

# VOTE-TRADING IN INTERNATIONAL INSTITUTIONS

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## Abstract

There is evidence that countries trade votes among each other in international institutions on a wide range of issues, including the use of force, trade issues and elections of judges. Vote-trading has been criticized as being a form of corruption, undue influence and coercion. Contrary to common wisdom, however, I argue in this paper that the case for introducing policy measures against vote-trading cannot be made out on the basis of available evidence. This paper sets out an analytical framework for analyzing vote-trading in international institutions, focusing on three major contexts in which vote-trading may generate benefits and costs: (1) agency costs (collective good), (2) coercive tendering and (3) agency costs (constituents). The applicability of each context depends primarily on the type of decision in question – i.e. preference-decision or judgment-decision – and the interests that countries are expected to maximize when voting. The analytical framework is applied to evidence of vote-trading in four institutions, the Security Council, the General Assembly, the World Trade Organization and the International Whaling Commission. The application of the analysis reveals that while vote-trading can create significant costs, there is only equivocal evidence to this effect, and in several cases vote-trading generates important benefits.

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# VOTE-TRADING IN INTERNATIONAL INSTITUTIONS

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## 1. Introduction

Vote-trading is prevalent in international institutions. Vote-trading is largely unregulated, and the incentives to sell and buy votes can be particularly high. There is evidence that countries trade votes among each other on a wide range of issues, including, the use of force, trade issues and elections of judges. Vote-trading in international institutions often involves deals between wealthy countries and poor countries. Poor countries have a greater incentive to sell their votes because payments are usually worth more to a poor country than to a wealthy country.<sup>1</sup> Furthermore, current voting rules based on the equality of sovereigns provide extensive voting powers to many small countries on matters that they care little about.<sup>2</sup> Therefore, small countries have a strong incentive to sell their votes. There is also an extensive demand for votes, as the decisions of international institutions have a growing impact on countries. Wealthy countries have ample resources to buy votes, and the price of votes is not necessarily high. The superpowers, especially the US, can buy poorer countries' votes by utilizing their aid allocations or securing loans from the World Bank or the IMF,<sup>3</sup> and the price for a vote is often a vote on another issue.

The practice of vote-trading usually carries a moral stigma. Vote-trading is widely criticized by commentators as being a form of corruption, undue influence, and even coercion. In most countries there are domestic laws that prohibit agreements based on the exchange of goods or money for votes. There is also an ongoing international effort to stop voting transactions in elections in developing countries.<sup>4</sup> Common wisdom would thus suggest that the practice of vote-trading should be made illegal in international law as in domestic systems. Contrary to this view, however, I argue in this paper that the case for introducing policy measures against vote-trading in international institutions cannot be made on the basis of available evidence. While vote-trading can create significant costs, it can also generate important benefits. There is only equivocal evidence to suggest that the costs outweigh the benefits, and in certain instances the evidence indicates that vote-trading is welfare-maximizing.

In Part 2, I set out an analytical framework for analyzing vote-trading in international institutions. The main criterion I use in this paper is efficiency or global welfarism.<sup>5</sup> In particular, I seek to identify the various costs and benefits of vote-trading and the contexts in which such costs and benefits may arise. I identify three specific contexts in which vote-trading has economic effects: (1) agency costs (collective good), (2) coercive tendering, and (3) agency costs

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<sup>1</sup> For an explanation in the context of domestic vote-trading, see Richard L. Hasen, 'Vote Buying', 88 *Cal. L. Rev.* (2000) 1323, at 1329.

<sup>2</sup> John H. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept', 97 *AJIL* (2003) 782, at 797. This paper does not discuss reform of voting mechanisms.

<sup>3</sup> Such loans are more valuable to recipient countries than they are costly to the major shareholders, especially the US; Erik Voeten, 'Outside Options and the Logic of Security Council Action', 95(4) *American Political Science Review* (2001) 845, at 853. In this paper I ignore the potentially harmful effect of such vote-trading on decisions of the IMF and the World Bank.

<sup>4</sup> Transparency International, *Global Corruption Report* (2004), at 76-87.

<sup>5</sup> The welfare or wellbeing of the global community as a whole, including its member states and people, needs to be considered. For a discussion of welfarism in international law, see Eric Posner, 'International Law: A Welfarist Approach', 73(2) *U. Chi. L. Rev.* (2006) 487.

(constituents). The main factor in determining which of these three contexts is relevant in specific cases is the type of voting decision in question and the interests that each country is expected to maximize when voting. In each of the three contexts vote-trading can have both beneficial and harmful effects. In addition to welfarism, I discuss the distributional effects of vote-trading in specific contexts where it may increase inequalities among countries.<sup>6</sup> In Part 3, I apply the analytical framework to specific case studies in four international institutions: the Security Council ('SC'), the General Assembly ('GA'), the World Trade Organization ('WTO') and the International Whaling Commission ('IWC'). I have chosen these institutions because there is solid evidence of vote-trading in each of these institutions and because these institutions engage in a wide array of international activities. Part 4 concludes.

## **2. Analytical Framework**

This part is divided into three sections. The first defines the various categories of vote-trading. The second defines the two main types of decisions that international institutions are responsible for: preference-decisions and judgment-decisions. The third sets out the main contexts in which vote-trading has economic consequences and the type of decision and circumstances in which such consequences will arise.

### **A. Categories of Vote-Trading**

Vote-trading may take the form of two main types of exchanges. The first type is outright vote-buying, which I define as any conditioning of value on voting for a particular outcome, except logrolling (as defined below). Vote-buying may take the form of one country offering payment to another to vote in a particular way ('carrot'). It may also take the form of a threat by a country (short of direct coercion<sup>7</sup>) to withhold a certain benefit ('stick'), e.g. bilateral aid, the consideration for the vote being the continued provision of that benefit.<sup>8</sup> The second type of vote-trading is logrolling. Logrolling differs from vote-buying in that the consideration for the vote is a vote on another issue. V1 votes on issue A for an outcome favored by V2, and in exchange V2 votes on issue B for an outcome favored by V1.<sup>9</sup> Logrolling may involve exchanges of votes within the same institution ('internal-logrolling'), but it may also involve an exchange of a vote in one institution for a vote in another institution ('external-logrolling'). I emphasize that I make no distinction between votes and decisions. Thus I treat cases where countries form a logrolling majority to pass a package of decisions, although there is only one formal vote on these decisions, and cases where there is a separate vote in respect of each different decision and countries enter logrolling agreements prior to the vote on each decision, in the same way. I use the term logrolling to refer to any and all types of logrolling. I use the term vote-trading to refer to any and all types of

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<sup>6</sup> I limit the discussion of the distributional effects to cases where vote-trading maximizes welfare, but harms the poor. In these cases, the welfare analysis on its own is unsatisfactory for determining policy.

<sup>7</sup> I define 'direct coercion' as a threat by a country to do something which it is not entitled to do under international legal norms.

<sup>8</sup> It may be argued that threats to withdraw benefits constitute coercion. However, international law does not prohibit such threats. While poor countries may be dependent on bilateral benefits, in the absence of a legal duty to provide these benefits, their withdrawal may be regarded as a legitimate use of donors' resources.

<sup>9</sup> I use the term 'vote-buyer' to refer not only to countries engaged in vote-buying, but also to countries engaged in logrolling. A country that wishes decision A to be adopted will buy a vote on decision A and will sell its vote on decision B.

vote-trading.<sup>10</sup>

### **B. Categories of Decisions**

The decisions of international institutions may be divided into two main types. The first type is 'preference-decisions'. In preference-decisions, countries are expected to vote in accordance with their individual interests or preferences in order to maximize their individual gains. Voters have no duty to consider the collective good or the interests of other countries when they choose how to vote. Thus there is no risk that the collective good will be compromised when countries pursue their individual interests. Most voting decisions in the domestic context are preference-decisions. In domestic elections people can vote for their preferred candidates without considering how their vote would affect others.<sup>11</sup> By contrast, there are only few voting decisions in international institutions that are preference-decisions, most notably, as explained below, the decisions of the WTO. I also emphasize that in international institutions the actual voters are governments. While governments have no duty towards other countries, they are expected to maximize the benefit to their own constituents.

The second type of decisions is 'judgment-decisions'. In judgment-decisions, countries are expected to consider the collective good or the interests of other governments and peoples rather than their own individual interests. Such decisions involve a judgment as to which result would best serve the interests of the international community. In judgment-decisions, voters have a duty to vote for decisions that maximize the collective good. Voters act as agents for other governments and peoples to consider the latter's interests and maximize their sum preferences. In the domestic context, relatively few voting decisions are judgment-decisions. For example, judges cannot exercise their subjective preferences when deciding a case, but need to consider the collective good in accordance with certain laws and norms. By contrast, in the international context, many decisions are judgment-decisions. As I discuss below, countries in the SC, the GA and the IWC have an express duty to maximize the collective good in making certain decisions.

I emphasize that the distinction between preference-decisions and judgment-decisions is not always easy to make and is to some extent a matter of degree. Nonetheless, for the sake of convenience, I will assume that the distinction is clear-cut and seek to categorize the decisions of each institution as either preference-decisions or judgment-decisions.

### **C. Rationale For and Against Vote-Trading**

The reasons for restricting or permitting vote-trading in the domestic context have been extensively discussed in other scholarly work.<sup>12</sup> In summary, it is fair to state that while most commentators believe that vote-buying in political decisions, such as elections, should be prohibited, opinions on the practice of logrolling are more equivocal. There is a greater divergence of opinion, though, as to why vote-buying and logrolling should or should not be prohibited. I do

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<sup>10</sup> I also note that the term 'bloc' or 'coalition' may involve vote-trading, but also countries voting for a common interest.

<sup>11</sup> Another example of preference-decisions is voting by shareholders in corporations.

<sup>12</sup> See Hasen, *supra* note 1; Saul Levmore, 'Voting with Intensity', 53 *Stan. L. Rev.* (2000) 111; Ettore Scimemi, 'Vote-trading in Corporate America', 14(4) *EBLR* (2003) 445; Thomas Stratmann, 'Logrolling', in Dennis Mueller (ed), *Perspectives on Public Choice Theory* (1997) 322; Zohar Goshen, 'Controlling Strategic Voting: Property Rule or Liability Rule?', 70 *S. Cal. L. Rev.* (1997) 741; Kochin & Kochin, 'When is Buying Votes Wrong?', 97 *Public Choice* (1998) 645.

not seek to assess this literature in this paper. While I draw in some instances on arguments made in the domestic context, I focus on dealing with the specific issues that vote-trading entails in international institutions.

In examining vote-trading the main criterion I employ is welfarism. The basic starting point of welfarism is that vote-trading, like any other transaction, maximizes welfare. A vote-trading agreement presumptively increases the wellbeing of the parties to the agreement. The basic presumption can be modified or supplemented in three different contexts: First, in judgment-decisions, vote-trading can generate benefits or costs to the international community at large. Second, in preference-decisions, coercive tendering practices employed by vote-buyers can impose costs on vote-sellers and other third parties, where vote-sellers are forced to sell their votes for unfair prices, but they can also generate efficient decisions and obstruct holdout attempts. Third, in preference-decisions, vote-trading can generate costs or benefits for the constituents of the vote-traders themselves. In the following sub-sections I discuss each of these contexts in greater detail.

I emphasize that vote-trading may also have distributional effects. In the context of agency costs (collective good) and agency costs (constituents), distributional issues are already incorporated into the welfare analysis to the extent that distributional considerations need to be considered in assessing the effects of vote-trading on the collective good or welfare of constituents, and therefore a distributional analysis is unlikely to add much over and above the welfare analysis. By contrast, as I explain below, distributional concerns are analytically significant in the context of coercive tendering in preference-decisions. Accordingly, I discuss distributional concerns only in the context of coercive tendering.

### ***1. Agency Costs (Collective Good)***

We need to examine in which circumstances the pursuit of individual interests through vote-trading harms or benefits the collective good. This primarily depends on the type of decision in question.

#### **(a) Preference-decisions:**

In preference-decisions, no harm is caused to the collective good when countries trade their votes to further their interests, as countries are expected to pursue their own interests anyway. In fact, subject to other costs discussed below, vote-trading maximizes aggregate welfare. Vote-trading not only increases the wellbeing of the parties to the agreement, but also allows voters to register the intensity of their preferences by enabling them to sell votes when they do not care much about the outcome and buy votes on matters they feel strongly about.<sup>13</sup> A system that registers intensity of preferences is *prima facie* more efficient because it better reflects the aggregate of individual preferences.<sup>14</sup>

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<sup>13</sup> Stratmann, *Ibid.*, at 325; Hasen, *Ibid.*, at 1343.

<sup>14</sup> Kochin & Kochin, *supra* note 12. In specific preference-decisions any vote-trading transaction may inflict costs on others, and such costs may be larger than the benefits to the parties to the vote-trading; for mathematical expositions see Hasen, *supra* note 1; Scimemi, *supra* note 12. However, as Kochin and Kochin show, there is no reason to believe *a priori* that on average such costs will be larger than the benefits. The key issue is to identify the circumstances where vote-trading generates more costs than benefits. As discussed below, in international vote-trading, I identify these circumstances to exist in the context of coercive tendering practices under certain conditions.

**(b) Judgment-decisions:**

In judgment-decisions the question is whether vote-trading generates outcomes that reduce or maximize the collective good. Countries generally enter into vote-trading agreements to further their own interests.<sup>15</sup> When the pursuit of self-interest via vote-trading comes at the expense of the collective good, vote-trading entails agency costs. Some agency costs, though, are already inherent in many judgment-decisions because, even without vote-trading, countries already vote inevitably with a view to maximizing their individual preferences at the expense of the collective good. The effects of vote-trading in judgment-decisions thus depend on a comparison of the result but for the vote-trading and the result facilitated by the vote-trading from the standpoint of the collective good. Accordingly, vote-trading is harmful when it leads to decisions ('bad-decisions') that are more harmful to the collective good than the decisions that would otherwise be adopted or the overall result if no such decisions were adopted. This would happen where, but for the vote-trading, countries would vote for decisions that better maximize the collective good ('good-decisions').<sup>16</sup> Countries have preferences for good-decisions ('good-preferences') for two main reasons. The first is altruism, which I define as a concern for the collective good. However, as pointed out by Posner, altruism in international relations is generally weak.<sup>17</sup> The second is individual interest in a good-decision, i.e., the country will benefit from a decision that maximizes the collective good.

Vote-trading can actually be welfare-maximizing, when it ameliorates agency costs caused by countries voting in their self-interest. This type of effect will occur where, but for the vote-trading, countries would vote for decisions that maximize their own personal interests (also, 'bad-decisions'), in circumstances where the vote-trading itself provides them with an incentive to vote for decisions that would better maximize the collective good (also, 'good-decisions'). When a country is faced with a choice whether to vote for a good-decision that is contrary to its individual interests or a bad-decision that promotes its interests, it is very likely to form a preference for the latter ('bad-preference')<sup>18</sup> rather than the former (i.e., a good-preference). The consideration for the vote can provide an incentive for a country with a bad-preference to vote for a good-decision. One possibility is that a vote-buyer will buy votes of countries with bad-preferences in order to pursue a good-decision (the 'benevolent vote-buyer'). Take, for example, a vote-buyer that buys the votes of a small minority that insists on blocking a good-decision. The benevolent vote-buyer's good preferences will not necessarily derive from altruism, but can - and usually will - derive also from its own individual interests. A second possibility is where two countries (or two different blocs of countries) that have opposing preferences commit to vote for a package of policies that maximize the collective good (an 'efficient logrolling compromise') instead of voting their own bad-preferences in specific decisions. Any country is concerned that if it votes its judgment on issues that implicate its own interests, it will not only lose on these specific issues, but if other countries generally vote their interests, it stands to gain less from its membership in the institution than the other countries that free-ride on that country's fulfilling its duty to vote for the collective good.

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<sup>15</sup> I ignore in this paper a legal argument that vote-trading in pursuit of self-interest violates per se countries' duty to maximize the collective good.

<sup>16</sup> A good-decision need not be optimal. It is sufficient that it is better than the decision that would be adopted but for the vote-trading.

<sup>17</sup> Posner, *supra* note 5, at 521-522.

<sup>18</sup> I assume for the sake of simplicity that bad-preferences always stem from personal interest, though they may also stem from mistaken judgments.

Logrolling can facilitate welfare-maximizing policies by giving countries the assurance that they will not lose to other countries by respecting their duty to vote for the collective good.

There are two main factors that can influence the pattern and effect of vote-trading transactions. The first is countries' preferences. The risk to the collective good is higher where vote-buyers have strong bad-preferences and vote-sellers have no preferences at all or weak good-preferences. On the other hand, the stronger the good-preferences of the putative vote-sellers, the higher the price they will charge for their vote, and the more likely it is that a vote-buyer with a bad-preference will not have sufficient resources or willingness to pay this price. Likewise, the stronger the good-preferences of a benevolent vote-buyer, the more resources it will be ready to invest in order to bring about a good-decision.

Second, to the extent that information is available on vote-trading agreements, countries that take part in such agreements can be subject to reputational costs. When information on vote-trading is available, vote-traders suffer harm to their reputation because they are perceived as acting in their self-interest rather than respecting their duty to maximize the collective good. Such reputational costs can provide countries with weak incentives to refuse to engage in vote-trading. We would expect reputational costs to be higher the greater the actual harm to the collective good and lesser when the vote-trading benefits the collective good. However, this will partly depend on the specific interests and views of interested countries and NGOs that may not always be the best agents of the collective good. Thus, countries and NGOs may criticize and harm the reputation of countries engaged in vote-trading that leads to a good-decision if they object to that good-decision.

I emphasize that the application of the above analysis to specific case studies suffers from two methodological problems, which can create uncertainty in evaluating the consequences of vote-trading.

First, in order to define the collective good and decide whether or not vote-trading increases or reduces it, we must make difficult empirical determinations concerning the aggregate welfare of all people. A precise evaluation of global aggregate welfare is not possible. In the absence of an accurate measure for making such an evaluation, other proxies have to be used. The wording of the relevant treaty is the first place to start in defining the collective good. The treaty will normally state the purposes of the institution and its voting decisions, and the considerations that countries must take into account when voting. However, the wording of the treaty taken literally may not be conclusive. Preferences may have changed over time so that the express wording of the treaty no longer fully reflects the collective good, and an expansive interpretation is required in order to accommodate changing preferences. It may be necessary to consider other factors as evidence of where the collective good lies, including countries' views and practices, global public opinion, media reports and empirical intuitions about global consensus. These factors are often subject to divergent views, and accordingly which view of the collective good should be adopted will often be subject to debate.

Second, as explained above, when examining the effects of vote-trading on the collective good we need to examine the likely outcomes but for the vote-trading. The non-adoption of the decision facilitated via vote-trading is not the only consequence to be considered, but also any unilateral action or consequence outside the institution which might result if the relevant decision is not accepted. Although it is possible to evaluate the political outcomes if not for the vote-trading by considering countries' positions and practices as indicators of potential outcomes, estimates of such outcomes will inevitably involve some degree of speculation and uncertainty.

## **2. Coercive Tendering**

Vote-trading can give rise to strategic problems of coercive tendering. The effects of coercive tendering are particularly relevant in preference-decisions.

### **(a) Preference-decisions:**

Vote-trading, as explained above, is *prima facie* efficient in preference-decisions. This presumption of efficiency is based on the assumption that parties enter willingly into vote-trading agreements. This assumption does not necessarily hold when strategic behavior places voters in a situation where they are forced into making coerced choices. A vote is coerced where voters sell their vote in circumstances in which they rationally believe that they have no reasonable chance of winning the vote. In these circumstances, it is rational for voters to sell their vote even for a price which is less than the value of the benefit that they sincerely believe they will obtain by exercising their voting right ('fair value'),<sup>19</sup> because otherwise they will be left with less valuable or worthless rights. However, coercive tendering will not necessarily be inefficient or unfair. As I explain below, when putative vote-sellers demand a price, which is higher than the fair value of their votes, coercive tendering may be welfare-maximizing. The following discussion considers first the elements of coercive tendering, and then explains the circumstances in which coercive tendering is inefficient and/or unfair or alternatively leads to efficient results.

### **i) The elements of coercive tendering:**

Coercive tendering practices are present when three elements are satisfied: a pressure to tender, collective action problems, and no competition for votes.

**(1) Pressure to tender:** We need to consider the source of the pressure on voters to make coerced choices. In vote-trading in domestic systems, such as electorates or public corporations, the relative power of each vote to affect outcomes and the benefit to each voter from making an informed choice are usually trivial. Thus, there is a strong incentive to sell votes to make some gain. Each voter knows that other voters also have a strong incentive to sell their votes. Knowing that there is a high probability that other voters will sell their votes and that the vote-buyer will win the vote, it is rational for each voter to sell his vote for any price above zero, otherwise he will be left with a worthless right. The vote-buyer can therefore attain control over the institution by paying trivial prices.<sup>20</sup> In vote-trading in international institutions the conditions are different. The number of voters in international institutions is not as large as in electorates or public corporations. Consequently, the relative value of each vote and the benefit from making informed decisions are larger.

Pressure to tender the vote in international institutions arises from an express or implicit threat that the putative vote-seller will be worse off if it does not sell the vote or sells it too late. A useful analogy is coercive tendering in corporate takeovers. It is known that when a tender offer is accompanied by an express or implicit threat either not to buy the shares at all or to buy at a lower price in the future, shareholders may tender their shares even when they believe that the offer price is less than the fair value of their shares. In these circumstances, shareholders are faced with a

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<sup>19</sup> On the assumption that but for the vote-trading a decision would not have been adopted, the fair value of each vote reflects the collective value of the votes that would be sufficient to obtain a favorable decision or block an unfavorable one.

<sup>20</sup> Levmore, *supra* note 12, at 123-125; Goshen, *supra* note 12, at 774-780; Kochin & Kochin, *supra* note 12.



choice: to accept the price at the front-end, or retain a less valuable minority stake when the takeover has been consummated. Many shareholders attach a significant probability to the likelihood that other shareholders (faced with the same threat) will tender their shares and the takeover will succeed. Thus, it is rational for them to sell immediately even if they value their share above the offer price.<sup>21</sup>

Coercive tendering in international institutions operates in a similar way. As described below in the case of the WTO, there is evidence that powerful countries may use coercive tactics when buying votes in order to effect decisions that benefit themselves potentially at the expense of other (although not necessarily all) members of the relevant institution. Typically, the putative vote-buyer offers certain inducements to countries, presumably those that object to its position on the vote, in consideration for their agreement to vote in favor of its position. In addition, it makes certain threats, for example, that bilateral aid will be withdrawn if a country does not vote as requested. The presence of inducements and threats is likely to make countries attach a positive probability to the possibility that many other countries will agree to the vote-buyer's proposal and that the vote-buyer will win the vote. Therefore, it is rational for voters to sell their votes even if the offer price is unfair.

In one main respect, however, coercive tendering in international institutions differs from coercive tendering in corporate takeovers. The distinction between the front-end and the back-end in the international context is not as clear-cut as in the corporate context, being mainly one of degree. Whenever a vote-buyer manages to buy a vote its chances of attaining the required majority increase. If other voters know that the vote-buyer is gradually accumulating votes, the belief that the vote-buyer will achieve the required majority increases as well. Presumably, every time a vote-buyer acquires a vote other countries increasingly fear that the vote-buyer will achieve the necessary majority without buying their vote, and the pressure to sell for a lower price increases. Thus we would expect the payment that each voter is offered for its vote to gradually diminish as the vote-buyer continues to accumulate votes, whereas in the corporate context, due to regulation, all shareholders are entitled to the best price offered to any of them during the tender period.<sup>22</sup>

**(2) Collective action problems:** If voters are able to act collectively and coordinate their positions vis-à-vis the vote-buyer - even when faced with pressure to sell - they may negotiate for a price that reflects the fair collective value of their votes.<sup>23</sup> If voters are unable to coordinate their positions, they are likely to form the belief that other voters will sell their votes, and therefore it is rational for them to do the same.

The feasibility of collective action depends on several factors. Two potential factors are the size of the institution and the voting majority. In electorates or corporations with many shareholders, the transaction costs of collective action are very high and often preclusive. In international institutions, though, where the number of voters is smaller, the transaction costs of forming coalitions are not particularly high. Collective action is therefore feasible even in the largest international institutions. Regarding the second factor, the larger the majority required to pass a

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<sup>21</sup> Lucian Bebchuk, 'The Pressure to Tender: An Analysis and A Proposed Remedy', 12 *Del. J. Corp. L.* (1987) 911; Lucian Bebchuk, 'Toward Undistorted Choice and Equal Treatment in Corporate Takeovers', 98 *Harv. L. Rev.* (1985) 1695.

<sup>22</sup> Section 14(d)(7) of the Williams Act; Rule 14d-10, Equal Treatment of Security Holders, 17 C.F.R. § 240.14d-10 (2001).

<sup>23</sup> Bebchuk (1987), *supra* note 21, at 924; Levmore, *supra* note 12, at 123; Kochin & Kochin, *supra* note 12.

decision, the smaller the collective action problem because voting-trading has to benefit more voters to affect voting outcomes.<sup>24</sup> Under a unanimity rule, consensus or a veto system, there is in principle no collective action problem, because one or several voters have the right to block unfavorable outcomes. However, exercising a veto power or blocking decisions is likely to be costly to small developing countries that exercise such rights, and the pressure to conform to stronger countries' dictates may be significant. Thus, developing countries may face collective action problems even where they possess a formal power to block adverse decisions. Accordingly, size and voting majority are not significant factors.

There are two other key factors in the international context that affect collective action. First, the stability of a bloc or a coalition depends on whether or not countries within the bloc have similar interests. Countries in a coalition often seek to achieve different policies. Each member of the coalition has an interest in only some of the policies that the coalition agrees to support. Coalition members may also be amenable to different types of inducements or threats. Some countries can be bought by certain threats because of their dependency on aid, while others may be more interested in a bilateral free trade agreement. There will always be some uncertainty among coalition members as to which inducements or threats the vote-buyer has offered to other coalition members, and whether such inducements or threats will be sufficient to induce those countries to defect from the coalition. This can increase countries' fear that other countries will defect from the coalition, in which case they should do the same. Accordingly, the more divergent the interests of coalition members, the more difficult it is for them to act collectively and the easier it is for vote-buyers to induce them to leave the coalition.

A second critical factor in countries' ability to act together is the relative costs of exit for the vote-buyer as compared to the costs of exit for the vote-sellers. Exiting the institution can take the form of either withdrawing membership or taking action (short of direct coercion) that would have the effect of undermining the institution's effectiveness or influence. For example, instead of reaching an agreement within the WTO, the putative vote-buyer can enter into bilateral trade negotiations. Exit options make it difficult for vote-sellers to act collectively when the costs of exit for putative vote-buyers, normally the superpowers, are less than the costs of exit for putative vote-sellers, normally developing countries. The costs of exit are higher for developing countries than for developed ones when the former are dependent on the relevant institution's decisions or because the institution itself is dependent on the participation and support of powerful vote-buyers. In these circumstances, there is an implicit threat that vote-buyers will exit the institution if they cannot obtain favorable decisions. If powerful vote-buyers decide to exit the institution, the costs are borne primarily by other less powerful countries.

**(3) Competition:** Competition among vote-buyers for votes can drive up the prices of votes to a level that reflects their fair value.<sup>25</sup> Competition would require vote-buyers to offer prices that are closer to the fair value of the votes in order to win the vote. Competition for votes in international institutions is constrained by the fact that many developing countries are too poor to buy votes. There will often be only one vote-buyer or one group of vote-buyers that buys votes for a specific policy, especially if developed countries adopt the same stance and seek to buy the votes of many developing countries with conflicting interests. Competition may develop, though, where

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<sup>24</sup> I note, though, that a qualified majority rule can also make it easier for putative vote-buyers to prevent unfavorable decisions from being adopted.

<sup>25</sup> Levmore, *supra* note 12, at 135-139.

the superpowers have opposing views and compete with each other for other countries' votes.

**ii) Is coercive tendering undesirable?**

Whether or not coercive tendering is inefficient and/or unfair depends on the price that vote-sellers receive for their votes. Coercive tendering will tend to be inefficient and unfair when this price is below the fair value of the vote. Voter-sellers suffer because they are transferring their rights for less than their worth. Other voters whose votes were not necessary to pass the decision suffer because they lose the vote. However, coercive tendering will be inefficient only if the costs to such voters outweigh the benefits to the vote-buyers and other countries that incidentally benefit from the decision facilitated by the vote-trading. Where the coercive tendering is directed by one or few wealthy vote-buyers towards many poorer countries, it may be reasonable to conclude that the costs to poor nations outweigh the benefits to vote-buyers. Nonetheless, even if coercive tendering cannot unequivocally be found to be inefficient, it can be objectionable on distributional grounds. When the prices of votes are unfair, coercive tendering has the effect of distributing resources from poor countries to wealthy vote-buyers. Such undesirable distributional consequences can in themselves provide good grounds for restraining vote-trading.

On the other hand, coercive tendering can be efficient and distributionally fair. Putative vote-sellers will not necessarily demand a price that reflects the fair value of their votes, but may seek to obtain higher prices. Countries may hold out for excessive prices, especially if their consent is required to effect a decision. Such holdouts are inefficient because they can delay or prevent welfare-maximizing decisions. It would be efficient if the holdout countries were pressured into accepting a fair offer for their votes by using a strategy of coercive tendering. Vote-buyers can use inducements and threats to create the belief in the holdout voters that a certain decision is imminent and therefore holding out would not be an effective strategy. The effect of such coercive tendering would be to split the holdout coalition by reducing the prices of votes to their fair value, and thereby facilitate efficient decisions.

Accordingly, we need to distinguish between cases where the coercive tendering imposes costs on vote-sellers and cases where coercive tendering constrains holdouts. This ultimately depends on whether the price vote-sellers receive for their vote is fair or excessive. This distinction raises a methodological problem. The assessment of the fairness of the price of a vote depends on a comparison of the value that countries would sincerely attach to the benefits that would accrue to them from favorable decisions as compared to the value of specific side-payments. For such a comparison to be accurate we need to monetize the values of decisions and side-payments (that often will be non-monetary). There is no scientific or systematic method to monetize these values, and the comparison will inevitably be based on political, social and economic opinions of what the vote-sellers have gained or lost in the decision-making process. Such opinions will often be widely divergent, and therefore the effects of coercive tendering can be subject to conflicting views.

**(b) Judgment-decisions:**

Coercive tendering practices can in principle take place in judgment-decisions as well, though their effect will be different. Under the circumstances explained above, it can be rational for vote-sellers to sell their votes if they believe that a certain judgment-decision will be adopted even if they vote against it. The effect of coercive tendering would be to make it easier and cheaper for the vote-buyer to pass decisions. But, even if coercive tendering plays some part in facilitating a

judgment-decision, the key policy issue remains the effect of that decision on the collective good, irrespective of whether or not it is easy or difficult for the vote-buyer to purchase votes and of the price transferred from the vote-buyer to the vote-sellers.<sup>26</sup> It is also noteworthy that with the possible exception of one seemingly isolated case,<sup>27</sup> it is very difficult to find cases where coercive tendering facilitates bad-decisions, and as the cases discussed below suggest, vote-buyers usually pay valuable consideration for votes on judgment-decisions.<sup>28</sup> Accordingly, I do not discuss coercive tendering in judgment-decisions.

### **3. Agency Costs (Constituents)**

#### **(a) Preference-decisions:**

In preference-decisions, the question is whether the vote-trading leads governments to accept decisions that reduce or increase the wellbeing of their constituents. A government can enter both vote-buying and logrolling deals in order to maximize the benefits of its constituents, either by gaining a vote on a policy that would benefit them or by receiving a valuable payment for the vote that the government utilizes for their benefit.

The potential problem is that vote-trading can give a special incentive for governments to pursue their own interests by selling votes instead of exercising those votes in the interests of their constituents. A government can agree to a decision that harms the interests of its constituents in return for a cash payment that it can utilize for its own benefit. However, similar to agency costs (collective good) in judgment-decisions, agency costs are already inherent in many preference-decisions because governments, especially in countries with weak accountability mechanisms, may also use voting rights to maximize their own interests at the expense of their constituents' interests. The question, then, is whether vote-trading exacerbates such agency costs. Agency costs are exacerbated when but for the vote-trading a country would vote for a decision that better maximizes the interests of its constituents than the overall outcome (including the decision obtained and the payment received) facilitated by the vote-trading. Vote-trading will have this effect when the option of selling the vote gave the government the incentive and option to sacrifice its constituent's interests in order to further its own. This risk is particularly pertinent in vote-buying deals and external-logrolling, where the consideration is a vote on an IMF or World Bank loan. In such transactions the consideration for the vote is a financial benefit that the government can disburse among the governing elite.<sup>29</sup> Payments made to a small ruling elite are also likely to be cheaper for vote-buyers than votes on major policy decisions.

On the other hand, vote-trading can actually ameliorate agency costs, where but for the vote-trading the government would have voted for a policy that maximizes its own narrow interests, or

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<sup>26</sup> The payment transferred to vote-sellers is merely a distribution of wealth.

<sup>27</sup> There is evidence that the US used coercive tendering practices to buy votes in the GA in order to pass a decision on the reduction of its UN dues by \$170 million; see Suzanne Nossel, 'Retail Diplomacy: The Edifying Story of the UN Dues Reform', *The National Interest* (winter 2001-2002) 94. Note though that the US also threatened not to pay its debt to the UN, amounting to \$1 billion, if its annual dues were not reduced, and therefore this case may be viewed as one of direct coercion rather than vote-trading.

<sup>28</sup> Voters with good-preferences may refuse to sell their votes for low prices even when they know that a bad-decision will be adopted anyway because they wish to maintain their reputations as countries that promote the collective good.

<sup>29</sup> Governments can also use logrolling, though, in order to maximize their interests, for example by pursuing a policy that protects affiliated elites at the expense of their constituents. But governments are also often able to maximize their interests by simply exercising votes in favor of policies that would have this effect.

the interests of an affiliated elite, at the expense of the interests of its constituents as a whole. The consideration for the vote can give incentives to the government to vote for a policy that better maximizes the interests of its constituents. The government of the vote-buyer is interested in maximizing the interests of its own constituents, but the policies it pursues incidentally benefit the constituents of the vote-seller as well. Thus vote-trading mitigates agency costs when a government pays another government to vote for a policy that maximizes the welfare of the constituents of both governments, even if the government buying the votes is probably not interested in the wellbeing of the constituents of the government selling the votes.

As in the other contexts discussed above, the analysis of agency costs is subject to methodological difficulties. First, the analysis requires an evaluation of which decisions would best maximize the interests of vote-sellers' constituents. Whether or not the decisions of international institutions benefit the people of vote-sellers can be subject to divergent opinions. Second, estimating governments' actions and their effects on their constituents if not for the vote-trading inevitably involves some speculation and uncertainty. Third, when a decision facilitated by vote-trading is not in the interests of vote-sellers' constituents, we need to examine whether the price for the votes adequately compensated these vote-sellers' constituents. Given there is no precise way of quantifying the values of specific policies or side-payments to specific constituents, it is very difficult to compare the value of votes to the value of side-payments. It is also extremely difficult to collate evidence on whether vote-sellers use the consideration for their votes for the benefit of their constituents or for the benefit of the governing elites.

#### **(b) Judgment-decisions:**

In judgment-decisions, by definition, there is no risk of agency costs (constituents) because governments are not expected to maximize the interests of their constituents, but only the interests of the international community.

### **3. Application of the Analytical Framework to Specific Case-Studies**

In this part I apply the analytical framework to vote-trading in four institutions: the SC, the GA, the WTO and the IWC. Each of the following sections discusses a different institution, first by describing reported cases of vote-trading, second by classifying the decisions of each institution as judgment-decisions or preference-decisions, and third by analyzing the effects of vote-trading in the relevant institution by reference to the reported cases. The analysis of the effects of vote-trading examines the applicable contexts in which certain benefits and costs may arise. In judgment-decisions, I discuss agency costs (collective good). In preference-decisions, I discuss coercive tendering and agency costs (constituents).

Before embarking on the analysis, one caveat should be made. Although there is ample evidence of vote-trading, the extent of the phenomenon is not entirely clear. It is possible that there are other unreported cases of vote-trading, and therefore the sample of cases is subject to a selection bias. Other borderline practices are difficult to categorize as vote-trading. For example, we do not know precisely to what extent countries shape their voting in accordance with potential threats of withholding certain benefits by other countries, and it may be difficult to verify the causal connection between vote-trading agreements and the outcome of votes. For the sake of simplicity, however, I limit the discussion to reported cases, bearing in mind that the evidence may be partial and requires careful evaluation.

## **A. The Security Council**

### **1. Reported Cases of Vote-Trading**

There is both specific and statistical evidence of vote-trading in the SC.<sup>30</sup> The discussion in this section focuses on specific cases in order to identify the effects of vote-trading on specific decisions. The first case concerns Resolution 678, which authorized the deployment of armed forces against Iraq in the First Gulf War in 1991.<sup>31</sup> In exchange for support for the resolution or abstention, the US made the following promises: a promise of financial aid to Colombia, Cote d'Ivoire, Ethiopia and Zaire; a promise to the USSR to keep Estonia, Latvia and Lithuania out of the November 1990 Paris Summit conference and to persuade Kuwait and Saudi Arabia to provide it with hard currency to make overdue payments to its commercial creditors; a promise to China to lift trade sanctions in place since the Tiananmen Square massacre of pro-democracy protesters and to provide support for a World Bank loan of \$114.3 million, and the resumption of normal diplomatic intercourse between the two countries. By contrast, the US cut off its \$70 million annual aid to Yemen because of its opposition to the resolution.<sup>32</sup>

In the prelude to the Second Gulf War, the US had less success in its vote-trading attempts. One report suggests that US aid, financial assistance and leverage played a role in securing Resolution 1441,<sup>33</sup> which called on Iraq to disarm from its weapons of mass destruction and set up an enhanced inspection regime to supervise the disarmament.<sup>34</sup> The main story, though, concerns the US failure to pass a resolution authorizing the use of armed force. There is evidence that throughout the negotiations the US attempted to buy the votes of non-permanent members – either by promising rewards or by hints of punishment.<sup>35</sup> The main targets of US solicitation were countries that had not decided how to vote, namely: Angola, Guinea, Cameroon, Pakistan, Chile and Mexico. Despite the leverage of the US over these countries and the economic inducements offered (especially, better trade terms and foreign aid),<sup>36</sup> they maintained their objection to the resolution.

Likewise, Malone tells the story of Resolution 940<sup>37</sup> on the restoration of the democratically elected government in Haiti and the ousting of the military regime.<sup>38</sup> The US and France were

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<sup>30</sup> A recent study finds that a country's US aid increases by \$16 million and \$45 million in important years when it rotates onto the SC; Kuziemko & Werker, 'How Much is a Seat on the Security Council Worth? Foreign Aid and Bribery at the United Nations', 114(5) *Journal of Political Economy* (2006) 905; see also Dreher, Sturm & Vreeland, 'Does Membership on the UN Security Council Influence IMF Decisions?', KOF Working Paper 151, ETH Zurich (2006).

<sup>31</sup> SC Res. 678 (1990).

<sup>32</sup> See Burns Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy', 85 *AJIL* (1991) 516, at 523-524; Simon Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law* (2001), at 181; Geoff Simons, *UN Malaise: Power, Problems and Realpolitik* (1995), at 63-64; James Baker, *The Politics of Diplomacy: Revolution, War & Peace, 1989-1992* (1995), at 275-328; Voeten, *supra* note 3.

<sup>33</sup> SC Res. 1441 (2002).

<sup>34</sup> Thalif Deen, 'US Dollars Yielded Unanimous UN Vote against Iraq', *Inter Press Service*, 11 November 2002.

<sup>35</sup> See 'Irrelevant, Illegitimate or Indispensable?', *Economist*, 20 February 2003; Gary Younge, 'Defiance of Global Will', *The Guardian*, 10 March 2003; Patrick Martin, 'Bugging, Bribes and Bullying: US Thuggery in Advance of UN Vote', *World Socialist Website*, 6 March 2003, at <http://www.wsws.org/articles/2003/mar2003/un-m06.shtml>; Barry Renfrew, 'France Battles US to Line Up UN Votes', *Associated Press*, 1 March 2003.

<sup>36</sup> Anderson, Bennis, & Cavanagh, 'Coalition of the Willing or Coalition of the Coerced?', *Institute for Policy Studies* (2003), at <http://www.ips-dc.org/COERCED.pdf>.

<sup>37</sup> SC Res. 940 (1994).

<sup>38</sup> David Malone, *Decision-Making in the UN Security Council: The Case of Haiti, 1990-1997* (1998), at 107.

interested in military intervention. Russia and China objected. China has generally been averse to policies that infringe on state sovereignty, including peacekeeping missions.<sup>39</sup> Russia has generally adopted an anti-Western foreign policy, under which it tends to object to US-led operations and seeks to weaken SC intervention.<sup>40</sup> There are very strong indications that the US promised Russia to support Resolution 937 concerning the UN peacekeeping operations in Georgia, which gave formal status to Russia's peacekeeping force in Georgia, the CIS.<sup>41</sup> The US facilitated World Bank loans to China by abstaining in the vote on those loans and also gave China security guarantees related to various concessions in relation to Taiwan. In return, Russia and China withdrew their opposition to the resolution and abstained.

## ***2. Category of Decision***

SC decisions are judgment-decisions. Countries are expected to vote with a view to maximizing the collective good rather than their own preferences. Article 24(1) of the UN Charter states that the members of the UN '...confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.' Moreover, Article 24(2) requires the SC to act in accordance with the purposes and principles of the UN. These purposes include maintaining international peace and security and promoting respect for human rights and fundamental freedoms. The SC is thus a form of public trust, under which SC members are entrusted with certain defined powers that they are required to exercise for the benefit of the international community. It is arguable that countries can take into account their interests to some extent. That the permanent five members ('P-5') have a veto power may suggest that they are entitled to use their voting powers to maximize their own interests. It can also be argued that because the SC seats are distributed geographically among regions,<sup>42</sup> each country can at least take into account the interests of the group it "represents". However, the better view is that countries' duty is towards the international community at large. The veto powers are designed to ensure that the SC does not usurp its powers, and there is nothing in the UN Charter to suggest that they override the SC's duties to maximize the collective good. Likewise, the geographical distribution of seats is intended to ensure that differing regions and cultures have a say in determining the collective good, rather than to legitimize countries' pursuit of their own interests.

## ***3. Analysis of Vote-Trading***

The question is whether or not the SC resolutions obtained via vote-trading are good-decisions or bad-decisions. The SC mandate and the purposes of the UN Charter serve as the initial guide to defining the collective good. The problem with identifying the SC mandate and the purposes of the UN Charter is that they have been subject to differing interpretations, especially in the context of the use of armed force. While the UN Charter conditions the SC's authorization of the use of armed force on the existence of a threat to international peace and security, the Charter has been interpreted expansively to allow the use of force in cases with a relatively weak international dimension, including: grave human rights violations and, more controversially, disruption of

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<sup>39</sup> Voeten, *supra* note 3., at 846.

<sup>40</sup> *Ibid.*, at 847.

<sup>41</sup> SC Res. 937 (1994).

<sup>42</sup> See GA Res. 1991 (XVIII), 17 December 1963.

democracy.<sup>43</sup> Accordingly, in considering decisions' effects on the collective good, we also need to take account of the general consequences of each resolution, countries' reactions to each resolution, and empirical evaluation of public opinion.

The SC resolutions that concern Iraq seem to have had generally wide support. The Iraqi occupation of Kuwait clearly constituted a threat to international peace and security. The resolution facilitated the freeing of Kuwait from Iraqi occupation, the use of force enjoyed a worldwide consensus, and most countries and people considered the action to be commendable.<sup>44</sup> Resolution 1441 was not controversial because it did not involve substantial sanctions on Iraq or the use of force. By contrast, before the Second Gulf War, when there was worldwide public opinion against military action,<sup>45</sup> vote-trading attempts failed to facilitate the SC's authorization. It is also noteworthy that alleged US threats before the Second Gulf War, unlike in the case of Yemen in the First Gulf War, do not appear to have materialized<sup>46</sup>

The operations in Haiti may appear more controversial because they involved the US using its military under the UN auspices within its own hemisphere. The US had a direct interest in preventing the flow of Haitian refugees from arriving in the US. Moreover, although the text of the resolution justified the intervention mainly on the basis of the humanitarian situation, the crisis was largely a domestic affair and the operations were aimed at changing the regime. Nonetheless, it appears that overall the effect of the resolution was, at least on balance, beneficial. The operations succeeded in ending the military regime responsible for grave human rights violations and facilitated the restoration of democracy. Despite initial reservations, especially by South American countries, the international reaction to the actions was generally positive and the people of Haiti welcomed the intervention.<sup>47</sup>

Similar concerns arise in relation to Resolution 937. Russia had a direct individual interest in increasing its influence within its hemisphere and was implicitly supporting the Abkhaz that resisted Georgian sovereignty. Despite these concerns, the cooperation of the Russian CIS forces with the UN forces in Georgia appears to have helped in maintaining stability. The costs, if any, to people in Georgia who resisted Russia's intervention were probably inevitable given that Russia was already involved in the area. Moreover, the subjection of Russia to some UN supervision actually ameliorated these costs and promoted international norms, albeit imperfectly.<sup>48</sup>

Accordingly, it appears that the results of vote-trading were generally positive. But, in order to assess the effects of vote-trading we further need to compare these results with the likely outcomes but for the vote-trading. One option is that the crises in Iraq and Haiti would have been left without a remedy. In light of the positive effects of the resolutions, no action would clearly be an

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<sup>43</sup> Chesterman, *supra* note 32, at 140-160.

<sup>44</sup> Resolution 678 was not without its costs. Weston, *supra* note 32, criticizes the lifting of sanctions against China and the sanctions directed at Yemen. These costs may, however, be justified by countervailing considerations. The US had the opportunity to curb Iraq's aggression, but its capacity to act against human-rights abuses in China was far more limited. While the costs to Yemen were high, it is not implausible to argue that the benefits from releasing Kuwait and sanctioning Iraq's aggression outweighed these costs.

<sup>45</sup> As the *Economist* comments, most countries opposed a resolution authorizing the use of force; 'Irrelevant, Illegitimate or Indispensable?', *supra* note 35.

<sup>46</sup> For example, Chile signed a bilateral trade agreement with the US in 2003. Angola, Cameroon and Guinea were granted GSP and AGOA eligibility in 2004 and 2005.

<sup>47</sup> Chesterman, *supra* note 32, at 155; Malone, *supra* note 38.

<sup>48</sup> Neil MacFarlane, 'On the Front Lines in the Near Abroad: The CIS and the OSCE in Georgia's Civil Wars', 18(3) *Third World Quarterly* (1997) 509.



inferior result. Another option is that of unilateral intervention without SC approval. The US's unilateral interventions both in Panama in 1989 and in Iraq in 2003 suggest that if Resolutions 648 and 940 had not been adopted the US would have intervened unilaterally both in Iraq in 1991 and in Haiti in 1994. Similarly, there is little doubt that Russia would have intervened in Georgia, given that Resolution 937 was essentially an *ex post* recognition of the CIS operations. Accordingly, it seems that the main effect of vote-trading on the basis of the above reported cases is to facilitate collective action in circumstances that merit intervention, where the vote-buyer would otherwise pursue unilateral action.

An exhaustive comparison of the merits of collective action versus unilateral action is outside the scope of this paper, but there are reasons to argue that collective action is preferable. Collective action promotes accountability of the relevant operation to the UN and subjects it to more stringent norms. Resolutions 678 and 937 included reporting requirements to the SC, and Resolutions 937 and 940 deployed UN observers to monitor the activities of national forces. While these accountability measures have not been optimal or sufficient,<sup>49</sup> accountability has been better than in unilateral interventions. Additionally, there is some scope for arguing that collective action is more effective than unilateral action in remedying threats to international peace and security. The US-led operations in Panama and Iraq in 2003 were significantly less successful than the interventions in Haiti and Iraq in 1991.<sup>50</sup> There is also evidence that countries and the global public tend to support multilateral operations and oppose unilateral ones.<sup>51</sup>

In summary, there are several reasons to believe that vote-trading in the SC generates good-decisions by facilitating collective action under the UN auspices. On this view, the US acts as a 'benevolent vote-buyer' that buys the votes of countries that would otherwise cast their votes for outcomes that would fail to maximize collective welfare. Countries such as China and Russia have traditionally objected to international intervention in countries' affairs.<sup>52</sup> These countries can block good-decisions relatively easily by exercising their veto power to maximize their interests against international intervention. Similarly, the logrolling between the US and Russia involving Resolutions 940 and 937 may be categorized as an efficient logrolling compromise. In order to make way for two decisions that would promote the collective good, i.e. the subjection of regional forces to UN supervision, Russia and the US agreed to concede their individual interests in having unrestricted freedom of action within their respective regions. Each country conditioned its agreement to UN supervision within its region on the other agreeing to the same

Moreover, the consequences of vote-trading, especially in relation to Iraq, suggest that it is unlikely that vote-trading would enable SC members to pass resolutions that are plainly offensive to the collective good. Two main factors lie behind this assertion. The primary factor is countries' preferences. The vote-buyer, normally the US, tends to have good-preferences supported by both altruism and self-interest. While the US is unlikely to buy votes if its interests are not at stake, it is

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<sup>49</sup> It was argued that the US had been given excessive freedom in carrying out the operations without sufficient UN supervision; Weston, *supra* note 32, at 526-528; John Quigley, 'The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism', 17 *Mich. J. Int'l L.* (1996) 249, at 264-269.

<sup>50</sup> For example, unlike in Panama, the operations in Haiti were relatively peaceful and the US completed its withdrawal on schedule; Malone, *supra* note 38, at 164.

<sup>51</sup> See Erik Voeten, 'The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force', 59(3) *International Organization* (2005) 527.

<sup>52</sup> Voeten, *supra* note 3, at 846-847; more recently, see Thalif Deen, 'Why China Blocks Sanctions in Iran, Sudan, Burma', *Inter Press Service*, 12 June 2006.

concerned with promoting peace, security and human rights and will normally justify its actions by reference to these objectives. In addition, the US's interests are often congruent with policies that maximize the collective good. For example, the US had individual interests in releasing Kuwait from the Iraqi occupation. Moreover, the preferences of vote-sellers seem to operate as a constraint on the vote-buyer's ability to buy votes for bad-decisions. While many small countries often form bad-preferences or have little interest in SC decisions, altruism may become an important factor, especially when one vote-buyer seeks to execute a bad-decision for its own benefit. Where concern for the collective good militates heavily against voting with the US, the price countries attach to their vote is high. In the Second Gulf War, poor countries, such as Guinea and Cameroon, did not respond to US solicitations. In fact, countries seemingly refused to support the resolution partly because they perceived the action as essentially serving American interests at the expense of the collective good. Likewise, many countries have an individual interest in curbing the US's ability to pursue SC resolutions, especially when the US pursues bad-decisions. Many countries had direct or indirect individual interests - including economic, political and ideological interests - against the use of force in Iraq in 2003.<sup>53</sup>

The second factor is information on vote-trading deals. It seems that widespread international public opinion and reputational costs can reduce the likelihood of bad-decisions facilitated by vote-trading. Before the Second Gulf War, there were ample, albeit sporadic, critical reports on the inducements and pressures employed by the US to reach a resolution. It is likely that public opinion objecting to the war put some pressure on countries or made it easier for them to resist the threats and inducements to vote with the US. Additionally, it is possible that at least partly because of the consensus on the need to free Kuwait, there was less criticism of the vote-trading before the First Gulf War, and the reputational costs to vote-traders were therefore much less significant.

## **B. The General Assembly**

### **1. Reported Cases of Vote-Trading**

The effect of vote-trading in the GA seems to vary with the type and importance of the decision at stake. The GA has the power to make nonbinding decisions, such as recommendations on issues relating to international peace and security, and certain binding decisions. With regard to nonbinding decisions, there is statistical evidence that aid and multilateral loans can buy votes in the GA.<sup>54</sup> The effect of such vote-trading on global welfare, however, is probably limited because of the nonbinding nature of the resolutions and their relative ineffectiveness in regulating states' behavior.<sup>55</sup> The discussion therefore focuses on binding decisions, where the effect of vote-trading is potentially stronger and there is more specific evidence of vote-trading deals. I focus on election

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<sup>53</sup> France, for example, had both political and economic reasons to oppose the intervention; John Carbaugh, 'The Role of Iraq's Oil as War Nears', *UPI Insight Magazine*, 20 January 2003.

<sup>54</sup> Dreher, Thiele & Nunnenkamp, 'Does US Aid Buy UN General Assembly Votes? A Disaggregated Analysis', KOF Working Paper 138, ETH Zurich (2006); Dreher & Sturm, 'Do IMF and World Bank Influence Voting in the UN General Assembly?', KOF Working Paper 137, ETH Zurich (2006). Despite the evidence of the US buying votes in the GA, it is difficult to evaluate the effect of this vote-trading on the substance of decisions because small countries also use vote-trading and negotiation blocs to counteract US vote-trading.

<sup>55</sup> On my examination of roll-call voting in the GA on votes deemed important by the US between 2000 and 2005, the US success rate was approximately 32%. Most of the resolutions supported by the US were not controversial and were passed by a compelling majority. Other resolutions supported by the US that were voted by a majority of less than 75% dealt with condemnations of human-rights violations in certain countries. Even if vote-trading played a role in the latter decisions, it would not be of major concern from a policy perspective.

decisions in the GA, where vote-trading among countries is consistently the norm.

The evidence relates in particular to election of nonpermanent members of the SC and election of judges to the ICJ.<sup>56</sup> Malone describes the ample trade of votes among states in elections to the SC, and provides valuable insights on this practice.<sup>57</sup> First, countries often trade votes for votes in elections to other organizations. Because of the SC's importance, votes in elections to the SC are usually exchanged for several votes in other elections. The votes of certain countries are worth more than the votes of others because of their active or passive influence over other countries' votes. Second, there is also evidence of vote-buying. Most commonly, there are allegations of aid being conditioned on votes and financial favors provided to officials of other countries. For example, the election of Japan in 1996 by a large majority was allegedly facilitated by its aid program and favors to officials.<sup>58</sup> Third, vote-trading involves virtually all countries. Malone claims that the P-5 do not trade openly but there may be exchanges of votes for 'badly needed favors' or in recognition of diplomatic friendship. However, it appears that when the US has strong views on the elections, it uses its full leverage (including vote-trading) to influence votes. Thus there are reports that the US intervened to prevent the election of Sudan to the SC in 2000,<sup>59</sup> and more recently the election of Venezuela.<sup>60</sup> It is noteworthy, though, that small countries (including Sudan and Venezuela) buy votes as well, especially by paying directly to delegates. Fourth, the strongest country does not necessarily win. Less powerful members can court small countries and win the elections. Every vote counts and elections can be decided by a small number of votes.

As in elections to the SC, there is strong, albeit general, evidence of vote-trading among countries in elections to the ICJ. Government representatives, candidates and even judges report that vote-trading rather than impartial evaluation of qualifications is an important determinant of international judicial elections.<sup>61</sup> Most commonly, states engage in logrolling. States agree to support the candidate of another state in return for support for their own candidates, often in elections to other positions in international institutions. As stated by Rosenne: '...there is little doubt that at times a delegation is instructed to vote for a given candidate in return for promises of

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<sup>56</sup> For an example in elections to UNESCO, see 'The New Head Teacher Takes Over', *Economist*, 31 October 1999; see also Nossel, *supra* note 27, arguing that the US lost the election to the UN Human Rights Commission in 2001 because its allies had committed to trades with other countries.

<sup>57</sup> David Malone, 'Eyes on the Prize: The Quest for Nonpermanent Seats on the UN Security Council', 6(1) *Global Governance* (2000).

<sup>58</sup> Global Policy Forum, 'Election of Members to the Security Council: 1996', at <http://www.globalpolicy.org/security/membership/elect.htm>. Similarly, Australian officials complained of vote-buying by Portugal, including the payment of UN dues of six African countries; 'Australia Plays Down Lost Bid for U.N. Security Council', *UPI*, 22 October 1996; see also 'Cruises, Concerts Even the Circus', *Associated Press*, 22 July 1998; Barbara Crossette, 'Road to Seat at U.N. is Paved with Perks', *New York Times*, 2 August 1998.

<sup>59</sup> Nicole Winfield, 'US Politicking Keeps Sudan off UN Security Council', *Associated Press/Nando Times*, 11 October 2000; 'To-the-Wire Fighting for UN Seats: US Backing Sudan Rival', *New York Times*, 6 October 2000; Paul Knox, 'War-torn Sudan Adds Fire to UN Race', *Toronto Globe and Mail*, 9 October 2000.

<sup>60</sup> 'Guatemala, Venezuela Deadlock Over UN Security Council Seat', *Associated Press*, 16 October 2006; 'Bachelet Under Pressure', *Progreso Weekly*, 1 June 2006; Letta Tayler, 'Bidding War for Seat on Security Council', *Newsday*, 16 October 2006, at <http://www.newsday.com/news/nationworld/world/ny-wovene164935429oct16.0,2754946.story?coll=ny-worldnews-toputility>.

<sup>61</sup> Shabtai Rosenne, *The World Court: What It Is and How It Works* (1995), at 63-67; Blokker & Muller, 'The 1996 Elections to the International Court of Justice: New Tendencies in the Post-Cold War Era?', 47(1) *ICLQ* (1998) 211, at 222-223; Chittharanjan Amerasinghe, 'Judges of the International Court of Justice – Election and Qualifications', 14 *Leiden Journal of International Law* (2002) 335, at 348; Davis Robinson, 'The Role of Politics in the Election and the Work of Judges of the International Court of Justice', 97 *Am. Soc'y Int'l L. Proc.* (2003) 277, at 279.

support on another matter of close concern to it, whether its own candidature in another election or a matter of substantive concern.<sup>62</sup>

## **2. Category of Decision**

Elections to the SC and the ICJ are judgment-decisions. Article 23(1) of the UN Charter expressly requires that in elections to the SC due regard be paid primarily to the contribution of countries to the maintenance of peace and security and the purposes of the UN Charter. Countries are expected to elect members with the greatest commitment to international peace and security. Likewise, Article 2 of the Statute of the ICJ states: 'The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juriconsults of recognized competence in international law.' Countries are required to choose the judges with the highest qualifications and moral integrity. It is noteworthy in this respect that both in the SC and the ICJ, seats are distributed among specific regions.<sup>63</sup> This arguably suggests that countries should elect the candidates that would best represent their interests or the interests of their region. The prevailing view, however, is that the most qualified candidates should be elected, and that geographical distribution is a secondary consideration both in SC elections<sup>64</sup> and ICJ elections.<sup>65</sup>

## **3. Analysis of Vote-Trading**

Whether vote-trading facilitates bad-decisions or good-decisions depends on whether vote-trading leads to the election of more qualified or less qualified candidates than those that would be elected but for the vote-trading.

The first place to start is to ask whether the quality of elected candidates is satisfactory. In the case of the SC, as Malone argues, not infrequently countries with weak reputations for promoting international peace win election to the SC at the expense of countries that have consistently displayed a commitment to such ideals. The election of Syria to the SC in 2001, a country alleged to be involved in sponsoring terror organizations, is one obvious example. Apart from legitimate reasons, such as *gaining* international prestige or pursuing broader objectives, countries seek a SC seat in order to advance their positions when the SC considers decisions that affect their interests.<sup>66</sup> Another reason may even be to attract financial aid from other countries that seek to buy their votes.<sup>67</sup> In the case of the ICJ, the picture is more equivocal. On the one hand, some take the view that the professional qualifications of ICJ judges are very high.<sup>68</sup> Nomination procedures in many countries are usually designed to provide some assurance that ICJ judges are duly qualified.<sup>69</sup> On the other hand, others take a different view. Reisman has argued that UN election

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<sup>62</sup> Rosenne, *Ibid.*, at 67.

<sup>63</sup> See GA Res. 1991, *supra* note 42. The geographical distribution of seats in the ICJ by custom is very similar to the arrangement in the SC, and each of the P-5 has one seat in the court.

<sup>64</sup> Article 23(1) of the UN Charter places emphasis on the contribution of member states to the maintenance of peace and security, and only secondarily on equitable geographic distribution.

<sup>65</sup> Article 2 of the ICJ Statute clearly emphasizes the professional and moral qualities of judges 'regardless of their nationality'.

<sup>66</sup> Malone, *supra* note 57.

<sup>67</sup> See Kuziemko & Werker, *supra* note 30.

<sup>68</sup> Blokker & Muller, *supra* note 61, at 223; Rosenne, *supra* note 61.

<sup>69</sup> Rosenne, *Ibid.*, at 62-63.

systems sometimes produce 'undistinguished candidates or mediocrities.'<sup>70</sup> There is even a claim concerning judicial misconduct to favor specific parties.<sup>71</sup> A recent study provides empirical evidence that decisions of individual judges are biased, first in favor of their country of origin, but also to varying extents in favor of countries that match the economic, political and cultural attributes of their own.<sup>72</sup> There is a suspicion that candidates may be expected to maintain loyalty to their countries' interests.

But even if the quality of elected candidates is unsatisfactory, we still need to establish that vote-trading materially contributes to this result. Malone's account seems to suggest that vote-trading is one among several elements in the election process that weakens the requirement that SC members show commitment to international peace and security. In the context of ICJ elections, Gross argued that certain qualified candidates were not elected because their countries did not belong to any vote-trading bloc in the UN,<sup>73</sup> and the practice of vote-trading has been heavily criticized by NGOs as reducing the quality of elections.<sup>74</sup> On this view, without vote-trading, countries would tend to elect better candidates. This view is plausible if we believe that countries have good-preferences because of individual interests or altruistic preferences. Vote-buyers will normally be countries that buy votes for their own candidacy or candidates. Such vote-buyers buy votes of countries that would otherwise vote for other better candidates, and there is naturally a chance that these vote-buyers will win.<sup>75</sup> One example may be Japan's landslide win over India in 1996, despite Japan's unimpressive record of participation in peace maintenance activities.<sup>76</sup> It is noteworthy that because voting is by secret ballot, there is little information on which countries actually trade votes, and therefore countries do not suffer reputational costs for vote-trading that facilitates bad-decisions.

On the other hand, a second opinion holds that vote-trading generates positive results. On this view, the required majority often has bad-preferences, and there is a need for a benevolent vote-buyer to buy votes to secure the election of better candidates. For example, in the case of elections to the SC, the US used its leverage (including vote-trading) in order to prevent the election in 2000 of Sudan, a country accused of gross human rights violations, and, more recently, of Venezuela, a country with a doubtful commitment to maintaining peace and security. In the case of elections to the ICJ, there are no specific examples, but one account suggests that influential countries buy votes to ensure the quality of elected judges. Rosenne argues that diplomatic contacts (presumably, including vote-trading) prior to the elections enable influential governments to indicate their views of candidates' qualifications, and that such contacts help in ensuring that

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<sup>70</sup> Michael Reisman, 'Redesigning the United Nations', 1 *Sing. J. Int'l & Comp. L.* (1997) 1.

<sup>71</sup> See Robinson, *supra* note 61.

<sup>72</sup> Posner & de Figueiredo, 'Is the International Court of Justice Biased?', 34 *J. Legal Stud.* (2005) 599.

<sup>73</sup> Leo Gross, *The Future of the International Court of Justice* (1976), at 744.

<sup>74</sup> See Lauren Etter, 'Call for ICC to Learn ICTY Election Lessons', Institute for War and Peace Reporting, 26 November 2004, at <http://www.globalpolicy.org/intljustice/icc/2004/1126icclessons.htm>

<sup>75</sup> Good-preferences in election decisions are likely to be weak and relatively cheap to buy. Altruism, as said above, is generally weak in international law, and individual interest in electing a candidate of another country is also likely to be weak because a country will not usually gain substantially from the election of another, albeit friendly, country's candidate.

<sup>76</sup> Another example may be Australia's loss to Portugal in 1996 despite its superior UN credentials and contribution to peace and security; Malone, *supra* note 57. Although both Japan and Portugal were allegedly engaged in vote-trading that presumably contributed to the result, we cannot know with certainty whether without vote-trading India and Australia would have been elected instead of them.

candidates measure up to the required standard.<sup>77</sup>

That vote-trading is beneficial is far from being the conclusive view. Vote-trading is also utilized by unethical countries that aim to promote less qualified candidates. Poor countries can afford the price of votes, given that countries often pay with votes in other international elections and the payments are often directed towards individuals that can be bought more cheaply. Syria, a country on the US's list of terrorism sponsors, was elected to the SC in 2001 despite the US's strong opposition, although the extent to which either Syria or the US were involved in vote-trading is unclear.<sup>78</sup> Moreover, even where the US actively bought votes for good-decisions, it is not clear what the result would have been if not for the vote-trading, because other countries also buy votes. Both Sudan in 2000 and Venezuela in 2006 engaged in vote-trading as well, so arguably they would have lost anyway if all countries avoided the practice of vote-trading.

In summary, it is difficult to conclude whether or not vote-trading leads to good-decisions or bad-decisions, and in some cases it may have no effect on the outcome. More information about specific vote-trading deals is necessary in order to assess their effect. The interesting question remains whether but for the option of making individual gains countries would tend to vote for more or less qualified candidates.

### **C. The World Trade Organization**

#### **1. Reported Cases of Vote-Trading**

Vote-trading is the norm in WTO negotiations. The essence of the WTO decision-making process involves vote-trading, in the sense that countries agree to support one policy in return for another country's agreement to support another policy. Vote-trading can take place between two opposing negotiating blocs. Vote-trading can also be intra-bloc. The essence of many coalitions within the WTO is internal-logrolling agreements under which each country agrees to support a list of negotiating objectives, only some of which are of interest to it.

More controversially, there is evidence of vote-trading coupled with coercive tactics employed by developed countries, especially the US and EC countries. Such practices take place in informal meetings before and during WTO ministerial conferences and they are aimed at breaking down coalitions of developing countries. The main focus of such attempts in the Doha Round in 2001 was the Like Minded Group (LMG), a group of 14 developing countries, which sought to promote implementation issues, development issues and procedural reform, and objected to negotiations over the Singapore issues.<sup>79</sup> Jawara & Kwa and Narlikar & Odell provide many examples of carrots, sticks and logrolling allegedly used to induce countries to defect from the LMG.<sup>80</sup> Threats included withholding preferential trade agreements and concessions and blocking the availability of IMF loans. More concrete side-payments included the following: The US granted South Africa \$9 million in technical assistance and \$9.2 million assistance under AGOA; Tanzania was granted \$3 billion in debt relief under the HIPC initiative and the ACP waiver; Jamaica received an aid

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<sup>77</sup> Rosenne, *supra* note 61, at 67.

<sup>78</sup> It is noteworthy that the US recently quit the race for the UN Human Rights Council seemingly because of fears that it would not be able to '...muster the 96 votes needed in the 191 member General Assembly'; Thalif Deen, 'US Quits Council Race, Possibly Fearing Defeat', *Inter Press Service*, 7 April 2006.

<sup>79</sup> The Singapore issues are: trade facilitation, transparency in government procurement, competition and investment.

<sup>80</sup> Jawara & Kwa, *Behind the Scenes of the WTO* (2003), at 148-183; Narlikar & Odell, 'The Strict Distributive Strategy for a Bargaining Coalition: The Like Minded Group in the World Trade Organization', in John Odell (ed), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (2006) 115.

package from the IMF and the ACP waiver; Kenya received the ACP waiver and technical assistance; Japan signed a bilateral investment agreement with Indonesia on condition that Indonesia endorse the talks about investment in Doha. Other countries received trivial promises: Malaysia received unenforceable promises regarding non-agricultural market access; Mauritius got an unbinding promise of a study program specific to small and vulnerable countries. The LMG eventually fragmented without achieving its objectives. Its members agreed to negotiate over the Singapore issues in future rounds in return for a general commitment to development issues.

The ministerial in Cancun took a different turn. A new group, the G-20, emerged, led by Brazil, China and India. The G-20 demanded that developed countries undertake nonreciprocal measures to eliminate trade restrictions, including radical cuts in domestic support measures provided by developed countries, duty-free access for tropical and other agricultural products, and the elimination of export subsidies for certain products. The G-20 strongly resisted the joint US and EC agricultural policy and the Singapore issues. As in Doha, developed countries tried to split the G-20. The US, for example, offered inducements in the form of tariff quotas to certain Central American countries and threatened to slow down regional integration. But the G-20 held together firmly in Cancun, and no agreements were concluded.<sup>81</sup>

Specific evidence of vote-buying or external-logrolling in the ministerial in Hong Kong in 2005 is scarce, although there are reports of 'divide and conquer' tactics employed by developed countries (possibly, including vote-trading) in order to split the G-20.<sup>82</sup> The end result appears to have been decided in closed-door negotiations between the US and the EC, on one side, and Brazil and India, on the other. Although some members, such as South Africa and Venezuela, expressed their opposition to it, all countries voted for a common deal, which included the following: in agriculture, a commitment to eliminate export subsidies by 2013, and a three-tier approach to reducing domestic subsidies; a commitment to ensure market access in services within four bands; reduction of tariffs on NAMA would be conducted in accordance with the Swiss Formula; and aid in the form of IMF and World Banks loans would be provided to developing countries.<sup>83</sup>

## **2. Category of Decision**

The decisions of the WTO, which concern trade rules, are preference-decisions. Countries are expected to pursue their individual interests in order to effect welfare-maximizing decisions for the benefit of their own constituents, irrespective of their effect on other countries and the international community. It has been argued that WTO decisions should be based on principles of equity and fairness,<sup>84</sup> in the sense that countries should take into account the interests of other - especially poor - countries and the international community. The development agenda of the WTO suggests that WTO negotiations should address the distributional concerns of poor countries.<sup>85</sup>

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<sup>81</sup> Narlikar & Tussie, 'The G20 at the Cancun Ministerial: Developing Countries and their Evolving Coalitions in the WTO', 27(7) *World Economy* (2004) 947.

<sup>82</sup> Deborah James, 'The Meaning of Hong Kong WTO', Global Exchange, 14 January 2006, at <http://www.globalexchange.org/campaigns/wto/3688.html>; Walden Bello, 'The Real Meaning of Hong Kong: Brazil and India Join the Big Boys' Club', *Focus On the Global South*, 22 December 2005, at <http://www.focusweb.org/content/view/799/36/>

<sup>83</sup> Kristy Balsanek *et al.*, 'International Legal Development in Review: 2005 Business Regulation', 40 *Int'l Law* 217.

<sup>84</sup> See Stiglitz & Charlton, *Fair Trade For All: How Trade Can Promote Development* (2005).

<sup>85</sup> The preamble to the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994 (the 'Marrakesh Agreement') stresses the '...need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the

Nonetheless, in its current form the WTO decision-making process does not allow for distributional concerns to be addressed other than via the negotiations process.<sup>86</sup> Developing countries are thus required to make reciprocal concessions for any benefit provided by developed countries, and developed countries have no obligation to make unilateral concessions in favor of poorer countries.

### **3. Analysis of Vote-Trading**

In preference-decisions, vote-trading is *prima facie* efficient. Vote-trading, especially internal-logrolling, is necessary for the effectiveness of the WTO decision-making process, which '...inevitably involves *quid pro quo* and sometimes *tit-for-tat*.'<sup>87</sup> The WTO voting system is based on consensus and each country has, at least formally, a veto power.<sup>88</sup> It would be virtually impossible to reach decisions by consensus without reciprocal tradeoffs. These tradeoffs are essentially based on internal-logrolling agreements, under which countries exchange their positions over different trade policies. Vote-buying and external-logrolling can also facilitate consensus. One example is where two opposing coalitions cannot reach an agreement, but wish to break the deadlock by making payments other than trade concessions. Similarly, where a developed countries' coalition reaches agreements over trade rules with the larger developing countries, leaving smaller countries little to gain, for example, because they have no exports of the relevant products, it may be efficient to allow side-payments to these smaller countries in order to facilitate consensus. The concern, however, is the extent to which vote-trading may involve inefficient coercive tendering and exacerbate agency costs (constituents).

#### **(a) Coercive Tendering:**

I first discuss the elements of coercive tendering, and then consider whether or not such coercive tendering is undesirable.

##### **i) Elements of coercive tendering:**

**(1) Pressure to tender:** That there is a pressure to tender in the WTO is clearly indicated by the presence of inducements and threats. Developing countries often labor under the fear that they will end up losing in the negotiation process. Therefore, it may be rational for them to accept side-payments even if less valuable than the concessions they demanded in the negotiations.

**(2) Collective action problems:** The ability of developing countries to bargain for better outcomes depends on collective action. While each country in the WTO formally has a veto power to stop trade deals and demand better value for its vote, the realities of power politics in the WTO are different. A draft of packaged agreements is usually agreed on in informal meetings, often without the participation of the smaller developing countries. The draft is presented at a formal meeting and is usually accepted with only minor amendments. When one country opposes such a packaged deal, it is likely to come under pressure from other countries. Particularly small developing countries may be unable to actively object to other countries' dictates because such

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needs of their economic development...'

<sup>86</sup> The preamble to the Marrakesh Agreement states that countries wish to contribute to the WTO's objectives, including growth in developing countries, '...by entering into reciprocal and mutually advantageous arrangements.'

<sup>87</sup> Sungjoon Cho, 'A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution', 7(2) *JIEL* 219, at 243.

<sup>88</sup> Consensus can be achieved so long as no member attending the motion manifests a formal objection to it.



objection may be followed by a sanction, such as the withdrawal of aid.<sup>89</sup>

Two main factors need to be examined to assess developing countries' ability to act collectively: the heterogeneity of coalition members' interests and the relative costs of exit for vote-buyers. First, the interests of members of developing countries' coalitions are not only not homogeneous, but often conflicting as well. Brazil and Argentina seek agricultural liberalization, whereas India has a protectionist policy on market access.<sup>90</sup> The smaller developing countries are focused on development and capacity issues, but even their interests are divergent and depend on their specific comparative advantages.<sup>91</sup> As explained above, the differences in interests of developing countries make their coalitions less stable and more vulnerable to inducements and threats. The experience of trade coalitions in the WTO as well as the GATT indicates that without internal coherence and shared commercial interests, a coalition is unlikely to succeed, especially when the US and EC stand together.<sup>92</sup> Second, the costs of exit for developed countries are significantly lesser than the costs of exit for developing countries. The US and EC are less dependent on the benefits of multilateral agreements than developing countries because the costs of losing a volume of exports are less likely to have a substantial effect on their economies.<sup>93</sup> In addition, the US and the EC can always seek bilateral or regional trade agreements because there are always countries that would like to have more access to their markets. Developing countries also have less bargaining leverage when negotiating bilaterally with the powerful countries, and they are likely to gain less in bilateral deals than in multilateral deals.<sup>94</sup>

The relatively low costs of exit for developed countries and the conflicting interests of developing countries create collective action problems, and together with the pressure on developing countries to tender their votes create the perception in developing countries that their demands will not be met in the negotiations. When countries begin to defect from a coalition by selling their votes, the coalition loses its credibility and ability to block adverse decisions, and other countries, fearful of being left with no gains, are likely to follow suit.<sup>95</sup> The collapse of the LMG in Doha and, to some extent, the G-20 in Hong Kong points to this pattern. The more countries defected from the LMG, the more the coalition's value diminished, which in turn prompted more defections, until India remained alone with no realistic power to object to the final agreement.<sup>96</sup> The G-20 has shown resilience in Cancun, but the result of Hong Kong suggests that deals can be concluded largely by appeasing the larger members of the G-20, Brazil and India, and leaving other countries dissatisfied. While such deals between developed countries and the larger developing countries are not always feasible, there are reasons to question whether developing countries would be consistently capable of acting collectively against coercive tendering practices.

**(3) Competition:** The main parties that buy votes, other than via internal-logrolling, are the US

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<sup>89</sup> Richard Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', 56(2) *International Organization* (2002) 339; Ehlermann & Ehring, 'Decision-Making in the World Trade Organization', 8(1) *JIEL* (2005) 51, at 66.

<sup>90</sup> Cho, *supra* note 87, at 236; Narlikar & Tussie, *supra* note 81, at 961.

<sup>91</sup> Narlikar & Odell, *supra* note 80, at 138-139.

<sup>92</sup> Narlikar & Tussie, *supra* note 81.

<sup>93</sup> Steinberg, *supra* note 89.

<sup>94</sup> Cho, *supra* note 87, at 237-239.

<sup>95</sup> Narlikar & Odell, *supra* note 80, at 132; Narlikar & Tussie, *supra* note 81, at 955-956.

<sup>96</sup> Narlikar & Odell, *Ibid*. It appears that the value of the inducements offered to countries for defection from the LMG gradually dropped as countries defected from the coalition, and the few that continued to struggle for the original agenda were left '...with neither a small bilateral deal nor the aspired collective gain.'

and the EC, and both tend to agree on a common position either before or during ministerial conferences. Developing countries, even the large ones, do not offer similar inducements to other developing countries to prevent defections from their coalitions, simply because they cannot afford to make side-payments.<sup>97</sup> Accordingly, there is no meaningful competition among vote-buyers in the WTO.

## **ii) Is coercive tendering undesirable?**

Coercive tendering may be undesirable on the grounds of efficiency and unfair distribution, but only if we can show that the inducements paid to specific countries and/or the value they have extracted from WTO decisions are less than the fair value of their votes. Thus we need to assess whether or not developing countries ended up losing from WTO packaged agreements. Commentators' views on this issue are widely divergent.

There is a body of opinion that developing countries tend to concede more in WTO negotiations than they receive. In relation to the Doha ministerial, it was argued that LMG countries were worse off after the conference than before it.<sup>98</sup> Perhaps the only meaningful gain to the LMG, a general commitment to development issues and promises to bolster technical assistance, was described as essentially verbal and did not mandate any operative effect.<sup>99</sup> Similar arguments have been made in the context of Hong Kong.<sup>100</sup> On this view, the agricultural concessions are minimal (especially the EC repackaged reforms that the EU was supposed to undertake anyway); aid for trade is a weak commitment to development (and possibly repackaging of IMF and World Bank loans as concessions); commitment to liberalization of services is harmful to many developing countries, and so is the Swiss formula in respect of NAMA. However, even if we adopt this view, we still need to show that the value of side-payments for agreeing to these decisions did not adequately compensate the vote-sellers. Some of the payments reported above, especially the nonbinding promises to impoverished countries, do seem to be negligible and certain inducements offered to developing countries, such as the ACP waiver, were found later to have limited value.<sup>101</sup> On the other hand, it is not clear how to compare the side-payments given to developing countries with the benefits they sincerely expected to obtain, especially as some countries did not concede much in the negotiations anyway.<sup>102</sup> Moreover, some countries did receive a sizable aid package or a loan, and they have probably not lost in this process. Accordingly, it is difficult to assess the extent to which developing countries as a group suffered

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<sup>97</sup> Narlikar & Odell, *Ibid.*, at 118. Developing countries can offer more access to their markets, but they are often politically constrained in doing so.

<sup>98</sup> Jawara & Kwa, *supra* note 80, at 114-142; Narlikar & Odell, *Ibid.*, at 133-136; Steinberg, *supra* note 89, at 366-367.

<sup>99</sup> Cho, *supra* note 87, at 226; Narlikar & Odell, *Ibid.*, at 134; Jawara & Kwa, *Ibid.*, at 158-159, 237-268. Not all coalitions, though, yielded to bilateral inducements, most notably the TRIPS/Public Health coalition, although here the support of public opinion in Northern countries played a major role; see Frederick Abbott, 'The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO', 5(2) *JIEL* (2002) 469.

<sup>100</sup> James, *supra* note 82; Bello, *supra* note 82; Stiglitz & Charlton, 'The Doha Round is Missing the Point on Helping Poor Countries', *Financial Times*, 13 December 2005.

<sup>101</sup> Jawara & Kwa, *supra* note 80, at 155-157; see further Grossman & Sykes, 'A Preference for Development: The Law and Economics of GSP', 4(1) *World Trade Review* (2005) 41.

<sup>102</sup> Some poor countries may not have much to offer in terms of access to their markets, and therefore the fair value of their votes is low. This problem lies principally in the lack of adequate distributional mechanisms in the WTO or more generally in international law rather than in vote-trading, because without vote-trading these countries would probably not be in a better position.

from the overall outcomes, if at all.

The other view is that WTO ministerial conferences have generally yielded fair and efficient results.<sup>103</sup> On this view, developing countries were able to extract fair value for their votes in the form of favorable decisions. Regarding the Doha ministerial, the commitment to development and concessions on TRIPS in exchange for an agreement to speak on the Singapore issues in future rounds has been viewed by many as a successful outcome. The US's and the EC's compromise on agriculture in Hong Kong, albeit not optimal, is equivalent to developing countries' concessions on services and NAMA. In this respect, the value of side-payments and threats exerted by developed countries are of limited importance from a welfare perspective if the end result is valuable to developing countries. The demands of the LMG and G-20 for unilateral concessions from developed countries, especially on agriculture, may be regarded as inconsistent with the WTO decision-making process, which is based on reciprocal concessions. Such demands may be viewed as holdout attempts designed to extract excessive benefits. The effect of coercive tendering therefore is to assist the US and EC in reducing the excessive demands of developing countries to a level that better reflects the fair value of their votes. Without such coercive tendering, holdouts could preclude or delay welfare-maximizing agreements.

In summary, those who believe that WTO agreements were adverse to the interests of developing countries and that no deal would have been a better outcome in Doha and Hong Kong, or that developing countries could have reached better and fair results in those conferences if not for the coercive tendering employed by developed countries, will argue against such tendering practices. However, if we believe that WTO agreements promote global growth and that the slow progress of WTO negotiations is at least partly to blame on developing countries' insistence on making excessive demands, we may be willing to countenance coercive tendering which is designed to facilitate welfare-maximizing agreements.

**(b) Agency costs (constituents):**

In preference-decisions we need to examine whether vote-trading leads to decisions that harm or benefit the interests of countries' constituents. The question is whether without the option of selling their vote, governments of developing countries would pursue policies that better maximize the interests of their constituents, or otherwise harm their interests. This question requires us to form a view regarding the effects of WTO decisions on the people of vote-sellers, essentially developing countries. Again, there are two main views on the effects of vote-trading, both of which are debatable.

The first view is that governments of developing countries may agree to vote for policies that benefit developed countries in return for a consideration that benefits those governments at the expense of the people of developing countries. As Narlikar points out: '...ministers can be tempted or blackmailed with carrots and sticks such as IMF programmes, aid packages, free trade arrangements and so forth...ministers have smaller shadows of the future than career diplomats. As a result, ministers may be more willing to sign on to agreements for short-term gains even if the agreement proves to be woefully inadequate, even harmful, in the longer run.'<sup>104</sup> There is even a

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<sup>103</sup> Jagdish Bhagwati, 'From Seattle to Hong Kong', 48(7) *Foreign Affairs* (2005); Jagdish Bhagwati, 'A Blend of Strong Measures Puts Trade Talks Back Together', *Financial Times*, 20 December 2005; Peter Sutherland, 'Commentary: Don't Dump Doha', *Wall Street Journal*, 2 August 2006; Cho, *supra* note 87, at 224-225.

<sup>104</sup> Amrita Narlikar, 'The Ministerial Process and Power Dynamics in the World Trade Organization: Understanding

suggestion that delegates or government officials courted by the US and the EC derived personal benefits from enhancing their relationships with powerful countries.<sup>105</sup> This risk is pertinent in WTO decisions where governments are expected to negotiate over permanent trade rules for the long-term benefits of their constituents. Governments are less likely to face criticism for accepting side-payments because the effects of conceding the long-term interests may not be apparent, especially given the weakness of domestic accountability mechanisms in many developing countries and the weak public scrutiny of WTO agreements through parliamentary ratification procedures.<sup>106</sup>

The problem with this view however is that we do not necessarily know that without the side-payments governments would actually pursue policies that better benefit their constituents. Even without vote-trading, governments can pursue policies that benefit the governing elite and neglect the interests of their constituents at large. Moreover, we do not necessarily know that the short-term benefits will be less valuable to the relevant constituents as compared with the policies that the relevant government would have pursued without vote-trading. While some of the side-payments mentioned above seem to be negligible, other benefits are more valuable; for example, if a poor country receives a valuable loan, the overall result may be in the interests of its people.

The second view is that vote-trading ameliorates agency costs (constituents). This view asserts that vote-trading forces developing countries to open up their markets and abandon protectionist policies. On this view, the freeing of trade is in the benefit of the people of developing countries, because it increases welfare in the long run. Direct payments and aid can be used by developing countries to build their capacity to compete, but even if such payments are not utilized for the benefit of the relevant constituents or too small to be useful, the free trade policies promoted by developed countries benefit the people of all countries by increasing global growth. It is possible, therefore, to argue that vote-trading gives incentives to governments that protect specific national groups to open up their markets for the benefit of their constituents, and in this way ameliorates agency costs created by these governments' protectionism.

Like the first view, this view has weaknesses. In particular, it assumes too readily that free trade benefits countries' constituents. There are reasonable arguments that some protectionism would favor people in developing countries. There is evidence that the benefits of global growth tend to flow primarily to elites rather than the middle and low-income classes,<sup>107</sup> and thus some protectionism may be needed to cater to the latter's interests. Protectionist policies can also be warranted by 'infant industry' considerations and local industries' inability to compete.

Whichever view we adopt, it is important to emphasize that the essence of the WTO is based on internal-logrolling agreements under which countries exchange votes to secure policies that benefit their own constituents, even if governments do so in a non-optimal way. Given that the risk of agency costs is lower when the consideration for votes is not of financial or tangible benefit, there is less concern with internal-logrolling agreements that presumably generate global benefits and more concern with vote-buying and external-logrolling involving IMF or World Bank

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Failure from Seattle to Cancun', 9(3) *New Political Economy* (2004) 413, at 424.

<sup>105</sup> Jawara & Kwa, *supra* note 80, at 176-177, discussing Kenya's Trade Minister's meetings with the US Trade representative.

<sup>106</sup> See Robert Howse, 'From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Game', 96 *AJIL* (2002) 94, at 106.

<sup>107</sup> See Peter Edward, 'Examining Inequality: Who Really Benefits from Global Growth?', 34(10) *World Development* (2006) 166.

loans. The problem with the latter transactions, though, as I explain above, is that it is not possible to determine conclusively whether they exacerbate or ameliorate agency costs without pre-established convictions regarding the effects of WTO decisions on the people of developing countries.

#### **D. The International Whaling Commission**

##### **1. Reported Cases of Vote-Trading**

Countries in the IWC are largely divided into three groups: the pro-whaling countries, such as Iceland, Norway and Japan; the anti-whalers, such as the UK, Australia, and the US; and finally, the group of countries that either do not care much or do not care at all about whaling issues.

There is compelling evidence that in recent years Japan has consistently bought the votes of many countries belonging to the third group with a view to buying several important decisions.<sup>108</sup> Japan has not only paid members of the IWC, but has also paid countries to join the IWC and vote in accordance with Japan's interests. The money is paid through Japan's Overseas Development Assistance and usually invested in the fisheries industries of the selling countries. One report states that Japan invested about \$160 million between 1987 and 2001 in fisheries aid to Caribbean countries, including St. Lucia, St. Vincent, St. Kitts & Nevis, Grenada, Dominica, and Antigua & Barbuda.<sup>109</sup> These countries consistently vote with Japan on virtually all proposed resolutions in the IWC. Other small countries that vote with Japan include Tuvalu, Benin and Guinea. There is also some evidence of external-logrolling. Japan trades votes in CITES CoP 11 for votes in the IWC with several African countries that want to restart international trade in ivory.<sup>110</sup> For convenience, I refer to Japanese vote-buying and external-logrolling collectively as 'Japanese vote-trading'. As a result of the Japanese vote-trading, the pro-whaling bloc has grown from 9 members in 2000 to approximately half of the members in 2006.

It should be pointed out that in order to pass a decision on key issues, such as a determination of protected species, setting catch limits of whale species, the permissible intensity of whaling and the designation of whale sanctuaries, the IWC must amend the Schedule to the International Convention for the Regulation of Whaling ('ICRW') by a three-fourths majority.<sup>111</sup> Other resolutions are decided by a simple majority.

Three main issues were subject to controversy in the IWC in recent years. First, Japan has been trying for several years to pass a resolution to lift the moratorium on commercial whaling effective since 1986, but has failed to reach the required three-fourths majority.<sup>112</sup> In 2006, however, a

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<sup>108</sup> See Alexander Gillespie, 'Transparency in International Environmental Law: A Case Study of the International Whaling Commission', 14 *Geo. Int'l Env'tl. L. Rev.* (2002) 333, at 345-347; Paul Brown, 'Fishing for Votes', *The Guardian*, 8 May 2002; Global Corruption Report, *supra* note 4, at 87-88; see related reports in the websites of Greenpeace, at <http://www.greenpeace.org/international> and the International Fund for Animal Welfare, at <http://www.ifaw.org>.

<sup>109</sup> Petitjean Roget, 'Socio-Economic and Political Aspects of the Aid Provided by Japan to the Fishing Industry in the Small Independent Islands in the East Caribbean', Eastern Caribbean Coalition for Environmental Awareness (2002), at [http://www.eccea.org/news/pdfs/SocEcJapAid\\_E.pdf](http://www.eccea.org/news/pdfs/SocEcJapAid_E.pdf).

<sup>110</sup> Mike Danaher, 'Why Japan Will Not Give up Whaling', 14(2) *Pacifica Review: Peace, Security & Global Change* (2002) 105, at 117.

<sup>111</sup> Article III(2) and V, The International Convention for the Regulation of Whaling, 2 December 1946, 161 U.N.T.S. 72.

<sup>112</sup> Japan has made many proposals to mitigate the moratorium by allowing a limited quota of community-based whaling along Japanese coasts. These proposals were all rejected; see IWC 52nd Report (2000); IWC 53rd Report (2001); IWC 54th Report (2002); IWC 55th Report (2003); IWC 56th Report (2004); IWC 57th Report (2005); IWC

declaratory resolution stating that the moratorium is no longer necessary and urging the IWC to resume commercial whaling on a sustainable basis was passed by a simple majority.<sup>113</sup> The second issue concerns proposals to establish whale sanctuaries in the South Pacific and in the South Atlantic. The Japanese vote-trading bloc was able to prevent these proposals from being accepted.<sup>114</sup> The third issue is the design of the new compliance mechanism, namely, the Revised Management Scheme ('RMS'). The debate over the RMS concerns several interrelated issues, including the level and intensity of inspection, the utilization of DNA technology to track whale products, recording information pertaining to animal welfare, and the composition of the compliance review committee. Whaling countries argue for a less stringent compliance mechanism but, more fundamentally, appear to condition agreement to the RMS on the resumption of sustainable commercial whaling.<sup>115</sup>

## **2. Category of Decision**

Decisions on whale regulation in the IWC are 'judgment-decisions'. Countries are expected to express their judgment on what should be the most appropriate measures for whale regulation in accordance with specified criteria. Article V of the ICRW states that '...amendments of the Schedule (a) shall be such as are necessary to carry out the purposes and objectives of the Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings;...and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.' The purposes of the ICRW, as stated in the preamble, include: safeguarding whale stocks for future generations, protecting whales from over-fishing, confining whaling to the species best able to sustain exploitation, and ensuring proper and effective conservation.

## **3. Analysis of Vote-Trading**

In order to assess whether vote-trading, especially the Japanese vote-trading, has facilitated good-decisions or bad-decisions, we need to identify the collective good against which IWC decisions should be evaluated. The problem with identifying the collective good is that it has been subject to a major debate. There are two main views of the collective good in the IWC: the conservationist view, under which whaling should be limited to sustainable levels, and the preservationist view that advocates a total ban on whaling. To consider these views we first need to examine the provisions of the ICRW. The ICRW contemplates safeguarding whales, but also sustainable whaling, optimum utilization, and due regard to the interests of the whaling industry. The ICRW also requires that whaling restrictions be based on scientific evidence. In fact, the preamble to the ICRW expressly recognizes that increases in whale stocks will permit increases in the number of whales that can be captured. Thus the ICRW clearly lends support to the conservationist view that accepts whaling to the extent that the relevant species is not endangered. Proponents of the conservationist view point especially to the fact that since the establishment of the IWC and the

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58th Report (2006).

<sup>113</sup> IWC Resolution 2006-1.

<sup>114</sup> IWC 52nd Report (2000); IWC 53rd Report (2001); IWC 54th Report (2002); IWC 55th Report (2003); IWC 56th Report (2004); IWC 57th Report (2005); IWC 58th Report (2006). There is a good possibility that if not for the Japanese vote-trading the IWC would decide to establish these sanctuaries.

<sup>115</sup> See Alexander Gillespie, 'The Search for a New Compliance Mechanism Within the International Whaling Commission', 34 *Ocean Development & International Law* (2003) 349.

ban on commercial whaling, the number of whales has significantly increased. It is generally accepted that the ban on commercial whaling is no longer justified by scientific evidence in respect of certain species that are now abundant, especially the Grey Minke Whale.<sup>116</sup>

Preservationists, on the other hand, interpret the ICRW expansively to allow moral sentiments towards whales to be given significant weight in IWC decisions. Whales have increasingly become viewed as having human attributes and killing whales is perceived by many as immoral.<sup>117</sup> Since the ICRW was signed in 1946, many countries, predominantly Australia, New Zealand, the US and the UK, have gradually adopted a strong anti-whaling stance by ceasing whaling operations and supporting extensive whaling restrictions. The current situation appears to be that without the Japanese vote-trading a substantial majority of countries in the IWC would support a permanent ban on all whaling, establishing more whale sanctuaries and a strict compliance regime.

Any view as to the effects of vote-trading depends on which view of the collective good is adopted. Preservationists argue that Japanese vote-trading is designed to promote its own individual interests. Japan views whaling as part of its national cultural identity, and strong domestic interest groups put political pressure on the government to continue whaling.<sup>118</sup> Japanese vote-trading is thus harmful because it is employed to block anti-whaling policies, such as the establishment of new sanctuaries and a stricter compliance mechanism. By contrast, conservationists would argue that Japanese vote-trading is beneficial. Countries with no whaling industry vote against whaling in order to appear 'greener' in the eyes of their public.<sup>119</sup> These anti-whaling countries vote their interests - i.e. to show commitment to environmental issues - at the expense of the collective good, properly defined in accordance with the ICRW to allow sustainable whaling. It is not implausible to argue that most people would support limited controlled whaling of abundant species if not for the false impression that all whales are endangered. While Japan's whaling views may be partly derived from its own interests, they also reflect Japan's judgment that scientific evidence supports a relaxation of anti-whaling measures.<sup>120</sup> Japan, on this view, is a benevolent vote-buyer that buys votes for good-decisions.

A 'middle view' may be offered as accommodating the interests of both anti-whalers and whalers. On the one hand, the IWC cannot ignore moral preferences that oppose whaling, but on the other hand, some limited commercial whaling is justified given whalers' strong preferences. In many respects, it seems that the current status quo, which is partly the consequence of Japan's ability through vote-trading to block new anti-whaling policies, represents this middle view. The moratorium and existing whale sanctuaries have led to a major increase in the number of whales, while whaling countries continue to conduct some limited whaling under a reservation to the moratorium<sup>121</sup> or, like Japan, under the scientific exception to the ICRW.<sup>122</sup> So long as the

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<sup>116</sup> See Danaher, *supra* note 110.

<sup>117</sup> See D'Amato & Chopra, 'Whales: Their Emerging Right to Life', 85(1) *AJIL* (1991) 21. Alternatively, preservationists often rely on a strong form of the precautionary principle under which, so long as there is some (even small) uncertainty in scientific evidence as to the levels of whale stocks coupled with the difficulty in enforcing partial bans on harvesting specific species, the continuation of the ban on whaling is justified.

<sup>118</sup> Danaher, *supra* note 110.

<sup>119</sup> Arne Kalland, 'Whale Politics and Green Legitimacy: A Critique of the Anti-Whaling Campaign', 9(6) *Anthropology Today* (1993) 6.

<sup>120</sup> Danaher, *supra* note 110. It is noteworthy that its vote-trading strategy subjects Japan to substantial reputational damage caused by reports of the media and anti-whaling NGOs, such as Greenpeace. Nonetheless, Japan continues to buy votes, in large part, because it believes that the conservationist view better reflects the collective good.

<sup>121</sup> Members of the IWC are not bound by its decisions if they express a reservation when the relevant decision is

Japanese vote-trading bloc does not exceed the three-fourths majority required to overturn the moratorium, an unlikely scenario at present, whaling will continue to be restricted to limited amounts; yet, it will remain difficult for anti-whalers to introduce more expansive anti-whaling policies.<sup>123</sup> Interestingly, even though the IWC decision-making seems somewhat dysfunctional, this status quo is actually close to the state of affairs contemplated by the ICRW.<sup>124</sup>

The middle view of the collective good may also be accommodated with political compromises that are based on internal-logrolling agreements. The negotiations in recent years in the IWC outside the scope of the annual meetings have been based on the idea that anti-whalers will agree to a relaxation of the ban on commercial whaling and whaling nations will agree to establish a strong enforcement and compliance mechanism.<sup>125</sup> This potential future compromise can be viewed as an efficient logrolling compromise, under which each group of countries concedes its personal bad-preferences in order to achieve a package of welfare-maximizing decisions. Anti-whaling countries would concede their personal preference for a complete prohibition on whaling, while whaling countries would concede their personal preference against a strong enforcement and compliance mechanism, in favor of a deal to allow limited sustainable whaling and improve enforcement.<sup>126</sup>

#### 4. Conclusion

When we examine the results of applying the analysis to specific institutions, we see that in most cases it is not possible to determine with certainty whether vote-trading is harmful or beneficial, and in some cases there are good reasons to believe that vote-trading maximizes welfare.

Taking judgment-decisions first, despite the moral implications associated with such decisions, vote-trading can have significant beneficial effects. I have argued above that the US paid countries in order to induce them to agree to welfare-maximizing (albeit not optimal) decisions, in particular the use of force against Iraq in the First Gulf War. The decision to use force in Haiti in 1994 and the recognition of the CIS force in Georgia can also be regarded as good-decisions. While there is no guarantee that vote-trading will never be used to facilitate bad-decisions, the failure of the US's vote-trading attempts before the Second Gulf War shows that countries' preferences and reputational costs can limit the vote-buyer's ability to buy votes for bad-decisions. In the GA, there is evidence that election results facilitated through vote-trading are in many instances not optimal, but there is no compelling evidence that vote-trading facilitated such results. In both elections to the ICJ and elections to the SC, two main conflicting views can be put forward. One holds that vote-trading reduces the quality of elected members, the other that it actually facilitates the election of more qualified candidates. Both views have some evidential support, but it is impossible to decide conclusively which better reflects the effects of vote-trading, especially

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adopted.

<sup>122</sup> Article VIII of ICRW permits IWC members to allow their nationals to kill whales for the purpose of scientific research. Japan has been accused of misusing this exception to pursue commercial whaling.

<sup>123</sup> While there is no evidence that anti-whalers currently buy votes, if Japan gets closer to attaining the three-fourths majority it is possible that anti-whalers will then resort to vote-trading in order to prevent the resumption of commercial whaling.

<sup>124</sup> See David Victor, 'Whale Sausage: Why the Whaling Regime Does Not Need to Be Fixed', in Robert Friedheim (ed), *Toward a Sustainable Whaling Regime* (2001) 292.

<sup>125</sup> Gillespie, *supra* note 115.

<sup>126</sup> Similarly, Japan may agree to the establishment of new sanctuaries in return for anti-whalers' votes on relaxing the requirements of the moratorium.



because we do not know whether but for the vote-trading countries would vote for better or inferior candidates. In the IWC, the major problem is the uncertainty regarding which view of the collective good should be adopted, the conservationist or preservationist. Without a reasonably certain conception of the collective good, it is impossible to determine whether or not vote-trading is undesirable. It should be emphasized that the Japanese vote-trading strategy has been successful only in maintaining the status quo in the IWC, by blocking anti-whaling policies but failing to facilitate pro-whaling ones. This status quo is actually consistent with the middle view of the collective good that balances between the preservationist and conservationist views. The middle view is also consistent with the emerging compromise in the IWC, which is based on an internal-logrolling deal between whaling and anti-whaling nations to relax the ban on commercial whaling but strengthen compliance mechanisms.

In preference-decisions, essentially the decisions of the WTO, the results of the analysis are similar. It is clear that certain transactions are, at least on balance, efficient, in particular internal-logrolling agreements that form the basis of the WTO decision-making process by facilitating mutual concessions on trade issues. Without such internal-logrolling it would be virtually impossible to achieve consensus over new WTO decisions. But the effect of other vote-trading transactions is subject to controversy, and ultimately depends on how we view the overall outcome of the WTO decision-making. While vote-trading may be viewed as part of a coercive tendering strategy employed by powerful nations to pressure developing countries to agree to policies they genuinely object to, others may contend that coercive tendering is simply a tool for preventing holdout countries from blocking welfare-maximizing decisions on liberalizing world trade. Likewise, while we may view vote-trading, especially vote-buying deals, as exacerbating agency costs (constituents) by allowing governments to sell votes to further their own interests at the expense of their constituents, vote-trading may also be viewed as ameliorating agency costs (constituents) if we consider WTO decisions that remove protectionist obstacles to free trade to be in the interests of the people of developing countries.

In light of this analysis, it would not make sense to introduce policy measures against vote-trading in international institutions. At least so far as the four institutions discussed in this paper are concerned, there is not one clear case where vote-trading has reduced global welfare, and there is substantial evidence that vote-trading can generate benefits. Even if we believe that vote-trading is costly overall, it is hard to contemplate an efficient mechanism to address its costs. Any express legal rule that prohibits all or some types of vote-trading would suffer from severe adjudication and enforcement costs, as most vote-trading deals take place behind the scenes.<sup>127</sup> There is also a risk that countries that are better at hiding their vote-trading attempts will free-ride on countries that comply with such a rule. Moreover, to the extent that a rule against vote-trading would prevent powerful vote-buyers from achieving favorable decisions in a certain institution, it may

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<sup>127</sup> In domestic electorates, it was the secret ballot rather than the ban on vote-trading, which was most effective in discouraging vote-trading. When voting is secret, vote-buyers cannot monitor numerous vote-sellers and have to bear the costs of cheating; Ackerman & Ayres, *Voting with Dollars* (2002), at 18. The secret ballot is unlikely to have a similar effect in international institutions, where the number of voters is substantially smaller. In secret elections to the SC the level of cheating - estimated to be 10 percent of written commitments and 20 percent of oral ones (Malone, *supra* note 57) - is not sufficient to discourage vote-trading. A secret ballot in international institutions can actually help vote-buyers conceal voting patterns that lend support for evidence of vote-trading. Japan, for example, has been trying for several years to propose that IWC decisions be taken by secret ballot in order to reduce the pressure by anti-whalers on voters that sell votes to Japan (Gillespie, *supra* note 108, at 344-345).

simply induce them to exit that institution.<sup>128</sup>

The remaining questions in regard to vote-trading call for further research. There is a need for more case studies and more facts, for example: the frequency of vote-trading in the SC; whether better judges would be elected without vote-trading; to what extent reputation affects countries' incentives to buy or sell votes; the value developing countries can expect to obtain by acting collectively in the WTO, etc. In addition, the analysis should be applied to more international institutions, such as the Codex Alimentarius and the World Health Organization, where vote-trading presumably takes place as well. It would also be interesting to extend the analysis to other international organizations with non-state members, such as the International Standards Organization and the International Olympic Committee.<sup>129</sup>

Finally, I note that the usefulness of vote-trading in judgment-decisions that implicate serious moral issues raises concerns about the practicality of the very idea of judgment-decisions made by states through a voting process. It may be unrealistic to expect self-interested countries with duties to their own constituents to vote for the collective good. In the domestic context, judgment-decisions are made only by professionals, rather than by self-interested political actors. We may question whether all judgment-decisions should be transformed into preference-decisions, though under a system where countries have better incentives to represent broader interests than solely their own. The incentives for countries to pursue the collective good are unsatisfactory, leaving significant scope for vote-trading to shape decisions and voting outcomes.

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<sup>128</sup> The US can act unilaterally outside the SC; instead of pursuing consensus in the WTO, the US and EC can seek bilateral or regional trade agreements; Japan may withdraw from the IWC and resume commercial whaling.

<sup>129</sup> It is likely that in organizations whose members are professional bodies, rather than countries, vote-trading will be inefficient, because but for the option of selling their votes professional bodies would probably vote their judgment rather than their preferences.