

indicated that with the creation of more seats on the Council for elected members, a significant number of which would be from the South,

an effective ‘group veto’ might be created for the developing world—without placing that veto into the hands of any single state. By greatly enhancing the strength and importance of the new non-permanent members, raising the threshold for Council action is seen by some as a key element of a new framework balancing the possible addition of [new] permanent members with the imperative of making the Council more representative by strengthening the voice of the developing world.⁴⁹

In this connection, again the colloquial use of the term ‘veto’ should not be taken to imply ‘weighted voting’.

It should be emphasized that not all cases of insufficient votes indicate prior coordination between some Council members to defeat a draft resolution. When a number of delegations fail to vote affirmatively, this most often occurs simply because national positions happen to coincide.

3. PROCEDURAL MATTERS AND THE ‘DOUBLE VETO’

.....

As mentioned earlier, paragraphs 2 and 3 of Article 27 make a distinction between voting in the Security Council on ‘procedural matters’ and on ‘all other matters’—that is, substantive matters. The distinction is an important one, since decisions on substantive matters can be blocked by the negative vote of a permanent member, whereas decisions on procedural matters cannot. The San Francisco Statement set out a number of matters to be considered *procedural*.⁵⁰ Agreement on this list had not been easily reached among the major powers. In particular, consensus on excluding from the scope of the veto a decision merely whether or not to consider and discuss a dispute or situation was reached only after the matter had been taken up in Moscow with Soviet Premier Josef Stalin personally.

The permanent members subsequently differed among themselves as to the import of the San Francisco Statement. The position of the Soviet Union was that the Statement was binding on all five permanent members, and that, given the standing in the new Organization of those major powers, a declaration agreed between them should be observed by the Security Council as a whole.⁵¹ During the Council’s early years, the representatives of France, the United Kingdom, and the United States sometimes based arguments as to whether a matter was procedural or substantive on provisions of the San Francisco Statement,⁵² but their positions were more nuanced than that of the Soviet Union. This was especially the case after the Soviet Union repeatedly invoked the San Francisco Statement when it blocked decisions which otherwise would have been agreed by the Security Council. Thus, at a meeting held on 21 May

1948, the representative of the United States contended that the San Francisco Statement 'was a statement of general attitude' and 'did not purport to be an agreement, much less an agreement binding in perpetuity'.⁵³

Non-permanent members of the Security Council, including Argentina, Australia, Belgium, Canada, Colombia, the Netherlands, and Poland, at various times expressed the view that the San Francisco Statement, in the words of the Australian representative, 'has no binding force on this Council'.⁵⁴ That same representative asserted that the Statement

was not accepted by any authority at San Francisco, not accepted by any committee, not accepted by any commission, and not accepted by the Conference in open session, and protests against its accuracy were made.⁵⁵

The representative of Canada invoked Article 103 of the UN Charter in challenging the validity of the San Francisco Statement:

If the Four-Power Declaration is regarded by the permanent members as in some sense constituting an international agreement, then surely the obligations, under the Charter, of the permanent members of the Security Council shall, as stated in Article 103, prevail over any obligations assumed under the Four-Power Declaration or 'any other international agreement'.⁵⁶

The representative of Poland said that the San Francisco Statement was not necessary because of the 'very clear statement' provided by Article 27 of the Charter. From that Article, he came to the same conclusion as the San Francisco Statement: that 'whether the matter is procedural or not is *not* a procedural matter' (our italics). Consequently, in his view, Article 27(3) applied to such questions without there being any 'need to invoke in any way, or even discuss the agreement among the five permanent members'.⁵⁷

Given this range of positions, the Security Council needed to consider a number of cases before general agreement was reached as to what types of matters would be considered *procedural*, and what types of matters would be considered *substantive*. That the distinction between the two types of matters initially created difficulties in the Security Council was suggested by the fact that some three years after the Council had begun to meet, on 14 April 1949, the General Assembly adopted resolution 267 (III) bearing the title, 'The problem of voting in the Security Council'. The distinction between *procedural* and *substantive* matters was only one aspect of the problem of voting in the Council referred to by the resolution, but it had already become clear that making the distinction was proving divisive. Accordingly, resolution 267 (III) included an annex listing matters which the Assembly recommended that the Council deem to be procedural.⁵⁸

The fact that in the Assembly the Soviet Union voted against resolution 267 (III) may be one reason why, although the Security Council subsequently considered the Assembly's recommendations, it took no action in this regard. Rather, on a case-by-case basis,

the following matters eventually came to be considered as procedural, as recorded in the *Repertoire of the Practice of the Security Council*.⁵⁹

- Inclusion of items in the agenda
- Order of items on the agenda
- Deferment of consideration of items on the agenda
- Removal of an item from the list of matters of which the Council is seized
- Rulings of the President
- Suspension of a meeting
- Adjournment of a meeting⁶⁰
- Invitations to participate
- Conduct of business
- Convocation of an emergency special session of the General Assembly

This list of matters is not identical to the one contained in the San Francisco Statement, nor does it replicate the list annexed to the Assembly's resolution 267 (III). At an early meeting of the Council, the Soviet representative asked rhetorically, 'What is procedure?' He then provided his own definition: 'Procedure is the order of discussion, the manner of taking decisions. In short, procedure is order, means, method.'⁶¹

Central to the development of the Council's practice with respect to distinguishing between *procedural* and *substantive* matters has been the question of the so-called 'double veto'. The 'double veto' refers to the situation which can arise when it is not clear whether or not a proposal should be considered *substantive*—that is, as susceptible to being blocked by a veto. Should it become necessary for the Council to vote to determine whether the matter is *procedural* or *substantive*, that vote itself would be subject to a veto. It is in this way that a 'double veto' can arise in the consideration of a single proposal.

The question of whether a matter was procedural or substantive was called the 'preliminary question' in the San Francisco Statement, which declared that

the decision regarding the preliminary question as to whether or not . . . a matter is procedural must be taken by a vote of seven [now nine] members of the Security Council, including the concurring votes of the permanent members.

The San Francisco Statement, basing itself on what would become Articles 28 to 32 of the Charter, maintained that certain decisions were clearly procedural, so the 'preliminary question' would not apply in such cases. In addition, the Statement indicated that no member would be able to prevent the Council from considering and discussing a dispute or situation brought to the Council's attention under what is now Article 35 of the Charter; that parties to a dispute could not be prevented by a veto from being heard by the Council; and that the veto could not be used to prevent 'any member of the Council from reminding UN Members of their general obligations assumed under the Charter as regards peaceful settlement of international disputes'. Rather,

the San Francisco Statement affirmed that the 'preliminary question' might arise with respect to

decisions and actions by the Security Council [which] may well have major political consequences and may even initiate a chain of events which might, in the end, require the Council under its responsibilities to invoke measures of enforcement under [Chapter VII]. This chain of events begins when the Council decides to make an investigation, or determines that the time has come to call upon States to settle their differences, or makes recommendations to the parties.⁶²

The emphasis in the San Francisco Statement on the 'chain of events' theory was partly in response to the Australian initiative described in Section 1, which sought to limit the veto to substantive decisions taken under Chapter VII.

The elasticity of the 'chain of events' theory made it difficult for even the permanent members to apply it in a systematic way to the early cases which came before the Security Council. It seemed that as a matter approached the theoretical frontier between procedure and substance, predicting the future course of events became highly subjective. This was particularly true with respect to the establishment of subsidiary organs, as will be discussed in Section 4. Handling the 'preliminary question' sometimes placed the rotating Council President in a difficult position. If the President considered a proposal to be procedural and proceeded on that basis, and was then challenged, he had two options. The President would have to decide either that the matter should be resolved by taking a vote on the 'preliminary question', which according to the San Francisco Statement would be subject to veto, or the President could put his course of action to a vote as a procedural matter, in which case the veto would not apply. If the Council President became aware in advance that there could be differences of opinion as to whether the main question was procedural or substantive, he was also faced with a second problem, that of sequencing. The President could first settle the 'preliminary question', so as to know subsequently how to interpret a negative vote by a permanent member, should there be one, on the main question. Or, the President could first hold the vote on the main question—in which case there would be a need to decide the 'preliminary question' only if a negative vote was cast by a permanent member, and only if the President's conclusion as to the result of the vote was challenged.

The question of the 'double veto' arose a number of times in the early years of the Security Council, and the proceedings were often confused and inconclusive. As the representative of the Netherlands said in the first case, if the Soviet Union exercised its veto in a vote on the 'preliminary question' following the vote on the main question, 'we come to the extraordinary position that a vast majority of the Council says this is a matter of procedure, but it is not a matter of procedure, because one member votes against it'.⁶³

Nevertheless, from the following eight cases it is possible to deduce a number of principles.

Case 1: The Spanish question, 1946

In June 1946, Australia and the United Kingdom proposed that, without prejudice to the rights of the General Assembly, the Security Council should keep the Spanish question under continuous review and maintain it on the list of matters of which the Council is seized. This proposal was put to a vote and received nine votes in favour, with the Soviet Union and Poland voting against. The President (Mexico) then declared that the resolution had been carried, because he 'thought it was a matter of procedure'. The representative of the Soviet Union disputed the President's conclusion and said that if any member of the Council disagreed with the Soviet interpretation, he would ask for a vote on the 'preliminary question'. The President stated that the observations of the Soviet representative 'would have been timely before we voted but he did not raise the question of substance until after the motion had been voted and accepted'. In response, the Soviet representative countered that the scenario described by the President 'does not alter the situation, because no statement to the contrary was made either'. The President then put to a vote his ruling that the question had been procedural. Eight members voted that the proposal of Australia and the United Kingdom had indeed been procedural, while France and the Soviet Union voted in the negative, and Poland abstained. The President then declared that the proposal was one of substance and had been defeated.⁶⁴ Thus there had been a 'double veto'.

Case 2: Membership, 1946

The United States proposed postponing the vote on the applications of Albania and Mongolia for UN membership. The President (Poland) ruled that the United States proposal was procedural, but after some dissent was expressed he announced that he would put the question to the vote. What was voted on, however, was not the President's ruling, but the 'preliminary question': 'I would like all those who believe that it is a matter of procedure to raise their hands.' The result was that the United States and four elected members voted in favour. Nationalist China, France, the Soviet Union, and the United Kingdom voted against, and two elected members abstained. The President interpreted the result of the vote in the following terms:

The question which the Council was asked was whether it supports my ruling that this is a matter of procedure. There were five votes in favour, and four against. These four against are all permanent members. Under that condition, it seems clear that my ruling has not been supported . . . Consequently, I regret the ruling has not been adopted by the Council, and we shall have to treat the resolution asking to postpone voting on Albania as a matter of substance.

This interpretation was questioned, so the President offered to 'formulate it in the form of a ruling and ask for challenges and a vote'. He then said that he interpreted the vote which had taken place as meaning that the United States proposal was 'not to be considered a matter of procedure'. The representative of the United States accepted this formulation, and the proposal to postpone consideration of Albania's application was put to the vote. The proposal was rejected, because the six affirmative votes it received fell short of the required seven votes. France, Poland, and the Soviet Union voted against, and there were two abstentions.⁶⁵ A 'double veto' was not considered to have occurred in this case because the proposal at issue failed owing to insufficient votes.

Case 3: Ukrainian complaint against Greece, 1946

The United States proposed the establishment of a commission, under Article 34 of the Charter, to investigate the facts, examine statements, and report to the Council on the Ukrainian complaint against Greece. The President (Soviet Union) ruled that the proposal related to the substance of the matter and was accordingly within the scope of the veto. This ruling was challenged by Australia and France, with the latter arguing that the proposal 'comes under the provision of Article 29 of the Charter'. The United States, however, agreed with the President. The representative of France intimated that he would not insist that a vote be taken on the question of whether or not the matter was procedural, after which the United States proposal was put to a vote and vetoed.⁶⁶

Case 4: Incidents in the Corfu Channel, 1947

Australia proposed that a subcommittee be appointed to examine all available evidence relating to the Corfu Channel case and to make a report on the facts as disclosed by this evidence. In this context, the representative of the United Kingdom raised two inter-related issues:

As a party to this dispute, I am deprived of my vote under Article 27, paragraph 3, of the Charter when it is a matter of decision under Chapter VI. I presume, though, that the vote which we are going to take is a purely procedural one and that I can exercise my vote.

The Council President (Belgium) ruled that the proposed study was not covered by Chapter VI:

Chapter VI does not mention decisions of the kind which we have now to take . . .
The sole function of the future subcommittee will be to facilitate the Council's work

by classifying information submitted to the Council; there is no question in this case of undertaking an investigation.

The representative of the Soviet Union disputed the President's view, and also contended that the President was not entitled to settle a question of this kind on his own authority. Nevertheless, the Soviet representative did not ask that the Council take a decision on the 'preliminary question', nor did he formally challenge the President's ruling. In the event, the United Kingdom voted in favour of the Australian proposal and the Soviet Union abstained.⁶⁷

Case 5: Greek frontier incidents, 1947

The United States proposed that the General Assembly be requested, pursuant to Article 12 of the Charter, to consider and make recommendations with regard to the incidents on the Greek frontier. When the Council President (Soviet Union) stated that he would hold the vote on this draft resolution on the basis of Article 27(3) of the Charter (that is, that the draft resolution was one of substance rather than procedure), the representative of the United States objected:

It seems to me that the resolution is clearly procedural. All the Council is asked to do here is to request another organ of the United Nations to consider and take action in a dispute which has been brought to the United Nations. There is no colour of substance to this resolution... In this resolution the Council is not attempting in any way to indicate a view with regard to the merits of the dispute.

After the rejection of proposals to adjourn the meeting and postpone voting, the representative of Belgium suggested that the Council should vote first on the main question. The President ruled, however, that the 'preliminary question' should be decided first. The ruling was challenged, put to the vote, and overruled. The United States draft resolution was then put to the vote and received nine affirmative votes, with Poland and the Soviet Union opposing. The President then declared that the United States draft resolution had been rejected. When this interpretation was challenged, the President put to the vote, not his ruling, but the motion that the United States draft resolution had been procedural. There were eight votes in favour, with the Soviet Union and Poland again voting against, and Syria abstaining. The President then declared that, because a permanent member of the Council had voted against the proposal that the United States draft resolution was one of procedure, that draft resolution had to be regarded as substantive, and therefore was not adopted. This interpretation was not challenged. Thus there had been a 'double veto'.⁶⁸

Case 6: Czechoslovak question, 1948

After the coup in Czechoslovakia in 1948, it was alleged that the political independence of that country had been violated by a Soviet threat to use force, and that the situation endangered international peace and security. The Soviet representative contended that the changes in Czechoslovakia had been effected by strictly constitutional means and that there were no grounds for any investigation by the United Nations. In this context, Argentina and Chile submitted a draft resolution which, 'without prejudice of any decisions which may be taken in accordance with Article 34 of the Charter', would appoint a subcommittee of three members to receive or to hear 'evidence, statements and testimonies and to report to the Security Council'. The Soviet representative asserted that the proposal was 'not of a procedural nature, but concerns the substance of the question', and he therefore proposed that a vote be taken on the 'preliminary question'. In response, the United States and other representatives argued that the proposal before the Council was clearly procedural, and that consequently no vote on the 'preliminary question' was necessary.

The President (France) then declared that a vote should be taken on the 'preliminary question', and that this should precede the vote on the main question. The Soviet Union and the Ukraine voted against treating the proposal of Argentina and Chile as procedural, France abstained, and the other eight members of the Council voted in favour. The President interpreted the vote as a decision to regard the main proposal as substantive, but this interpretation was challenged. The challenge was put to a vote by the President in the following terms: 'Will those who object to my interpretation raise their hands?' Six members voted to reject the President's interpretation; the Soviet Union and the Ukraine voted to uphold it; and France, the United Kingdom, and the United States abstained. Since the proposal to reject the President's interpretation failed to receive seven votes, the interpretation stood. The proposal of Argentina and Chile was then put to the vote and was vetoed by the Soviet Union.⁶⁹ Thus there had been a 'double veto'.

Case 7: Complaint of armed invasion of Taiwan, 1950

While the Council was considering the complaint of armed invasion of Taiwan, it was proposed that a representative of the People's Republic of China be invited to participate in the discussion. Nationalist China took the view that the proposal was substantive, but the President (United Kingdom) ruled that the Council should first hold a vote on the main question: 'after we have taken it, we can argue this question out as to whether the vote is valid or not'. A discussion then ensued over the applicability of the San Francisco Statement, with the representative of Nationalist China pointing out that already in previous cases some of the permanent members—notably France and the

Soviet Union—had deemed matters to be substantive which had been listed as procedural in that Statement. The United States representative then declared that

We consider the proposal now before us to be a procedural proposal. I shall vote in the negative, on that understanding. If, subsequently, the Council should hold that the motion is substantive rather than procedural and that, hence, my negative vote constituted a veto, I would reserve the right to change my negative vote to an abstention.

Two separate proposals to invite the People's Republic of China to participate were put to the vote, but both failed to secure the necessary seven votes. One of the proposals was resubmitted the following day and received seven votes in favour, three against (Nationalist China, Cuba, and the United States), and one abstention. The President declared that in his opinion the proposal had been adopted, but this was challenged by Nationalist China. After discussion extending over parts of two meetings, the President asked the Council to vote on whether or not the main question had been procedural. There were nine votes in favour, Nationalist China against, and one abstention (Cuba). The President then declared that the proposal had been adopted. Nationalist China protested against this and suggested that an advisory opinion of the International Court of Justice should be sought. The President regarded this as a challenge to his interpretation and asked the Council to vote on the challenge. When the challenge was put to the vote, however, the surprising result was that there were no votes in favour, none against, and no abstentions. The President regarded this as approving his interpretation, and the issue lapsed.⁷⁰

Case 8: The question of Laos, 1959

France, the United Kingdom, and the United States proposed that the Council appoint a subcommittee on the question of Laos, 'to examine the statements made before the Security Council . . . to receive further statements and documents and to conduct such inquiries as it may determine necessary'. When the Soviet Union contended that the proposal was substantive, the President (Italy) put the question to the vote. All members of the Council except the Soviet Union voted that the proposal was procedural. Following the vote, the President declared that the proposal was procedural. The Soviet representative protested this interpretation, but the main proposal was put to the vote and, despite a negative Soviet vote, was then declared by the President to have been adopted.⁷¹

On the basis of these eight cases, we believe that the following conclusions can be drawn. First, although the San Francisco Statement listed certain matters which were to be regarded as procedural, in the actual practice of the Security Council during its early years this list was not seen as determinative. Rather, defining which matters were procedural had to be done on a case-by-case basis. Second, the 'chain of events' rationale showed itself in the early cases to be highly subjective, and therefore not

decisive in determining whether a matter was procedural or substantive. Third, it is possible for the ‘preliminary question’ to be voted on before or after voting has taken place on the main proposal. In some cases, members have preferred to await the outcome of the vote on the main proposal before raising the ‘preliminary question’, since the vote and the President’s interpretation of the results might obviate the need to take up the ‘preliminary question’. In other cases, some Council members have insisted on first taking up the ‘preliminary question’ when it has seemed that the way members would vote might depend on whether the main question was regarded as a matter of procedure or of substance. Fourth, although some Presidents attempted to resolve the ‘preliminary question’ through a presidential ruling, a general consensus developed among the Council members that the ‘preliminary question’ was itself a substantive matter and therefore, if raised, should be decided by the Council as a whole through a vote.

Most instances relating to the ‘double veto’ arose with regard either to the establishment by the Security Council of a subsidiary organ or to the interaction between the Council and the General Assembly on a particular conflict situation. After practice in both of these areas became more established, the ‘double veto’ ceased to be an issue, and no cases have occurred since 1959.

In the Council’s contemporary practice, almost all procedural matters are decided without a vote. The agenda item under which a meeting will be convened is usually agreed informally as part of the advance planning for each meeting. Procedural votes are held on the agenda only when some Council members have objected to taking up the matter at issue. The two most recent cases of such votes were in relation to the situations in Zimbabwe in 2005⁷² and Myanmar in 2006.⁷³ After the issue of Palestinian participation was resolved in 1994, invitations to participate in a meeting have normally been agreed informally beforehand. Rare later votes on proposed invitations to participate occurred in 2000, during consideration of the situation in the Balkans.⁷⁴ During the course of a meeting, if a decision needs to be taken to suspend or adjourn, the Council members now usually leave that decision in the hands of the President. It was unusual in 1990, and again in 2003, that proposals to suspend and to adjourn, respectively, were voted on.⁷⁵

Even when a vote has not been necessary to resolve a procedural matter, the President announces each procedural decision during a meeting as such by banging the gavel and pronouncing some equivalent of the phrase, ‘It is so decided’.

4. VOTING ON THE ESTABLISHMENT OF SUBSIDIARY ORGANS

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As has just been seen in Section 3, several cases arose in the early years of the Security Council in connection with whether the establishment of a subsidiary organ with