

## DECISION-MAKING IN REGIONAL ORGANIZATIONS

1. Decision-making is probably the most important activity in the life of an international organization. Once adopted a formal decision leads to legal consequences and has to be implemented. This is essentially how the programmes of action of such organizations are implemented. The provision in the constituent instrument of an international organization on how decisions are to be taken should be understood in the context of a whole **process** and the events leading up to a final decision.
2. Several steps precede a final decision; such as putting the specific item on the agenda through a formal proposal, the consultations, debates, fact finding and studies that may be required, the efforts by participants to find agreement amongst themselves, and finally adoption in a formula that is expressly approved by the organ concerned. The correct **recording** of a formally binding decision is also very important.
3. International organizations develop **rules and procedures** on how their decision-making process is conducted; from putting a matter on the agenda till adopting and recording a final decision. In most instances the formal provision in the organization's founding agreement will contain only the essence regarding decision-making and may not be sufficiently detailed.
4. A new international organization can gain valuable insights by comparing experiences elsewhere. Article 17 of the SACU Agreement deals with "decisions" and provides: "*Except as otherwise provided in this Agreement, decisions of the institutions of SACU shall be made by consensus.*" The provision is rather elementary and does not explain any procedural aspects or the technical rules that may be involved. The process in terms of how consensus is reached is not dealt with. It does, by implication, exclude adoption on the basis of a majority vote. However, it does not imply a rigid veto.
5. This provision has to be unpacked and the meaning of "consensus" clarified. The rules of procedure should contain the more detailed arrangements and should explain the technicalities

6. Consensus-based decision-making is widely practiced by international organizations. What it means in practice can be ascertained by looking at the activities of other international organizations. Before the concept of **consensus** is discussed in some detail, the concept of **decision-making** itself merits some clarification.
7. The following citation from the writings of an international commentator sheds light on what is generally meant with the term “**decision-making**.” “*Under the **process** of decision-making we understand what takes place in the given body of an organization when the will of its members is coordinated and moulded into one which can and shall be considered under the relevant law of the organization as the expression of the will of the organization.*”<sup>1</sup>(Emphasis added.) Decision-making is described as a process, not a single event.
8. This process, by necessity, entails a wider set of activities, as reflected in the additional rules and procedures on decision-making in a specific international organization. The practical needs of a particular situation can then be accommodated; not all decisions are equally difficult to reach.
9. In complicated matters where viewpoints differ, the **procedures** on decision-making become particularly important. The purpose behind such procedures is to facilitate the decision-making process; to make it easier to reach agreement among the members. Formal preparation may be necessary, studies may be required and consultations often take place. There can be a whole chain of events before a final decision is adopted.
10. The **recording** of the text of a final decision is very important. It is definitely not ideal to use informal “keeping of minutes” for the purpose of recording decisions which are purported to be final, especially if preceded by detailed discussions and wide-ranging viewpoints. If the members are not debating a written and formally submitted proposal, the matter becomes more complicated and a real danger exists that the “agreement” reached is not correctly reflected, or that all the nuances are not included in the recorded version.

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<sup>1</sup> I. Ustor *Decision-making in the Council for Mutual Economic Assistance* 134 RDC 174 (1971 iii) Quoted by Schermers and Blokker **International Institutional Law**, Martinus Nejhoff Publishers, Boston/Leiden 2003 at 491.

Serious differences may then arise at the very next meeting when the minutes have to be approved.

11. The more controversial or complicated a matter, the greater the need to record a decision in writing **in the very meeting which has taken the decision**. That written version then becomes part of the record; it will be recorded in the minutes of the meeting. When it comes to implementation uncertainty should be avoided.
12. If a decision-making process is properly prepared and guided by the necessary procedures, the discussion itself is more structured, will produce clarity and will avoid uncertainties when it comes to implementation. The legal effect and consequences are more certain and outcomes more predictable. The latter is of particular importance in organizations with formal dispute resolution mechanisms. The practice to record a decision in writing at the very moment of finalizing it for adoption has the additional benefit of bringing discipline to the occasion when those who take the decision also have to put their own agreement in writing.
13. All decision-making begins with an **initiative**. It may not necessarily lead to a final decision, but will at least start the discussion. The more dynamic and responsive an organization, the more readily such initiatives are accepted. It is often also not possible for specific organs or institutions within an organization to acquit themselves of their duties unless they can initiate discussion in the right bodies.
14. Who may submit formal proposals to be debated and adopted as decisions? The founding agreement may not contain sufficient detail or express provisions in this regard. Then it becomes important to invoke the objectives and purposes of the organization, strive to reach effective outcomes and to consult the expressly granted powers of institutions and of Members. Express powers also generate implied powers, enabling institutions to do certain things “by necessary implication”. In the final analysis the organization must be able to function effectively, move forward and implement the founding agreement.
15. Commentators point out that the Secretariat of an international organization “...may have some power to take initiatives for decisions, in particular for those concerning its own

position.”<sup>2</sup> Secretariats of international organizations derive a power of initiative “from the nature of their functions, or from special instructions.”<sup>3</sup> Some may, of course, be empowered by the constitution of the organization to perform rather specific tasks and should then enjoy the necessary right of initiative to put such matters on the agendas of the relevant institutions. If they cannot do so they will frequently not be able to perform their functions.

16. The right of initiative may also be available to governments, parliaments, interest groups, individuals, experts or organs in an organization.<sup>4</sup> The notion of *initiative* should not remain a vague notion; well-prepared proposals should be submitted if effective outcomes are desired.
17. What does it mean to adopt a decision **by consensus**? It is the case when debates are “...continued until general agreement is reached. Decisions are then taken not by voting, but by consensus”.<sup>5</sup> Literally consensus means “common feeling” or “concurrence of feeling”<sup>6</sup>.
18. It is the actual **adoption process** which is now different; it involves a deliberate effort of actively seeking agreement among the members. There is no final decision until consensus is reached. Consensus differs directly from majority rule. The latter entails that a proposal is adopted if the prescribed majority vote in favour of it. However, consensus does not necessarily mean unanimity in the sense of a rigid right to veto a proposal and to stop the process in its tracks. There must be an active and formal endeavour to reach consensus.
19. When is consensus reached? Those in the meeting and involved in the decision-making must process know and understand that they have to actively pursue and search for consensus. Schermers and Blokker have observed the following about how consensus is reached:

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<sup>2</sup> Schermers and Blokker *op cit* at 495.

<sup>3</sup> *Ibid.*

<sup>4</sup> See in general the discussion by Schermers and Blokker 494 *et seq.*

<sup>5</sup> *Ibid* 523.

<sup>6</sup> *Ibid* 524.

*“Taking decisions by consensus often involves protracted negotiations, to achieve the desired concurrence of views and to avoid express objections with an important role often being played by the chairman of the meeting. Wide varieties of interests have to converge into an acceptable compromise, and it is his task to guide this process. In many organizations, if these negotiations are unsuccessful, decisions may nevertheless be adopted by majority vote. However such majority decisions will lack the necessary authority for those who were outvoted.”<sup>7</sup>*

20. The role of the chair is of particular importance and the search for compromise may involve informal discussions with particular groups. The rules of procedure of organizations often oblige the chair to attempt to secure consensus on proposals.<sup>8</sup> The members must accept this practice; it flows from the very nature of the process. At the end the chair will notify the meeting of the agreement reached and it should be recorded.
21. In the WTO, where consensus is also practiced but with 153 members, the consensus requirement is formulated in the negative. Consensus is achieved “...*If no member, present at the meeting where the decision is taken, formally objects to the proposed decision.*”<sup>9</sup>
22. Where does this discussion leave an organization such as SACU? The following may be noted:
- Article 17, SACU Agreement is rather rudimentary and needs elaboration through additional rules and procedures.
  - The role of the chair is vital. She/he has a responsibility to actively pursue the objective of bringing divergent views into agreement. This process can include informal discussions.
  - Care must be taken with the recording of consensus-based decisions when they are finally adopted. Again it is the function of the chair to formulate what has been agreed and to state clearly the consensus in the meeting. The actual recording

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<sup>7</sup> At 524.

<sup>8</sup> See the examples in Schermers and Blokker at 528.

<sup>9</sup> Agreement establishing the world trade Organization, Art. IX. note 1.

will be done by the Secretariat; given its responsibility under Article 10(3) of the Agreement to “*arrange meetings, disseminate information and keep minutes of meetings of SACU institutions.*”

- Consensus is not unanimity in the sense of each member enjoying an automatic veto. This would paralyse international organizations. International practice shows how contemporary international organizations increasingly want to avoid this type of approach when it comes to adopting final and binding decisions with legal effect and which Members often have to implement domestically.

23. The present initiative in SACU to establish a formal and permanent Summit of Heads of State and Government will require clear rules not only on what this Institution will be empowered to do, but also how it will adopt decisions. Given the present arrangement it seems obvious that it will take decisions on the basis of consensus. Exactly how consensus will be reached and what the fall back position will be, should be made clear.