 27 June 1974.

³³ This feature of the “consensus procedure” has been discussed by J. K. Sebenius (1983), (1984) and R. D. Tollison and T. D. Willett (1979). Further, it clearly implies that the conference will be very actively engaged in the process of choosing among potential constraints, and not limited only to predefined constraints that may not attract broad agreement.

presiding officer is officially delegated to represent. The balancing of the potentially divergent interests within the person of the presiding officer (their self-interest, the national-interests they were delegated to represent, and the interests of the conference that may conflict with either or both of the others) make this job a very difficult one. When performed well the presiding officer can greatly lower the “Decision Costs” of the Conference and speed up the time required to reach agreement. When performed poorly the presiding officer will drive up “Decision Costs,” delay the progress of the conference, and even prevent its conclusion. We could end up with the likes of Versailles, perhaps worse.

Third, in paragraph 2. (d) we find relief from the many sources of rising “Decision Costs” by fixing a time that limits any further expenses, a time to call for a vote and conclude the process of search. UN experience has shown that, in several preparatory committees assigned by the GA to prepare an adequate working draft treaty, when the time came to vote it was found that there was not sufficient agreement to proceed.³⁴ While this clause does not directly lower the “Decision Costs” function, it does effectively place an upper limit based on the determination of a majority of the participants in the conference.

³⁴ This was the situation in the preparatory work for both the second and third UN Conference on the law of the sea. The consequences of this failure to reach initial agreement lead, in the case of UNCLOS III, to the strategy of iterative rounds of negotiating, rather than starting with an essentially completed text. See B. Buzan (1981) and R. D. Eutis (1977). For an economic interpretation of the general strategy employed see G. Ress’ (1994) discussion of the economics of “*ex ante* safeguards against *ex post* opportunism in international treaties.”

Another economic issue related to avoiding dissenting votes centers on the implications of a vote over future financial liabilities. In the Opinion of the International Court of Justice in the “Certain Expenses” case, the UN may hold member States, who are dissenting parties to General Assembly decisions, at least partially liable for the financial consequences of those decisions. Thus, any explicit vote would objectively measure the degree of general agreement and provide a clear record of where or over what issues, the dissent may be focused. Here again the clarification of the Director of the General Legal Division in his statement to the Population Commission wrote that:

In the United Nations organs, the term “consensus” was used to describe a practice under which every effort is made to achieve unanimous agreement; but if that could not be done, those dissenting from the general trend were prepared simply to make their positions or reservations known and placed on the record.³⁵

5.4.3. The roles of the “presiding officer”

Clearly the most crucial element of the “consensus procedure,” from the point of view of constitutional economics, is the role of the presiding officer. This section will elaborate the economic interpretation of this role of presiding officers. It shall also provide some specific examples of the unintended consequences that have emerged at conferences that have employed the “consensus procedure.” In particular we will discuss two innovative elements that have been used by presiding officers to enhance the “progress” of building “general agreement,” and one innovative

³⁵ *United Nations Judicial Review* 1974, p. 164.

constraint devised by the conference to restrain a presiding officer whose performance is encumbered by conflicting interests.

5.4.3.1. Innovation 1 - Making committee participation "open-ended"

As mentioned in Chapter Three above, there is a need in a large alliance organization like United Nations treaty making conferences, to limit the size of working groups, or committees in an effort to economize on the amount of time and personnel devoted to the efforts. From the standpoint of methodological individualism, the matter should center on the choice of particular individuals. However, in the institutional setting of international treaty conferences the issue of "institutional representation" plays a predominant role. A method of committee assignments needs to address a variety of conflicting goals; sovereign equality of states, a sense of "representativeness" in the character of sub-set of states assigned to committees. Committee assignments are generally determined by a sub-committee appointed and headed by the presiding officer of the conference.

One initial method to allocate committee appointments at large international conferences has been on a geographical basis, roughly proportional to the number of countries within each region. But this approach does not always match the preference intensities of the national assignments, nor does it necessarily recognize any attributes of the individual representative, who may have expertise in particularly

relevant areas of one committee, but not others.³⁶ While the criteria of expert knowledge is a relatively straightforward matter in the assignment problem, the issue of preference intensity is not. So the notion of an “open-ended” working group or committee emerged.

An “open-ended working group” is a flexible, yet efficient approach to the establishment of sub-committees of the plenary (of the whole). Its *officio* membership is appointed and fixed in size like most subcommittees in such a way as to ensure regional representation. The major difference between an “open-ended working group” and other subcommittees is that it is open to *ex officio* interested parties. The smaller the committee size, however, allows for “a more efficient and economical procedure” for drafting an instrument’s text.³⁷

In the actual experience of “open-ended working groups,” several authors have pointed out that when non-appointed States participate they generally do so for only a small portion of the committee’s overall program of work.³⁸ Sometimes the additional participation that occurs

³⁶ This criteria is explicitly recognized as important in assignment of representatives to the UN Commission on International Trade Law, which in addition to the requirement that delegates have expertise in trade law, operates on rotating country assignments of a semi-annual basis.

³⁷ D. Sutter (1994) discusses how the “economics of information” would affect the outcome in situations of “constitutional choice.” He suggests, as I am here, that when the institutional environment is changed, the information and knowledge discovery opportunities are also changed. The fact that the “open-ended” committee environment provides a greater opportunity for decentralized input to enter the committee’s consideration, suggests that outcomes of this arrangement are more likely to be well informed or information rich.

³⁸ *The Review of the Multilateral Treaty Making Process* (1985) p. 232, and S. Rosenne (1989) p. 392-393.

in an “open-ended working group” is not merely from non-appointed States, but also from representatives serving on other concerned or related committees, commission, or even by NGOs (through informal invitation).³⁹

One example of the extensive impact of the “Open-Ended” approach occurred during the drafting of the Convention on the Rights of the Child, and the Second Optional Protocol to the International Covenant on Civil and Political Rights. This took place in 1988 in the ECOSOC’s Commission on Human Rights, which normally has only a membership of 54 States. There was clearly a variety of strong preference intensities among the delegates over some of the issues contained in these two treaties, which included legal rules on government practice of capital punishment. As a result of these preference intensities the 54 member Commission, at one point included the participation of 97 Observer States.⁴⁰

³⁹ *The Review of the Multilateral Treaty Making Process* (1985) p. 208.

⁴⁰ At the time, 1988, the UN membership stood at 159 States. This meant that the total number of States participating in the Commission’s deliberations was 151 - almost the UN’s full membership! It is also interesting to note that after these two instruments were finalized in ECOSOC under the “consensus procedure,” the GA adopted the first “without a vote.” The first treaty restricts states from applying capital punishment to anyone under the age of 18. President Bush rejected signing this treaty because by the precedence of the US Supreme Court, had established an age limit of 15 years. The GA resorted to a vote over the second instrument, whose sole purpose is the abolishment of the death penalty in certain circumstances. The vote was 56 States in favor, 26 against, and 48 abstentions.

5.4.3.2. *Innovation 2 - Learning from non-voting input*

The presiding officer needs to possess “entrepreneurial” characteristics, and demonstrate a willingness to break out of modes of negotiating that appear to inhibit the progress of the conference goals. An example of this came during the 1978 session of UNCLOS III. The chairman of the financial negotiating group (NG-2), took the initiative of involving some NGOs in the work of this group.⁴¹ These NGOs in turn introduced NG-2 to a group of MIT researchers who had developed a computer model that detailed some of the financial ramifications of various mining-royalty schemes applicable to the prospect of seabed mining.

The fact that the MIT project was introduced to the committee through the independent “good offices” of UN recognized NGOs enhanced the committee members’ view that the seminar was unbiased in nature. This NGO involvement came about at the initiation of the presiding officer. These NGOs had participated in the formal NGO sessions of UNCLOS III in 1976 and 1977. The organizational purpose of these NGOs was not directly related to matters of oceans law, nor were they experts in international law. Their aims and purpose generally focused on world peace and social cooperation. This also lent credibility to their hosting of the MIT seabed mining simulation. Their contributions lead to dramatic improvements in NG-2’s ability to come to agreement. Such informal participation by NGOs has been described by Sebenius (1984) as “instrumental in bringing about the financial compromises”⁴²

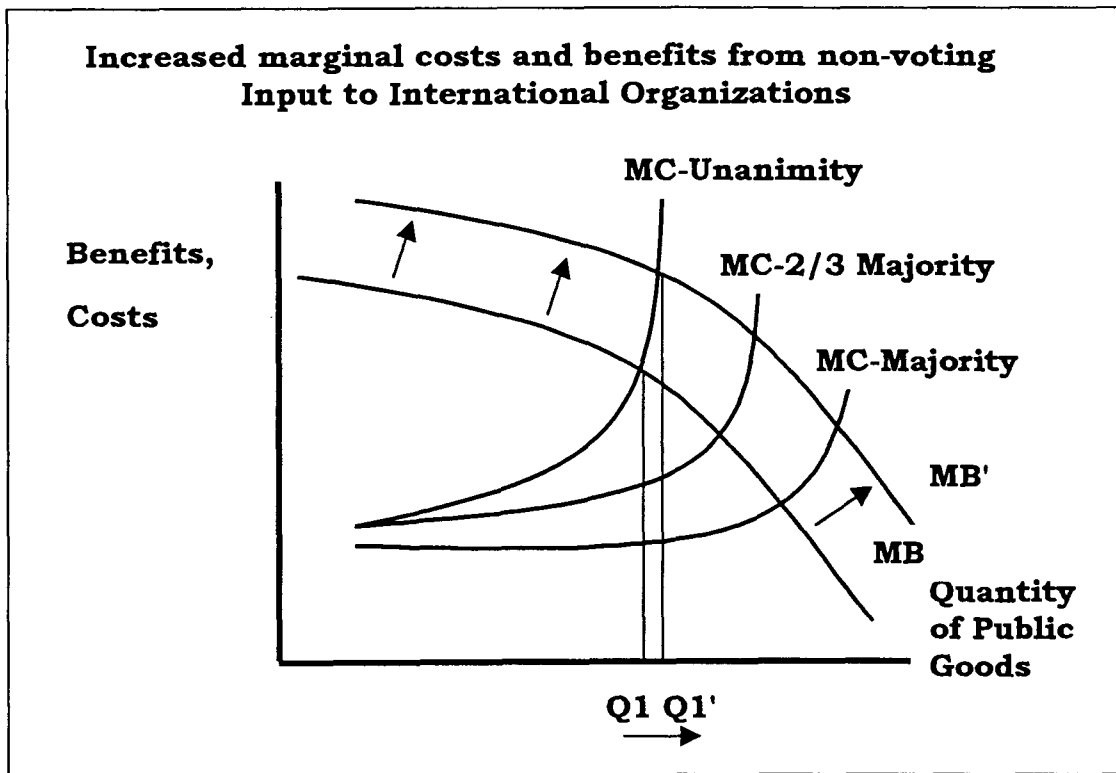
⁴¹ See Sebenius (1984) for his first hand account of the 1978 session.

⁴² Sebenius (1984) p. 14.

necessary to complete the negotiations of that section of the Law of the Sea treaty.

The kind of learning and discovery of new understandings about the nature of the seabed mining problem, not only reduced the “decision-time” cost function (which would promote higher levels of agreement), it also provided a method for the Committee to construct a solution viewed as superior to any of the governmental proposals previously submitted to them. This latter effect could be interpreted, according to Frey’s explanation of voting in international organizations, as an upward shift to the right of the marginal benefits curve (see shift in MB in Figure 5.9).

Figure 5.9



5.4.3.3. *Innovation 3: Constraining the errant political entrepreneur*

As I noted above, the unique responsibilities of the presiding officer present a clear and potential opportunity for “government failure” due to what I have called the “public choice” discrepancies. The possibility for complex and challenging personal conflicts over addressing one’s private-interests, one’s perceived national-public-interests as a delegate, or the global-public-interests of a UN Committee where one serves as presiding officer, are no doubt great. One difficulty in the 1977 session of UNCLOS III was not that the presiding officer was passive, but rather that he actively revised the draft negotiating text with blatant disregard to national delegations other than his own. This problem brought progress in the First Committee to a standstill (as perceived by the Plenary), and lead to further specification of constraints placed on the role of the presiding officer during the 1978 session.⁴³

Caution should be stressed when there is such an open and obvious potential for this type of “government failure.” Such caution should note that some form of constraints may be supportive of the “responsibilities of a presiding officer,” while at the same time monitoring and possibly restraining his/her personal actions that may be seen as conflicting with these “responsibilities.” Beginning with the 1978 session, any revisions or modifications in the composite negotiating

⁴³ See B. Buzan (1981) p. 336-337, R. D. Eustis (1977), and B. H. Oxman (1979).

text⁴⁴ were to be “the collective responsibility of the President, and the Chairman of the main Committees, acting together as a team headed by the President.”⁴⁵ What this specification implied was that no single individual, delegate, President or Chairman would be able to alter the draft text in any fashion which did not meet with widespread support of the Plenary.⁴⁶ This specification effectively establishes a constraint to insure that only progressive negotiations would enter the official text and allows changes that would serve the personal or narrow national interest of any particular presiding officer.

5.5. Conclusions

This Chapter finds that the economic cost theory of voting, whether augmented for a “rent seeking” society or not, allows economists to explain why particular voting rules appear in different problem situations. As Buchanan (1989); (1990) has stressed regarding the notion of Constitutional Political Economics, the problem situation where choice is among constraints is very different from the problem situation where choice is within a given set of constraints. The application of methodological individualism in situations of “constitutional choice” (i.e.,

⁴⁴ See a more detailed description of the UNCLOS III procedure below. This was the preliminary text developed prior to the final draft of the Convention.

⁴⁵ See *UN Document A/CONF.62/62* (1978).

⁴⁶ See Buzan (1981) and *UN Document A/CONF.62/62* (1978).

where choice is among constraints) implies the use of unanimity in matters of collective choice. The economic cost theory of voting rationalizes why the unanimity rule is not commonly practiced.

We explored a modification to Spindler's (1990) model of voting in a "rent seeking" society, and provided his theoretical results with empirical corroboration. We presented the operation of treaty making conferences as examples of what Buchanan (1990) has described as situations of "constitutional choice," where the object of choice are constraints themselves. We discussed the "consensus procedure" and provide an economic interpretation of its operation. Within this economic interpretation we found some positive unintended consequences of the "consensus procedure" that tend to guard against the "public choice" abuses, and that tend to approach more actively the building of higher levels of agreement than what would result by merely applying voting rules in the situation. There are many important elements within the practice of the "consensus procedure" that constitutional economists should become aware of, and study further.

Chapter Six

Conclusions and Implications

This dissertation has examined international treaty making practice in light of three economic approaches. These approaches are the “market failure” or “public interest” approach; the “government failure” or “public choice” approach, and the “constitutional economics” approach. The uniqueness of this study is the examination of institutional arrangements for creating treaties, rather than narrowly focusing on a particular treaty. Some common economic models have been extended to address crucial elements of the problem and process of international treaty making itself. These extensions make several important contributions to the literature.

6.1 Economic literature and economic practitioners

The economic literature relating to treaty making and international organization was reviewed in Chapter Two. Two outstanding examples of economist practitioners are presented, John Maynard Keynes and James Sebenius.

This Chapter extensively reviewed the economic literature on problems in and related to treaties and treaty making practice. It has reviewed a significant study of the practice of the professional economist in international agencies. It has further, reviewed the writings and practice of John Maynard Keynes at the Paris Peace Conference of 1919

and at the Bretton Woods Conference in 1944. As well, it has reviewed the negotiation analysis approach of James K. Sebenius, who participated in the Third United Nations Conference on the Law of the Sea. Many important notes were made regarding the evolving practice at treaty making conferences, and on the thoughts and ideas raised by Keynes and Sebenius regarding enhancing the treaty making and negotiation processes, and the analysis of this type of situation in an “economic” mode.

6.2 The “market failure” approach

Chapter Three has applied the economic theory of alliances to the previously unexplored field of conventional international law, and arrived at the standard conclusions concerning the non-optimal provision of public goods, and disproportionate burden sharing. The powerful “public choice” critique that the alliance model makes is that the government officials (being self-interested individuals) attempt to provide public goods, but the government also fails by its “independent-adjustment” behavior to provide these public goods optimally for the “public interest” as defined by the alliance.

This Chapter further extended the standard model of alliances to include a unique institutional agent (the Non-Governmental Organization), whose aims are more related to the alliance’s purpose than to particular members, and who have non-standard behavioral characteristics. The outcome of this NGO-augmented alliance model was improved relative to the Pareto optimal, as a result of the mixed Cournot-Lindahl allocation behavior, that arises in this type of alliance. Further,

when NGO policy makers adopt expectations that the collective choice of governments will fall short of the Pareto optimal level of treaty production, they may act to compensate for the expected government failure.

These are both new and important additions to the alliance literature. The NGO-augmented alliance model should be readily applicable to several increasingly important fields where these organizations are becoming more and more involved, such as; foreign aid and development projects, environmental protection and sustainable development, human rights standards, and their unexplored role in peace building as opposed to defense maintenance.

A further direction for extending these alliance models of conventional international law, would include the examination of spillover effects caused by the joint production of public goods with varying degrees of "purity and impurity."

6.2.1. Important implications and future areas of development

An important application of my NGO-augmented alliance model is to the analysis of foreign aid, international development assistance, and the general problem of United Nations financing. There are four reasons why this implication of my model should be pursued.

First, it is increasingly being reported that NGOs have a high rate of effective productivity in the implementation of development aid projects.¹ Second, there has been a growing trend by many government

¹ See L. Gordenker and T. Weiss (1995), this entire issue of *Third World Quarterly* was devoted to examinations of NGOs in the field of development.

development agencies such as US AID, and Canada's CIDA, to fund projects initiated by NGOs (this is different from the more business like practice of contracting out projects to "commercial" development contractors).² Third, in efforts to "de-politicize" the issues that arise when donor governments are viewed as domestically self serving in the award of development contracts, governments such as Norway have chosen to place the decision authority over their budgeted aid moneys to the International Red Cross, thereby preserving their governments image of "public trust." Fourth, these notions have significant implications concerning the understanding of UN financing, both the general assessments (currently at 2.7 Billion \$US), and the extraordinary budgets, derived on a voluntary basis, that deal primarily with development and peacekeeping programs (currently about 65 Billion \$US).³

The United Nations' assessment budget is structured more on the lines of explicitly agreed to membership dues, and as such do not raise the standard alliance kind of question. Then too, the "extraordinary budgets" of the United Nations are either "pure" public goods provision in times of war (well at least a standoff from a war situation), or are "impure" public goods because they fund development projects that are highly localized in their benefits and potential spillover effects. Thus,

² See both Charlton and May (1995) and Meyer (1995).

³ Regarding these last two points see the report of the Nordic Council (1991), and the Ogata and Volker report (1993), as well as Officer (1994).

here too, the standard assumptions and conclusions of the alliance model do not fully explain the situation present at the United Nations.

6.3 The “government failure” approach

The fundamental premise underlying the “public choice” research program is examined. The widely cited work of Vaubel (1986) on “the public choice approach to international organization” is reviewed, and a Popperian critique of his methodology is offered. A “public choice” interpretation of the economic theory of alliances is explored, including the extensions in application and structure made in the previous Chapter.

If there is any “public interest” being served, the “public choice” approach fails to draw much constructive or “positive” attention to it. The efforts of Adam Smith were to call attention to the fact that while we might devise an analysis of the behavior of “knaves” the purpose of the outcome of economic analysis was to discover the “unintended social benefits” (as well as acknowledging the costs) of such behavior. This orientation of Smith is generally lacking in the “public choice” literature.

Chapter Four examined the fundamental “boundary condition” that is identified by the “public choice” discrepancies (i.e., that one corner solution exists where individuals are in positions intended to serve the “public interest” yet make choices and take actions that are more clearly fulfilling “private interests” instead). This Chapter also raises some methodological concern that this “corner solution” should not be focused on to excess, that the general economic approach involves the individual rational maximization hypothesis within situational

problem settings. It argues that there is more to learn by focusing on the elements of the situation than on the narrow specification of the maximization postulate.

Nevertheless, the “public choice” discrepancies do provide some unique interpretations to situations. This “public choice” critique was therefore applied to the economic theory of alliances, and to the extension of that theory to the field of conventional international law, and to the NGO-augmented alliance model. What this application found does explain some interesting facets to the circumstances of the evolution of conventional international law. From this we should conclude that often times when individuals do violate the “public trust” that has been invested in their appointment to public office, such violations lead to unintended consequences that are quite socially beneficial. We also find support for the notion that the international arena has more constraints in many matters that tend to limit the potential harmful effects of public servants pursuing “private interests,” than do most national situations.

6.4 The “Constitutional Political Economy” approach

The distinction made in “Constitutional Economics” between situations where choices are made among potential constraints, versus situations where choices are made within constraints is explored. Treaty making is an example of this first type of situation. The emergence of the so-called “consensus procedure,” and related innovations at the United Nations, are presented as unintended consequences of government failure to work within certain constraints of the organization. Further it is shown that

these innovations as successful methods for dealing with situations of choices among potential alternative constraints.

Chapter Five finds that the economic cost theory of voting, whether augmented for a “rent seeking” society or not, allows economists to explain why particular voting rules appear in different problem situations. As Buchanan (1989); (1990) has stressed regarding the notion of Constitutional Political Economics, the problem situation where choice is among constraints is very different from the problem situation where choice is within a given set of constraints. The logical application of methodological individualism in situations of “constitutional choice” (i.e., where choice is among constraints) implies the use of unanimity in matters of collective choice. The economic cost theory of voting rationalizes why the unanimity rule is not commonly practiced.

We explored a modification to Spindler’s (1990) model of voting in a “rent seeking” society, and provided his theoretical results with empirical corroboration. We presented the operation of treaty making conferences as examples of what Buchanan (1990) has described as situations of “constitutional choice,” where the object of choice are constraints themselves. We discussed the “consensus procedure” and provide an economic interpretation of its operation. Within this economic interpretation we found some positive unintended consequences of the “consensus procedure” that tend to guard against the “public choice” abuses, and that tend to approach more actively the building of higher levels of agreement than what would result by merely applying voting rules in the situation. There are many important elements within the practice of the “consensus procedure” that constitutional economists should become aware of, and study further.

6.5 Conclusions and contributions

This dissertation makes significant contributions in four areas: (1) an excursion in the history of economic practice; (2) the application of the theory of alliances to a previously unexplored topic, and extensions of the model's formulation reflecting new production and evaluation criteria; (3) the methodological critic of "public choice" economics points to its unique but limited usefulness, and (4) the examination of the notion of collective choice "among" constraints is examined in the context of UN treaty making conferences, and an economic interpretation of the so-called "consensus procedure" is presented. Thus, this work is shown to have implications on a number of specific topics relating to the institutional patterns of international treaty making. These implications have not been previously derived by either the "market failure," the "government failure" or the "constitutional economics" approaches to the study of political economy.

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