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AMENDING THE CHICAGO CONVENTION AND ITS TECHNICAL STANDARDS—CAN CONSENT OF ALL MEMBER STATES BE ELIMINATED?

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The 52 nations meeting at the Chicago Aviation Conference in 1944, the last Winter of World War II, were confronted with the commanding fact that global conflict had thrust aviation into a new era of world-wide dimensions, unparalleled in the past, and the unprecedented progress of the war years prophesied continual and ever increasing change in the post-war period. The Conference, one of the earliest efforts in international planning emerging from this second World War, thus faced a double task — the achievement of a basic agreement on international civil aviation principles suitable to the new international environment and the creation of an institution which could evolve and whose technical standards could be amended consonant with the anticipated expansion in this highly technical field, latent with national political and economic implications.

The Chicago Conference’s attention was centered primarily on the basic conflict between the British and American views on the economic regulations of air transport.¹ The British conceived of the ultimate goal of international aviation planning as the control of competition between states by an international organization. The American position was predicated on the principle of removal of state restrictions on international flight, so that aviation might expand beyond national boundaries unfettered by the doctrine of air sovereignty. Compromise proving impossible in 1944, the Chicago conferees tended to observe the traditional approach that international organizations should function primarily as coordinating and advisory bodies, with states retaining freedom of action in all matters not specifically restricted by any of the Convention covenants.

¹ See J. C. Cooper, Internationalization of Air Transport, 2 Air Affairs 546 (1949); T. Burke, Influences Affecting International Aviation Policy, 11 Law & Contemp. Prob. 598 (1945-46).
The Convention on International Civil Aviation was designed to replace the Paris Convention of 19192 and the Habana Convention of 19283 and to create the "first real world organization for civil aviation."4 Unlike many multipartite treaties covering the so-called "specialized" fields of international relations, it includes in one instrument general legal commitments as well as the constitution of a permanent organization. Its 96 articles are divided into four parts: Parts I and III relating to air navigation and transport principles respectively; Part II setting forth the Constitution of ICAO; and Part IV relating to such heterogeneous topics as disposition of disputes over interpretation, registration of aeronautical agreements, the annexes, and amendment procedure.5 The Constitution provides for two basic organs within the agency — an Assembly representing all the contracting States and a 21 nation Council elected by the former. The criteria determining the Council's composition suggest the principle adopted in many post-war inter-state agencies, that states possessing the major interest and power in the specialized field for which the agency is designed, shall be accorded greater influence in policy-making.6 Consequently, Council members are to be selected on the basis of their contribution to the provision of facilities for air navigation, their importance in air transport, and their geographical position so that major world areas may be represented.7 The character of the Council assumes special interest, for it is upon this body that the principal functions of the agency devolve.

Amendments to the Convention Proper

The organization assumes some quasi-judicial authority in its role of interpreting the Convention, its Annexes, and infractions thereof, and it also may undertake broad administrative tasks such as the operation of navigation facilities on the request or consent of a state.8 It possesses few powers of a legislative character within the accepted

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2 Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 League of Nations Treaty Ser. 174 (1922); also Dept. State No. 2143 (1944). The Convention came into force in 1922 and was adhered to by 37 States and the Saar Territory; four States subsequently denounced it.

3 Commercial Aviation Convention Between the United States of America and Other American Republics, Feb. 20, 1928, U. S. Treaty Ser. 840 (1929). The Convention was ratified by the United States in 1931; eleven States in the western hemisphere were parties to the treaty.

4 J. C. Cooper, The Right to Fly 157 (1947). The Paris Convention was ratified by western European states primarily; the United States, Russia, China and the majority of South and Central American States did not subscribe to the treaty.


7 Convention on International Civil Aviation, Art. 50 (b), supra note 5.

8 Convention on International Civil Aviation, Art. 71, supra note 5.
meaning of the term—the power to enact rules obligatory on all member states whether or not they agree, thus overruling the will of a dissentient minority. The rights and obligations of a state established in the Convention may not be altered without its consent. Changes in or amendments to any of the 96 articles require preliminary approval by a two-thirds vote of the Assembly, and "come into force" when ratified by two-thirds of the contracting parties or a greater number if the Assembly so designates. Such amendments, however, change the rights and obligations of the ratifying states only. Time may thus work to subject states to diverse obligations and rights; the only escape from the destruction of the uniform character of the Convention lies in the power conferred upon the Assembly to provide, in its resolution approving the amendment, that non-ratifying states will cease to be parties to the Convention. This course of action by the Assembly risks possible reduction in the number of participating states, although it accords to the plenary body quasi-legislature power.

ADOPTION AND AMENDMENT OF INTERNATIONAL STANDARDS

The 1919 International Convention regulating Aerial Navigation and the Commission it created have been cited frequently as breaking new ground in international law-making techniques, primarily because of the authority accorded to the Commission to amend the Annexes to the Convention which established air navigation rules. Although the Annexes related to technical matters exclusively, the innovation has been singled out as exemplifying the conferral of legislative power of a limited character on an international body. The Chicago Convention does not perpetuate this innovation although its provisions for enacting international aviation rules are patterned after the 1919 model. The Council is vested with substantial responsibility for adopting and amending "international standards and recommended practices and procedures" pertaining to such subjects as rules of the air, communications systems and customs and immigration procedures, embracing in all a list of eleven topics specifically referred to in the Convention; and "such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate." The breadth of subject matter suggested by this concluding phrase negates the conclusion that the Council's mandate is constitutionally limited
to the usual conception of "technical matters." Much effort at the Chicago Conference was channeled toward the preparation of twelve such air codes designated also in the Convention, for convenience, as "Annexes." Intended originally to be attached to the Convention when drafted at Chicago, in line with the precedent of the Paris Convention, the twelve Annexes emerged in draft form for submission to the States for further study and eventual adoption by the Organization. Nine Annexes have been adopted by the Council as of March 1949. The objective of these codes which are to "become part of fixed international law" is to insure that "aircraft, flying in all parts of the world, will comply with the same standards, follow the same procedures, give and recognize the same signals, everywhere."

The drafting and arrangement of the provisions of the Convention relating to the establishment and amendment of international standards and recommended procedures as Convention Annexes tend to obscure the three basic steps involved in the enactment of these codes into international air law. The initial step in the intricate procedure for enactment of such Annexes is undertaken by the Council of the Organization as one of its fourteen mandatory functions and consists of the adoption of a standard or recommended practice by a two-thirds vote of the Council at a meeting called for that specific purpose. In contradistinction to the procedure established by the Paris Convention, the standards and recommendations or amendments thereto do not assume the character of law by the Council's action alone, but are subject to what may be designated as a referendum among contracting States. This referendum, the second step in the adoption of an Annex, provides for its submission to the States for a period of three months

12 The question of the scope of the phrase, "such other matters concerned with the safety, regularity, and efficiency of air navigation," was raised in meetings of the Economic Commission of the Second Assembly. Objection was offered to the suggestion that standards and recommended practices might also relate to insurance requirements on air transport risks on the grounds that Article 37 should not be used to trespass into the realm of "political" matters. The Commission deleted the recommendation for a standard from its report but did not commit itself on the legality of resorting to the procedure of Article 37 to achieve uniformity in economic and political matters as well as those more clearly related to technical subjects. Economic Commission, Minutes of the 12th Meeting, June 16, 1948, ICAO Doc. No. 5672, A2-EC/56, 18/6/48.

13 Convention, Art. 54 (1) and 90, supra note 5.

14 Resolution II, Draft Technical Annexes, supra note 5.

15 ICAO Monthly Bulletin, May 1949. The nine Annexes adopted cover the following topics: rules of the air; licensing of pilots and air crews on international routes; meteorological codes; aeronautical maps and charts; dimensional practices in air ground communications; operation of aircraft, scheduled international air services; aircraft nationality and registration marks; airworthiness of aircraft; and facilitation of international air transport.

16 S. W. Morgan, International Civil Aviation Conference at Chicago, What It Means to the Americas, Blueprint for World Civil Aviation, Dept. of State No. 2348, Conference Sec. 70, at 12 (1945).

17 The voting provisions set forth in Article 90 relate to the "adoption" of Annexes, but it would seem that they also govern subsequent amendment procedures. Presumably Annexes will be most frequently prepared by the divisions of the Air Navigation Commission as suggested by C. X and Art. 54 (m) of the Convention. The Annex on Facilitation of Air Transport was prepared by the Air Transport Committee.
or longer, during which States may notify the Council of their disapproval. If a majority of States do not object to the measure within this period, it enters into force and becomes a supplement or Annex to the Convention. The third and final step involves the application of the standard by contracting States within the period established by the Council; however, any state finding it impracticable to comply in all respects with an international standard or procedure may exempt itself from obligation to comply by notifying the Organization immediately of the variance in its own regulations.18

While it is apparent that the standards adopted by this process, or subsequent amendments thereto, "are not to be given compulsive force," this has not been deemed a serious impediment to their general application. It has been predicted that "states will wish in their own interest" to adhere to these international aviation codes.19 By the terms of the Convention, each state undertakes to collaborate "in securing the highest practicable degree of uniformity." Moreover, certain privileges mutually accorded to States by the Convention may be denied parties failing to comply with international standards. Licenses and certificates of competency and airworthiness issued by States, which do not meet a minimum standard established by the Organization, need not be recognized as valid by other contracting States. Aircraft or personnel failing to satisfy international standards may not participate in international navigation without the permission of foreign States into which they enter.20 These provisions provide a form of sanction against non-conforming states and offer additional incentives for uniform application.

The legislative procedure employed in the development and amendment of air standards and practices has been criticized as a "retrograde step" in constitution-making and relatively restrictive when contrasted with the provisions of the Paris Convention which conferred upon the plenary body of the Organization full and final authority to alter the technical Annexes to the Convention, effective on notification to contracting States.21 The heterogenous state of development of aviation throughout the world, in addition to the economic difficulties flowing from the war, have been advanced as necessitating provision for non-compliance.22 Moreover, objections by States to the acceptance of treaty

18 Article 38 also provides that "in the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment...."


20 Convention, Art. 33, 39, and 40, supra note 5.

21 C. Parry, Introductory Note to Constitutions of International Organizations 23 Brit. Y. B. Int. L. 460 (1946); C. W. Jenks, Some Constitutional Problems of International Organizations, 22 Id. at 68 (1945).

22 The International Civil Aviation Organization, 18 Dep't. State Bull. 465 (1948).
obligations which they have not approved may have necessitated placing the standards on a voluntary basis.

**Development of Amendment Procedures by the Chicago Conference**

An examination of the documents of the Chicago Conference reveals that the Convention amendment procedure was subjected to extended study while the provisions relating to the adoption and amendment of international standards and procedures were less carefully scrutinized. Committee I of the Conference devoted itself to the drafting of the Convention and was in turn divided into three subcommittees correspondingly roughly to three of the four parts of the Convention as finally enacted. The American and Canadian Convention proposals were adopted as a basis of discussion in the subcommittees of Committee I. The provisions regarding the establishment of standards in the American proposal substantially resemble the first two steps required under the Chicago Convention. Standards and amendments thereto were to be "drawn up by the Executive Council, approved by two-thirds of the votes present, and submitted to each member State of the Assembly"; they were to become effective "within a prescribed time after their submittal to each State member of the Assembly, unless a majority of the State members of the Assembly have registered their disapproval" within a time prescribed by the Council. Moreover, the contracting States were to agree to act in accordance with any regulations established by the Organization. The discretion accorded States in accepting or rejecting international regulations under the Chicago Convention was not anticipated by the original American plan. The Canadian Convention proposals followed more closely the Paris Convention, and proposed that amendments to the standards should be binding on the member States as soon as adopted by the Assembly by at least two-thirds of the total possible votes.

The American plan for amending the basic law of the Convention imposed a duty on the Executive Council to initiate and receive suggested modifications. Amendments approved by a three-fourths vote of those present in the Council were to be passed to the Assembly for majority approval of that body. All amendments so approved were to become effective only if they received unanimous ratification by the

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23 *International Civil Aviation Conference, Resolution 2 of Committee I, Doc. No. 44, 1/3, I Proceedings of the International Civil Aviation Conference 549 (1948); adopted at the first meeting of Committee I, Nov. 8, 1944, Verbatim Minutes of Organization Meeting of Committee I, Doc. No. 46, 1/4, Id. at 532.

24 *Minutes of the Second Meeting of Subcommittee 1 of Committee I, Nov. 7, 1944, Doc. No. 102, 1/1/2, Id. at 647.


26 *Revised Preliminary Draft of an International Air Convention (prepared for the Canadian Government), Doc. No. 50, 1/7, Art. 50 (2), Id. at 570.
States. In contrast, the Canadian plan suggested a simpler and less restrictive approach to change. Amendments to the Convention articles were to be examined and adopted by the Assembly by majority vote. They were to become effective on ratification by a number of states to be subsequently designated, presumably by less than unanimous membership ratification.

The divergent views of the United States, Canada, and Great Britain regarding the economic control of aviation led to a closed conference of the three powers from November twelfth to twentieth. The draft proposal which emerged from the joint effort, a partial draft of "sections of an International Air Convention relating primarily to Air Transport," adopted the American plan for amendment of international standards. No provision for alteration of the Convention proper was included in this joint draft. A joint subcommittee formed to consider the three-nation proposal suggested to its drafting committee that it insert a provision for amendment of the Convention itself by a two-thirds vote of the Assembly, subject to ratification by all contracting States. The drafting committee liberalized the suggested procedure for amendment of the Convention so that unanimity in ratification would not be required for the effectiveness of an amendment, although only ratifying States would be bound. A Committee of Legal Advisers, asked to consider this article in the light of constitutional difficulties, proposed two alternative drafts. The first draft followed the pattern established by the drafting committee. The second draft was divided into two sections:

(1) Amendments to the Convention may be proposed by the Assembly by a two-thirds vote of those present. A proposal for an amendment adopted by the Assembly shall be submitted to each Contracting State for ratification in accordance with the constitutional practice of the State. An amendment shall take effect one year after it has been ratified by two-thirds of the Contracting States. This two-thirds majority shall include two-thirds of the Member States of the Council.

(2) At any time during the six months following the ratification of an amendment by the necessary majority, any Contracting State which has not ratified the amendment may inform the Council that it disavows therefrom; in that case it shall not be bound by the amendment but shall cease to be a member of the Organization as soon as the amendment takes effect, notwithstanding anything to the contrary elsewhere in this Convention.

27 Art. 24 (2), supra note 25.
28 Art. 50 (1) and 3 (1), supra note 26.
30 Minutes of Second Meeting of Joint Subcommittees of Committees I, III, IV, Doc. No. 398, I/23, III/38, IV/16, Nov. 25, 1944, Id. at 469.
32 Third Revised Draft of Document 358, (Articles to be Distributed among Parts II, III, and IV, and renumbered accordingly), Art. 19 (3), Doc. No. 442, 1/44, III/66, IV/38, Nov. 29, 1944, Id. at 375.
Discussion of these two alternatives in the joint subcommittee indicated that the majority of the conferees considered the second alternative objectionable on two grounds: namely, that it would force a non-ratifying state to withdraw from the Organization and that some States would encounter constitutional limitations in agreeing to be bound by amendments which they did not ratify. The United States delegation indicated that it would have to enter a reservation, if the second draft were adopted, although it has approved similar provisions in other international conventions.

The second draft proposal of the Committee of Legal Advisers followed the amendment provision of the Covenant of the League of Nations; it also suggested a pattern subscribed to in other inter-state agencies of this post-war period in that it accorded to members of the Council, an organ representative of the principal powers in aviation, a special voting prerogative. At the same time it provided for legislation by a qualified majority which was empowered, in effect, to bind the minority by its decisions although the latter might escape by withdrawing from the organization. It thus sought to maintain among the members consistent convention obligations at all times. The principle that dissent automatically terminates membership was ultimately modified and incorporated into the first of the two drafts prepared by the Legal Advisers. After further rephrasing, it accorded to the Assembly discretionary power to determine whether an amendment was sufficiently important to justify automatic termination of the Convention engagement if not ratified.

The provisions regarding international standards which appeared in the three-power draft remained unchanged. The draft of the subcommittee preparing Part I of the Convention embracing air navigation principles, which was ultimately combined with the revised three-power draft, included the article which destroyed the obligatory force of the standards envisaged in the United States and three-power proposals.

EARLY ATTEMPTS AT LAW-MAKING IN INTERNATIONAL AGENCIES

The Chicago Conference, meeting in the last winter of World War II, a half year before the United Nations Organization assumed concrete form, could draw principally on the experiences of the pre-war international bodies in approaching the task of constitution-making. A

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33 Minutes of the Eighth Meeting of the Joint Subcommittee of Committees I, III, IV, December 1, 1944, Doc. No. 469, 1/53, III/66, IV/48, Id. at 488.
34 Second Supplement to Second Interim Report of Drafting Committee of Subcommittee 2, Committee I, Chapter VI, Art. 32 and 33, Doc. No. 437, 1/2/33, Nov. 30, 1944, Id. at 668.
35 The United Nations Relief and Rehabilitation Administration, a temporary agency created in November 1943, and the United Nations Food and Agricultural Organization, whose constitution was published in July 1943, were the only two specialized agencies of the post-war or war period which preceded the Chicago Conference in order of organization.
perusal of pre-war international organizations would seem to reveal that, although the rule of unanimity in voting procedures in such organs has seldom been consistently adhered to, few organizations have been endowed with essential law-making powers.\footnote{C. A. Riches, \textit{Majority Rule in International Organization} 293 (1940).} Some organizations, however, have been accorded or have gradually assumed through practice a large degree of legislative power in affecting changes in the basic convention of the organization and in other instances by adoption of rules supplementary to the fundamental treaty obligations.

The Universal Postal Union stands forth as the classic illustration of international bodies in which the unanimity rule has been abandoned in the interest of more effective international organization.\footnote{Treaty Concerning the Formation of a General Postal Union, 1874, 19 U.S. Statutes at Large 577 (1877), The last Congress met in 1947, \textit{see} 17 Dep't. State Bull. 585 (1947).} In 1874 a conference of 22 states, including the United States, produced the first Postal Convention establishing the “General” Postal Union. The inevitability of rapid change in this technical field was recognized even in this first conference and accordingly the delegates incorporated into the Convention provision for periodic Congresses of the Union to be “held with a view of perfecting the system of the Union, of introducing into it improvements found necessary. . . .”\footnote{Art. 18, \textit{Ibid.}} The Convention provided for one vote for each country in these Congresses but omitted any reference to voting requirements for effecting the contemplated changes.\footnote{Beginning at the Paris Congress of 1878, the principle of one vote per country has been substantially modified in effect by granting to colonial possessions separate votes despite almost continuous opposition from non-colonial powers. \textit{See} L. B. Sohn, \textit{Multiple Representation in International Assemblies}, 40 Am. J. Int. L. 79-84 (1946); also, L. S. Woolf, \textit{International Government}, 198-99 (1916). A draft convention, prepared by Germany, in 1874, which furnished the basis of discussion, provided that “no modification may be proposed to the present convention affecting the rates and the question of transit, unless by the unanimous consent of the Union representatives at the Congress.” This more rigid procedure was rejected. J. F. Sly, \textit{The Genesis of the Universal Postal Union}, International Conciliation 407 (1937).} Subsequent revisons of this provision over the years have resulted in offering members the choice of accepting changes in the Convention on a fixed date or withdrawing from the Union, for earlier conventions are annulled by the entry into force of the new engagement. The benefits of freedom of transit for a state’s mail have made withdrawal extremely unattractive and the practice has therefore emerged of treating Conventions as effective on the
prescribed date, without waiting for ratifications which may be delayed for several years. Congresses have evolved into a permanent legislative organ by the combination of three factors: treaties which were unique in providing for their application on a definite date, abrogating all previous engagements; a practice of achieving decisions by a majority vote; and most important, a tacit acceptance by a dissenting minority that the association's practical value outweighed the possible disadvantages which might flow from acceptance of the majority's wishes.

It has been emphasized that the legislative techniques adopted by the Union may have resulted principally from the nature of its work and the character of its delegates. The Union would obviously be deemed a "non-political" organization under a League of Nations classification which has been interpreted by one writer to designate the regulations of international activity pertaining chiefly to the interests of individuals in contrast to the relations between states as "political units." In addition, the drafters of the 1874 Convention and the delegates to the subsequent periodic Congresses have been primarily men technically trained in the field whose primary concern is efficient functioning of the Union.

The Postal Union of the Americas and Spain, born in 1921, followed the legislative pattern of the world-wide Union. Modifications of the basic law of the Union may be effected by the Congresses by majority vote. Conventions come into effect on a designated date, superseding previous treaties. The alternative to acceptance of the majority's decision is withdrawal.

International Legislation in the League Era

The birth of the League of Nations in 1920 ushered in a period in which international organization expanded and undertook comparatively substantial functions. Although the Assembly of the League was obviously not an international parliament, it assumed some legislative power in amending the Covenant, its basic legislation. The Covenant

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42 WOOLF, op. cit. supra note 39 at 195; M. Gabrini, Summary of the Work of the Universal Postal Union from 1874, International Conciliation 137 (1937).
44 Sly, supra note 39 at 403.
45 Pan-American Postal Union—Principal Convention ... Sept. 15, 1921, 30 League of Nations Treaty Ser. 157 (1924-25). The Union was subsequently designated as the Postal Union of the Americas and Spain. The Fifth Congress met in September 1946. 14 Dep't. State Bull. 815 (1946).
46 Article 19 of the 1921 Convention provided that it should come into force on Jan. 1, 1923 abrogating the South American Postal Convention of 1911 and that withdrawals could be effected on one year's notice. Article 15 establishes the procedure by which modifications of the Convention may be carried out in the five year intervals between majority or simple majority in other cases. None of the nineteen articles refers to the vote required in Congresses for modification of the Convention and the majority vote principle of the Universal Postal Union has apparently been duplicated. See RICHES, op. cit. supra note 36.
provided for amendments to take effect when ratified by the States represented in the Council and a majority of the Assembly members; it was silent as to the vote required for proposing amendments. A strict interpretation of the unanimity rule required in Assembly voting could have been anticipated for the approval of amendments in an organization predominantly political in character. However, the Assembly drew a technical distinction between “decisions” which under the Covenant would demand a unanimous vote and “recommendations” having no binding effect on members per se and therefore valid if approved by only a majority. Assimilating this distinction to the adoption of amendments, since the latter imposed no obligations until ratified, the Assembly proposed changes in the Covenant by the same vote required for ratification — a majority of the Assembly including the concurring consent of States represented in the Council. The Covenant presented a further innovation, for a State signifying its dissent from an amendment was not bound thereby but automatically ceased to be a member of the League. Although numerous examples appear in earlier political conferences of states of the imposition of obligations on unwilling parties, the incorporation of this principle into treaty established it as a valid legal procedure, indicating a significant break with the past in legislative technique.

The International Labor Organization, also a product of the Paris Peace Conference, substantially followed the Covenant amendment provisions. However, no provision for withdrawal or automatic termination of membership for non-ratifying states appeared in its 1919 Constitution. Although the procedural aspects of the amendment

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49 LEAGUE OF NATIONS, RECORDS OF THE SECOND ASSEMBLY, Plenary Meetings, 676-681, 723-733 (1921) The Report of Committee I, “Conditions of Voting on, and Ratification of Amendments to the Covenant,” appears as Annex B to the minutes of the twenty-eighth Plenary Meeting of the Assembly. Id. at 708. At the twenty-ninth Meeting the Assembly also adopted the resolution that no amendment would be passed during that session unless it received a three-fourths majority vote of the Members including the votes of all the Members of the Council represented at the meeting. However, the Assembly accepted and passed the resolution of the First Committee that amendments could be proposed by a majority vote of the Assembly including the unanimous votes of all Council Members, apparently establishing a precedent in view of the failure of the proposed amendment to Article 26 to come into effect.

50 The practice of revising treaties effecting European political settlements without the consent of all the signatories, appears to have been common in the nineteenth century and many parts of the 1919 Peace Treaties were subject to revision without the consent of all parties. See H. J. Tobin, THE TERMINATION OF MULTIPARTITE TREATIES 206-249 (1933).

51 Constitution of the International Labor Organization, Art. 36 (422), Pt. XIII of the Treaty of Versailles, supra note 6 at 716. Amendments of the Constitution, adopted by two-thirds of the votes cast at the Organization’s Conference, took effect when ratified by three-fourths of the Members including the States composing the Council of the League. The Conference was composed of four representatives of each State, two government delegates and two representing employer and employee groups within the State respectively. The British draft convention, taken as a basis of discussion at the second meeting of the Commis-
provisions of the Covenant and the Labor Organization's Constitution marked progress toward more flexible procedure, the necessity for unanimous Council approval presented a formidable obstacle to change and growth.\(^{52}\)

Although less widely publicized than the League or the ILO, other organizations of this period were accorded a legislative role equally unique. The International Relief Union of 1932, through its plenary body, could amend by a two-thirds vote the Statute attached to the Convention, containing provisions governing the internal organization of the Union and its financial control.\(^{53}\) Ratification being eliminated completely, the procedure of the Organization assimilated closely that existing in national parliaments. The Railway Union offers a possible precedent for the provisions relating to adoption and amendment of standards in the Chicago Convention. The Committee of Experts of the Union, in which each State was entitled to representation, could effect changes in Annex I of the Convention which were effective in three months unless two governments objected in the interval.\(^{54}\)

Increasing recognition of the need of flexibility and change in international arrangements may be found in some of the treaties of this period also. The Montreux Convention of 1936, establishing the Turkish Straits regime, provides for revision of two articles of the Convention by three-fourths majority vote.\(^{55}\) The International Sanitary
Constitution for Aerial Navigation of 1933 devised a novel technique for revision which has been cited as a precedent for provisions of the World Health Organization's Constitution. Modifications approved by the International Office of Public Hygiene were to enter into force within twelve months of their circulation among the contracting States, if two-thirds of the parties approved; such approval was manifested by express consent or from failure to register objections within the prescribed period, although dissenting parties were not bound by the majority's decision. States were called upon to "contract out" of obligations, being bound unless they expressly dissented.

Amendments to the Annexes of the Paris Convention

The 43 provisions of the 1919 Convention Relating to the Regulation of Aerial Navigation obviously played a role in shaping the 96 articles of the Chicago Convention. The International Commission for Air Navigation was the only permanent body established by the Paris Convention and it included representatives of all states although until 1926 a system of weighted voting was utilized to protect the interests of the large powers and not until 1933 did complete equality in voting rights prevail. The Commission was entrusted with the power of amending the "provisions of the Annexes A-G" which consisted of seven codes relating to air navigation principles similar to the Chicago standards and recommended practices. The Annexes were attached to the Convention as an integral part. Annex amendments were originally effected by a vote of three-fourths of the total vote possible if all representatives were present. By a Convention amendment effective in 1933, this procedure was modified so that a three-fourths vote of the Commission, including at least two-thirds of the total possible votes if all States participated, would permit revision. Modifications entered into law, without subsequent ratification of the contracting States, on notification by the Commission.

Amendments to the Convention itself were achieved by a two-thirds vote of the total possible vote but became effective only if ratified by

\[50\] International Sanitary Convention for Aerial Navigation, April 12, 1933; Art. 61; 161 League of Nations Treaty Ser. 65 (1935-36). The Convention was revised by UNRRA in 1944, effective 1945. 14 Dep't. State Bull. 451. A protocol to prolong the Convention became effective on April 30, 1946. Id. at 331. The United States entered a reservation to Article 61 of the original Convention to the effect that no amendments will be binding on this Government unless accepted by it.

\[57\] By protocol of amendment adopted by the Commission at its fourth session, June 30, 1923, which entered into force in Dec. 1926, each state represented in the Commission was henceforth entitled to one vote but modifications of the Annexes still required a vote of three-fourths of the total vote of the Commission including three of the five following States: The United States (not a party to the Convention), the British Empire, France, Italy, and Japan. 78 League of Nations Treaty Ser. 441 (1928). The Commission held an extraordinary session in June 1929 to which it invited non-contracting States with a view to facilitating their adhesion by a general revision of the Convention. Sixteen non-contracting parties participated. The Final Resolutions included modification of Article 34 to deprive the five enumerated States of their special voting rights. International Commission for Air Navigation, OFFICIAL BULLETIN No. 16, 33-34. This revision entered into force in 1933. 138 League of Nations Treaty Ser. 418 (1933).

\[58\] Supra note 2.
all members.\textsuperscript{59} In contrast to the Annex revision procedure, this arrangement seems unduly restrictive.

The 1919 Aerial Convention was drafted by the Aviation Commission of the Paris Peace Conference, a group of military experts chiefly, representing twelve states with double representation accorded the five larger powers.\textsuperscript{60} A British draft convention apparently first suggested the provision for alteration of the Annexes and the technical portions of the Convention without subsequent state ratification; it provided, however, that such alterations should be achieved only by unanimous vote of the Commission.\textsuperscript{61} The Commission was to be composed of two representatives from each of the five principal powers and five other representatives elected by the contracting States. Objections by the minor powers to their exclusion from the Commission led to the complicated weighted voting procedure according more control to the major powers, with membership on the Commission open to all states.

Although the Annex modification procedure seems comparatively progressive, it has been pointed out that until 1933 an extremely small minority could block change.\textsuperscript{62} Moreover, the Commission was limited somewhat in its ability to keep abreast of change in aerial navigation, for its power regarding the Annexes was of a revisionary nature only. Unlike the Chicago Convention which permits the Council to draft and adopt standards covering a wide variety of topics, the Paris Convention strictly circumscribed the substantive field in which the Commission could act.\textsuperscript{63}

**Recent International Constitutions**

Turning to the current international scene, a brief glance at other international bodies existing today would seem to indicate that the Chicago Convention, as previously suggested, may be characterized as representing a rather orthodox approach to world cooperation. The imposition of obligations on states without their consent is still a rare phenomenon although amendment procedures have tended to abolish the unanimity requirement. The Charter of the United Nations, the only non-regional political organ of this era, provides for an amendment procedure similar but less rigid than the League's. Amendments

\textsuperscript{59} Art. 34 \textit{supra} note 2.

\textsuperscript{60} J. C. \textit{Cooper}, \textit{op. cit. supra} note 4 at 27. The five powers to be accorded double representation on the 1919 Commission were the United States, Britain, Japan, Italy, and France.

\textsuperscript{61} \textit{Riches}, \textit{op. cit. supra} note 36 at 82.

\textsuperscript{62} \textit{Riches}, \textit{op. cit. supra} note 36 at 94.

\textsuperscript{63} The Commission interpreted “modifications” of the Annexes (Convention Article 34) to permit addition of new matters to complete the regulations “within the general framework of the convention.” \textit{International Commission for Air Navigation, XV Official Bulletin} 37 (May 1929), Resolution No. 436. The 1919 Commission met for its twenty-eighth session in Aug. 1945 to bring its technical annexes into conformity with the draft annexes prepared at Chicago, for the period during which it would remain in existence. 13 Dep't. State Bull. 294 (1946).
adopted by two-thirds of the Assembly's members come into force upon ratification by two-thirds of the Members including all the permanent Members of the Security Council. No withdrawal clause appears in the Charter, although considerable debate centered around its omission, primarily as a result of the voting prerogatives accorded the principal powers in amending the Convention. A committee report advocating the omission of such a clause concluded that a dissenting state might legally withdraw rather than accept the alteration of its rights and obligations.

Although designed as a temporary body, the United Nations Relief and Rehabilitation Administration provided the initial effort at global cooperation by the war allies and revealed to some degree the pattern for specialized agencies in the new era of international organizations it opened. Born of an inter-governmental agreement signed by 44 states in November 1943, UNRRA was assigned the task of planning, coordinating and administering measures "for the relief of victims of war in any area under the control of any of the United Nations." The resolutions of the Council, its plenary body, passed by majority vote, could be considered legislative in character only in so far as the internal functioning of the Administration was concerned, for they imposed no obligations on Members without their consent.

The amendment procedure of the Convention divided proposals into three groups: amendments creating new obligations for member States required Council approval and bound only those States accepting them. Other amendments became obligatory merely by Council adoption; while modification of two of the Convention articles took effect on Council approval, including also the unanimous vote of the Central Committee. This distinction as to the substantive character of amendments appears frequently in recent constitutions.

The United Nations Food and Agricultural Organization, the first permanent post-war specialized body, has been aptly described as a
"fact-finding and advisory agency." Amendments involving new obligations for member Nations take effect only on ratification by two-thirds of the contracting States and then only for parties ratifying. Inconsistent obligations may thus exist among the membership. All other amendments are effective on a two-thirds majority vote "of all the members of the Conference." The United Nations Educational, Scientific and Cultural Organization has a more liberal amendment procedure, perhaps because of the supposedly less vital nature of its work. The British delegates to the Conference creating UNESCO proposed that amendments would be effective on approval by the General Conference of the organization and the United Nations General Assembly. The United States opposed this position maintaining its right to pass on important alterations in agreements to which it was a party. A compromise was achieved whereby amendments approved by the Conference involving fundamental alterations in the aims of the Organization or new obligations for members require ratification by two-thirds of the members before coming into force for all parties to the Convention. Other amendments are effective after Conference approval.

The International Monetary Fund and the International Bank for Reconstruction and Development, both highly specialized agencies performing vital functions, have adopted an elaborate weighted voting system based on financial contribution. Amendments to both Constitutions in most cases may be effected by acceptance of three-fifths of the Members. Both Constitutions recognize the right to withdraw from the Organizations.

The International Labor Organization's amended constitution and the constitution of the World Health Organization provide for change

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69 Press Release of Aug. 23, 1944, relating to the Report of the Interim Commission on Food and Agriculture, 11 Dep’t. State Bull. 207 (1944). Article I establishes the functions of the Organization—to collect and disseminate information, and to make recommendations and submit conventions regarding agricultural products and marketing; to furnish technical assistance on request. Article XI imposes the duty on Members to make periodic reports on progress towards the achievement of the aims of the organization and on the action taken in regard to recommendations and conventions submitted by the Organization.


71 "the defenses of peace," Documents Related to United Nations Educational Scientific and Cultural Organization, Pt. II, Dep’t. of State No. 2457, Conference Ser. 80, p. 34.

72 Art. 13, Pt. I, Id. at 13. The Conference has power according to the same article of the Constitution to adopt, by a two-thirds majority, rules to carry out the article. Like FAO, UNESCO has three principal organs: a Conference representing all states which is the policy-making body, an Executive Board acting under the authority of the Conference, and an administrative division.

without the consent of all of the membership, while the International Refugee Organization and the International Trade Organization clinging to the more orthodox rule that amendments involving alterations in obligations are only effective for ratifying States. Both of the latter organizations, however, permit the adoption of other amendments by a less rigid procedure. The International Trade Organization’s amendment article closely resembles that of the Chicago Convention, for the plenary body of the Organization, when approving an amendment, may determine that it is of such a nature as to warrant “suspension” of States failing to ratify. Suspension from the rights and privileges of membership in the organization appears preferable to termination of convention engagements of dissenting states and perhaps as useful in persuading acceptance of the majority will.

**Rule-Making Procedure in WHO**

The World Health Organization is the only post-war agency with rule-making procedures substantially similar to the Chicago Convention’s provisions on standards. The general policy-making organ of the agency, the Assembly, is endowed with authority to adopt regulations by majority vote concerning five classes of subjects: sanitary and quarantine arrangements; nomenclature with respect to disease, causes of death and public health practices; standards as to diagnostic procedure; standards on biological and pharmaceutical products in commerce; and advertising and labeling. Such regulations adopted by the Assembly come into force for all members after notice, “except for such members as may notify” their rejection or reservation within that period. This procedure requires states to assert dissent by affirmative action, if they desire to escape treaty obligations; labeled as the “contracting out” principle, it is a procedural innovation designed to replace the older principle whereby states had to designate assent to be bound, to contract into obligations, and inaction avoided liability.

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74 Constitution of the International Health Organization: Report of the United States Delegation on the International Health Conference, 1946, Dept. of State No. 2703, Conference Ser. 91, Art. 73 at 43; Constitution of the International Labor Organization, 29 Official Bulletin 203 (1946), Art. 36. Under the new amendment procedure of the I.L.O. the proportion of Members required for ratification has been reduced from three-fourths to two-thirds, although this proportion must include five of the eight states of chief industrial importance. The twenty-seventh session of the Conference in November 1945 adopted the Constitution of the I.L.O. Instrument of Amendment 1045, altering, inter alia, the amendment procedure of Article 36; it came into force in accordance with its terms on Sept. 26, 1946, thirty-nine Members having ratified it. Withdrawal from the Organization is now legally provided for the first time in Article 1 (5).


Although the World Health Organization was the first international body created on the instigation of the United Nation's Economic and Social Council and therefore not an agency which can be deemed a product of any one state, the United States was apparently responsible for the development of the concept of “contracting out,” prompted by the need of “a mechanism in the international field which would permit rapid general application of new scientific techniques in the international control of the spread of disease.” The Senate Foreign Relations Committee is credited with suggesting that some method be found to accomplish the above result without “requiring that Committee to consider highly specialized technical matters.” The procedural mechanism incorporated in the constitution of the Organization is designed to avoid constitutional obstacles in United States' participation since modification of existing domestic regulations will permit cooperation in most instances and may be effected by the executive branch of the government alone. This government is further protected, if substantial changes are involved, by the provision for rejection or reservation.

In the World Health Conference this provision encountered opposition; it was promptly branded as an infringement of sovereignty although a special legal committee found no validity in that argument. It was pointed out that each State participates in the Assembly and therefore is a party to the legislative process by which the regulations will be developed, although a majority is empowered to overrule the wishes of a minority. The 1933 Sanitary Convention noted above was cited as precedent for the arrangement; there was divided opinion as to whether the International Aviation Convention provisions regarding standards could be so considered.

The “contracting out” device differs from the procedure relating to amendment of international standards in the Chicago Convention for the Health Assembly's vote alone is necessary for the adoption of rules, although the effective date is temporarily postponed. Subsequent collective State approval is not required for placing the regulations in effect for a majority of States. As in the Chicago Convention, however, each member may exempt itself from compliance by notice given in a specified time. The Health Organization's legislative procedure is

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79 Ibid.
80 Id. at 18.
81 "Contracting out" of legal obligations in contrast to "contracting in" is a device more frequently resorted to in this era of international organization. Article 10 of the Articles of Agreement of the Bank provides that where approval of any Member is required for the act of the Bank, it will be deemed to be given unless the Member objects in reasonable time after notice. See P. J. Baker, The Codification of International Law, 5 Brit. Y.B. Int. L. 63 (1924), where it was suggested that an improvement in the machinery of the general law-making convention could be produced by the insertion in the convention of the "provision that ratification of every signatory power would be assumed, unless within a certain fixed period" it indicated intent not to ratify. See also Proposal 28, The International Law of the Future, A. B. A. (1944).
shortened by the omission of one step embodied in the Chicago Convention, the second step in the adoption of standards, calling for approval of Council action by states before the regulation assumes the character of law. Moreover, the organs in which this rule-making power resides in each of the agencies differ somewhat in character, for the Council is the repository of this authority under the Chicago Convention and its membership, as previously indicated, is confined to twenty-one states selected on an interest basis. In contrast, the plenary body assumes this legislative function in the Health Organization thus substantiating the argument that no infringement of sovereignty occurs since each state participates in the legislative process.

With the exception of the two primary political organizations of this century, the League and the United Nations, the plenary bodies of international agencies have usually exercised any powers of a legislative nature entrusted to the institution. The protection or recognition of states of major importance in aviation, as suggested by the provisions determining Council membership, in addition to the increased efficiency which may be anticipated in a smaller group operating in almost continuous session, may be advanced as justification for endowing the Council rather than the Assembly with rule-making power. It may be questioned, however, whether these persuasive factors are not balanced to some degree by the disadvantages and delays arising from the procedural step calling for state referendum on Annexes after Council action. This referendum might be eliminated if standards were approved by the Assembly, states being sufficiently protected by the provisions for non-compliance.

**Revisions of Article 94 Proposed by ICAO**

While little dissatisfaction has been evidenced by member States with the Convention provisions on adoption of standards, the procedure for amendment of the Convention proper, provided in Article 94, has been subjected to continuous study with a view to revision. The United States apparently initiated this movement during the Provisional Organization's life. The principal change originally advocated contemplated a distinction found in many recent conventions, between amendments involving new obligations for states and those which do not; the former would require ratification to be effective and the latter would be valid when adopted by a two-thirds vote of the Assembly after a determination by a similar vote of that body that no new obligations were involved. The Convention was also to be altered to permit a two year suspension period prior to the automatic termination of Convention commitments as the penalty for failure to ratify amendments deemed to require uniform adoption.

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83 ICAO, Text of a Proposed Amendment to Article 94 of the Chicago Convention, ICAO Doc. No. 4039, A1-CP/12 at 29.
Subsequent committee discussions revolved around two other suggested changes of a subsidiary nature; that a state differing with the Assembly's decision regarding the effect of the amendment on its existing obligations should be accorded "something in the nature of an appeal" to the International Court of Justice, and that the amendments depriving a state of existing rights, as well as those imposing new obligations, would be effective only if ratified also. Objections were raised in these discussions to the constitutional difficulties encountered by some states in accepting amendments imposed without ratification, presumably even such amendments not altering the rights or obligations of a state. The United States, which on other occasions has advocated this procedure in regard to amendments not altering the obligations of a state, questioned the acceptability, unless provision for appeal to the International Court was included.

The British delegation suggested a different approach by advocating that all amendments should be subject to ratification by two-thirds of the contracting States, but that the action of this qualified majority should bind all parties. This procedure has been adopted in the United Nations Charter, and in the constitutions of the World Health Organization and the International Labor Organization. Disconsenting States would have the choice then of renouncing the Convention or accepting the authorized change.

The first two Assemblies of the Organization held in 1947 and 1948 deferred action on the revision of the amendment procedure but further study of Article 94 continued. The Legal Committee at its Third Session in the Fall of 1948 was charged with the preparation of two alternative draft articles for consideration by the Organization. Both texts prepared by the Committee provide elaborately detailed procedures, one text including nine subsections and the other eleven. The first text incorporates the following principles: (1) amendments initially will fall into two groups, those imposing new obligations or depriving a state of existing rights and those which do not; the former would require ratification by a qualified majority for validity and then bind only ratifying states; the latter would come into force for all contracting States after Assembly approval unless objected to within 60 days; objection would call for an appeal to the International Court of Justice for an advisory opinion which would be accepted as conclusive determination of the effect of the amendment; (2) amendments of the first type would be further subdivided by a decision of the Assembly into two categories, those which are of such an essential nature in relation to the Convention as to require acceptance by all

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84 ICAO, Report Submitted to the Legal Committee by the Subcommittee on the Amendment to Article 94 of the Chicago Convention, ICAO Doc. No. 5089, LC/80, 19/1/48.
86 Ibid.
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States and those which are not; in the former case failure to ratify would be considered as "constructive denunciation" of the Convention while in the latter case such failure would invoke no penalty.

The second text follows the British proposal: after Assembly approval of an amendment, a period of six months would be provided for dissents by contracting States; at the termination of this period, the Assembly must again consider and approve the amendment before opening it to ratification; ratification by at least two-thirds of the states would be required to bring an amendment into force; amendments receiving the requisite number of ratifications enter into force for ratifying parties only, but failure to ratify within twelve months of the effective date of an amendment is interpreted as denunciation of the Convention, effective a year later.87

The Legal Committee's discussion of the above texts and its final report evinced little enthusiasm for either revision.88 The first text was deemed legally unacceptable unless the provision for amending the Convention without state ratification was deleted. The removal of that provision would leave the suggested text with little to recommend it over the present Convention article. In support of its position, the Committee pointed out that it was contrary to the constitutional law of most states to recognize the validity of amendments which they had not ratified. No reference was made to the several international conventions which provide for amendment by this procedure.

The Committee also noted that appeal to the International Court for an advisory opinion as to the effect of an amendment on prior rights and obligations of states would place the Court in a difficult situation if called upon to overrule the conclusions of a sovereign state. In the discussion it was asserted that an advisory opinion would "obligate neither the State nor the Organization requesting it. The appeal procedure here involved is novel but there would appear to be no legal objection to states and organizations committing themselves in advance to give binding effect to an advisory opinion and two recent conventions have so provided.89 Moreover, it has been pointed out that the "law of treaties and the interpretation of treaties is by far the largest subject

88 Id., Annex C; Minutes of 8th, 9th and 10th Meetings of the Legal Committee, Third Session, Lisbon, Sept. 29 and 30, 1948; LC/ Working Draft, Nos. 28, 29, 30 respectively.
89 See for example General Convention on the Privileges and Immunities of the United Nations (U.N. Doc. No. A/43, Feb. 9, 1946), which provides that the advisory opinion of the Court shall be accepted as binding on the parties. Article 37(2) of the present I.L.O. constitution authorizes the Governing Body of the Organization to provide for the appointment of a tribunal for the expeditious settlement of disputes relating to Convention interpretation and further states that "any applicable judgment or advisory opinion of the International Court of Justice shall be binding" upon such a tribunal. (Emphasis supplied.) The Havana Charter for an International Trade Organization provides for reference to the International Court for advisory opinion in any discussion or request of a State Charter, C. XIII, Art. 96 and Annex N, supra note 76.
in the Court's jurisdiction.” The Committee considered the second text suggested by the British delegation which offered a choice between ratification and constructive denunciation in all amendments less flexible than the present procedure, which leaves this decision to the Assembly to be determined as each case arises.

The Committee concluded that the result to be achieved by either revision would not justify the effort or risks involved, for the amendment of Article 93 itself, under the present procedure, might lead to reduction of contracting parties or inconsistent obligations. It suggested as preferable the determination of the conditions under which the present Article 94 should be applied, the submission of these conditions to member States, and the application of the automatic denunciation procedure only when really essential.

**Suggested Changes in Article 94**

The procedures for amending multipartite treaties of the last century tend to fall roughly into three general patterns. Carrying over the principles accepted in earlier bargaining treaties to law-making agreements, changes in convention commitments of *any* of the parties could be achieved only by the unanimous agreement of *all* of the parties. This oldest and obviously restrictive technique accorded to each state what has been termed “the liberum veto” whereby the action of one dissenting state could block all revisions. The inflexibility of this procedure inevitably led to its gradual abandonment and the development of two alternative approaches. Perhaps the most common amendment pattern today permits the alteration of treaty obligations on ratification by a qualified majority of participating states, with such alterations obligatory only for ratifying or consenting states. A third procedure, probably less widely accepted because of its theoretical impact on the independence of states, establishes machinery for effecting revision of the convention by less than a unanimous agreement of the parties, with such revisions assuming obligatory force for all of the parties. Under this last procedure, recognition is often accorded to the doctrine that a state’s rights and obligations may not be altered without its contemporaneous consent by inserting in the convention withdrawal or renunciation provisions available to a dissenting state. The constitutions of organizations born subsequent to World War II have frequently resorted to a combination of these various patterns in recognition of the differing substantive character of changes which may be necessitated.

The Legal Committee’s conclusions regarding revision of Article 94 succinctly pose the basic difficulty inherent in the last two amendment techniques—the maintenance of uniform international air law enacted in the Convention among all contracting States, without sacri-

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facing the equally if not more important objective of universal adherence to the Convention throughout the world community. The incompatibility which may exist between the two goals of uniform application and universal participation springs from the reluctance of states, as previously noted, to confer upon international institutions power to impose subsequent obligations without their contemporaneous consent. The institutional defects which result from this reluctance has been deemed to reflect realistically the fundamental character of the international community today, founded on the sovereignty or independence of its component parts.

While it is an accepted legal tenet that no state may be forced to enter into an agreement to which it has not consented, it is questionable whether this principle can be advanced to support the thesis that a state may not voluntarily enter into an agreement to be bound in the future by obligations legislated by a majority of the states. While the necessity of initial consent to a treaty conferring such law-making power on an institution is admitted, no violation of state sovereignty occurs because of the "continuing effect of the original agreement which is an integral element in the authority of each subsequent decision."91 Whatever genuine legal limitations may exist in the national constitutional law of some states, the doctrine of sovereignty alone cannot be logically advanced as a legal obstacle to international legislation by this method.92

The formation of such an original agreement committing states to accept subsequent changes to which they do not contemporaneously consent has occurred in the past more frequently in fields of international activity which do not directly affect the more vital political or economic interests of states. However, the two principal political associations of the twentieth century, the League and the United Nations, adopted this procedure. This amendment technique has been made palatable to the great powers in most instances by according to them special prerogatives such as a veto right or a greater number of votes. It is apparent also that states have resorted to this procedure in fields of activity in which a substantial community of interest exists among them and the need for interstate cooperation is sufficiently obvious to make withdrawal or renunciation a theoretical rather than a practical alternative. When such need exists and desire for coopera-

91 P. B. POTTER, INTERNATIONAL ORGANIZATIONS 191 (5th ed. 1948).
92 It has been frequently pointed out that voting procedures correlate directly with practical matters of control and management rather than any dictating theory. W. Koo, JR., VOTING PROCEDURES IN INTERNATIONAL ORGANIZATIONS (1947); N. L. Hill, UNANIMOUS CONSENT IN INTERNATIONAL ORGANIZATION 22 Am. J. Int. L. 320 (1928). C. C. Hyde, 2 Int'l Law 1383 (2d rev. ed. 1947): "An independent State possesses the capacity to enter into international agreements that cover a vast field of action pertaining to objectives that are of infinite variety. Such a State may, however, formally resolve through the medium of a constitution not to avail itself of the full measure of its capacity to contract and so strive to prevent itself from agreeing to accept classes of undesired undertakings."
tion becomes strongly manifest, reduction in membership will not present a serious threat to the convention.93

Assuming the resolution of the primary problem in acceptance of amendments supported by a majority, namely the initial consent of states to such a treaty provision,94 there would seem to be an inherent advantage in endowing international organizations such as ICAO with legislative power of this character. Law-making by a majority in national deliberative bodies has generally been recognized as the most effective means for harmonizing government with the mutable needs of society. Moreover, it has been pointed out that failure to consent to many convention amendments frequently does not imply objection to the bargain as often as it suggests negligence or disinterest. Provisions permitting a majority of the contracting parties to effect changes not obligatory on the minority offers no adequate substitute, for such changes under modern world conditions may be relatively pointless unless universally applied.

The present amendment procedure of the Chicago convention places a double burden on the Assembly by requiring determination not only of the merits of the contemplated change but further assessment as to whether it should be considered as sufficiently important to require uniform application, with the continuous threat of reducing state participation. This aspect of the present article may inevitably lead to a reluctance to foster any major change, however desirable, or the dissolution of the Convention into several subsidiary agreements. In contrast, a procedure for changing the rights and obligations of all by approval of a qualified majority affords a clearer opportunity for weighing the amendment on its merits.

It may be suggested also that reference to constructive denunciation arising from failure to ratify an amendment could be advantageously deleted from the amendment article. The right to reject new rules of law is secured to states through the general denunciation provisions of Article 95 of the Convention. The requirement that a state must resort to the positive and relatively drastic act of renouncing the entire Convention to avoid a comparatively small change in its obligations and rights may serve as a deterrent to loss of membership in most cases. Moreover, the burden of terminating Convention commitments then rests with the dissenting state rather than with the Organization.

Special consideration might have to be accorded larger powers before such a change would receive substantial support. The Interna-

93 The experiences of the Universal Postal Union would seem to substantiate this conclusion. Although 18 states withdrew from the League between 1920 and 1942, none of these was a result of the application of the amendment procedure of Article 26 of the Covenant.

94 The desire of states to maintain as wide a control over future situations as circumstances will permit leads to a basic reluctance to commit themselves to future obligations which might be carried by a majority to which they would be bound to submit. Hill, supra note 92.
tional Labor Organization's amended Constitution, which calls for ratification of amendments by five of the eight major powers as well as a majority of the membership, seems to offer a more equitable approach in this regard than according a veto power to particular states. Although it is apparent that international law is dependent for its ultimate effectiveness on the will of states, the advantages of machinery sufficiently progressive to permit uniform changes of a vital character in a dynamic field such as international aviation should not be underestimated.

**CONSTITUTIONAL DIFFICULTIES IN AMENDING ARTICLE 94**

The second World War thrust the mantle of international leadership upon the United States and its primary position is nowhere more evident than in the realm of aviation. This new responsibility would seem to involve serious consideration of all efforts leading toward more effective inter-state organization and it has been suggested herein that the amendment of Article 94 of the Chicago Convention may be one means of realizing this objective. It is vigorously contended, however, that constitutional limitations of many states, especially the United States, prohibit the endowment of international institutions with power to amend the basic agreement without the contemporaneous consent of all participating states. Pre-war surveys of national constitutions reveal that in many the treaty-making function of the state is dispersed between the executive and legislative branches of the government. The rise of representative government has led to a democratization of the treaty-making procedure by requiring that international engagements may be entered into only with legislative approval. Such a procedural requirement, however, does not necessarily indicate that the municipal agency by which a treaty is ratified may not consent in the agreement to forego its right to pass on subsequent changes in the instrument, or, in essence, delegate its authority to the organization membership acting as a majority. The extensive participation of modern states in certain treaties herein discussed, which provide for amendment by agreement of less than the total membership, would indicate that no serious constitutional obstacle exists in the national law of most states.

The Constitution of the United States has often been construed to restrict this nation from negotiating any treaty which binds it to accept in advance additional obligations which it does not subsequently approve — approval including Senate authorization. Article II, Section 2 of the Constitution suggests the basis of this position, for it accords to the Senate authority to advise and consent to treaties negotiated by the President as a prerequisite to their conclusion. The crux of the argument is that the Constitution invalidates any conferral of treaty-

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95 RALPH ARNOLD, TREATY-MAKING PROCEDURE (1933); S. B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT (1904).
making authority on an agency which under the Constitution devolves upon the Senate.\textsuperscript{86}

Although the Constitution fails to specify any other means of concluding international engagements by the federal government,\textsuperscript{87} a parallel practice has been pursued by the executive, since the advent of the Constitution, of entering into agreements with or without the approbation of the entire Congress.\textsuperscript{88} An examination of post-war agencies referred to herein reveals that in all but two cases United States participation was not effected by the treaty-making process:

<table>
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<tr>
<th>Organization and Date of Instrument</th>
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<th>Legislative Action\textsuperscript{90}</th>
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<td>2. FAO, August 1, 1944</td>
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<td>3. ICAO, Dec. 7, 1944</td>
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<td>5. IMF and IBRD (Monetary Fund &amp; Bank), Dec. 22, 1944</td>
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<td>7. ITO, Constitution approved by UNO, Dec. 15, 1946</td>
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<td>9. ITO, Mar. 24, 1948</td>
<td>Transmitted to the Congress as an Executive Agreement, April 28, 1949</td>
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The United States membership in the Universal Postal Union has always occurred through executive agreement "ratified and approved" by the Postmaster General and "approved" by the President under power

\textsuperscript{86} See for example Report of the Senate Committee on Foreign Relations on the General Arbitration Treaties of 1911, S.Ez. Rep. No. 1, Sixty-Second Congress, 1st Sess., 30 Senate Documents, No. 98 at 6 (1911).

\textsuperscript{87} Article I, Section 10, refers indirectly to international engagements other than treaties: "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State or with a foreign Power . . . ."

\textsuperscript{88} See WALLACE MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941).

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The same law provides the basis for participation in the Postal Union for the Americas and Spain. The United States joined the ILO in 1934 after Congress, by joint resolution, authorized the President to accept membership, and this action was reaffirmed in 1947 by joint resolution approving its revised constitution.

In a majority of the joint resolutions of Congress providing for United States participation, a section has been carefully inserted to provide that the President or any agent of the United States shall not accept any amendments to the constitution on behalf of the United States which impose new obligations for this country "unless Congress by law authorizes such action." Such a provision appears in the resolutions providing for membership in the International Bank, the Monetary Fund, FAO and UNESCO. The UNRRA appropriation, which followed signature and participation by Presidential act alone, included notice to contracting parties that "no amendment under Article VIII (a) . . . involving new obligations for the United States" would be binding without approval by joint resolution of Congress. Section VIII (a), embraced amendments involving new obligations for members which were effective for each member only on acceptance by it. Sections (b), and (c) of the same article covered amendments not adding to states' obligations and were obligatory for all participants on adoption by a qualified majority vote of the plenary body in most instances. It is significant that UNESCO, FAO, IRO, the International Bank and Monetary Fund all permit amendment of their Constitutions by majority approval in matters not imposing additional burdens on states and that, as in the case of the UNRRA authorization, no reference is made in the respective joint resolutions to this aspect of the amendment procedures. The Congressional restraint on executive action appearing in these resolutions raises the question as to what agency of the state may be authorized to effect changes in the terms of agreements and suggests that Congress has by practice taken unto itself a fundamental role in effecting such agreements, which it is reluctant to abandon. These expressions of legislative restraint obviously do not constitute reservations to the agreements, for the Conventions specify that state approval of amendments is a prerequisite to the imposition of obligations in such cases. However, the omission of any

100 25 Statutes 654 (1889). Original participation of the United States in the Universal Postal Union was authorized by Act of 1872, 17 Stat. 283; Section 167 read: "that for the purpose of making better postal arrangements with foreign countries . . . the Post-Master, by and with the advice of the President, may negotiate and conclude postal treaties and conventions. . . ."

101 49 Stat. 1182 (1934); also U.S. Treaty Series, No. 874 (1934).


103 Since the Constitution does not provide directly for Congressional participation in effecting international agreements, it may be argued that the legislature in such cases has no power to delegate. The basis for Congressional action has been deemed an extra-constitutional usage, sanctioned by the courts on many occasions. See Field v. Clark, 143 U.S. 649 (1892); The Brig Aurora, 11 U.S. (7 Cranch) 382 (1913).
reference to the sections of the above Constitutions providing for obligatory changes in the instruments authorized by the majority, if such changes do not alter state obligations, would imply that Congress has acquiesced to subsequent amendments of a minor nature without requiring its contemporaneous consent.

United States participation in some post-war agencies merits further consideration, for the constitutions of some of these institutions call for the passage of all amendments by less than unanimous ratification or approval. The United Nations Charter is not relevant to the problem of delegation of treaty-making functions, for the United States is obviously protected by the veto from accepting subsequent changes of which it does not approve. Since the veto is reserved to the permanent members of the Security Council only, it seems apparent that many states consider the legislative role in writing a treaty a delegatable one. The 1934 Congressional resolution authorizing membership in the International Labor Organization does not refer to the amendment provisions of that Constitution.104 The joint resolution authorizing membership in the World Health Organization, which also provides for obligatory amendments effected by the majority, suggests that withdrawal provisions may be deemed adequate protection against the imposition of additional obligations which the United States does not support. The resolution notes the absence of a withdrawal article in the WHO Constitution and reserves to the United States the right to take such action after notice. No reference to the amendment procedure appears in the law.

The executive agreement accompanied by Congressional action has become by custom and usage a recognized channel for conducting foreign relations, approximating in national law the stature of a treaty.105 Some of the above agreements would prompt the conclusion that Congress considers its legislative role in some instances as subject to delegation to an external agency such as an inter-state institution. Moreover, the Supreme Court in the Curtis-Wright decision indicated that it would hesitate to condemn such a practice:

"... it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power."

In contrast to the method by which the United States has participated in other specialized agencies of recent creation, the Chicago Con-

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104 The joint resolution of 1934 carefully specified that no obligations under the Covenant of the League were assumed by the United States accepting membership in the ILO. It further stated that "special provision has been made in the constitution ... by which membership of the United States would not impose or be deemed to impose any obligation ... upon the United States to accept the proposals of that body as involving anything more than recommendations for its consideration." This statement apparently refers only to the status of conventions prepared by the Organization and submitted to states for voluntary action.


CONSENT IN AMENDING CHICAGO CONVENTION

The convention was submitted to the Senate as a treaty and approved by that body. Unlike most of the conventions, it includes not only international constitution but the basic principles of international air law. Its amendment procedure may therefore pose a slightly more difficult problem under the constitutional doctrine of the United States. It would seem questionable, however, that the problem of delegating the treaty-making function of the Senate differs basically in theory from that presented by Congress delegating its role in the making of executive agreements. Recent decisions of the Supreme Court evidence a tendency to regard the choice of the methods or the agency by which foreign relations are conducted as involving political issues to be determined by the legislative and executive departments rather than the courts. The ultimate responsibility for determining what treaty powers may be conferred on an international body may thus rest with the Senate and the executive. The reluctance of the Senate to enter into international engagements providing for amendment according to majority will perhaps present the most serious obstacle to United States' approval. The Inter-American Treaty of Reciprocal Assistance, ratified by the United States in December 1947, manifests a recognition of the desirability of vesting substantial power in international institutions. The treaty calls for the application of political and economic sanctions against an aggressor if two-thirds of the Contracting Parties agree to such measures. The constitutionality and expediency of a treaty commitment are frequently confused. If the utility of flexible procedures for change are sufficiently apparent, it seems doubtful that constitutional difficulties prohibit their authorization.

107 Field v. Clark, 143 U.S. 649 (1892).
109 18 Dep't. State Bull., 60.