

## CAN EU'S ENHANCED CO-OPERATION MECHANISM PROVIDE SOLUTIONS TO THE "SINGLE UNDERTAKING" PROBLEMS OF THE WTO?

**DRAGOȘ NEGRESCU\***  
**GILDA TRUICĂ\*\***

**Abstract.** *The "Single Undertaking" is a feature making the WTO unique among multilateral organizations. Introduced at the end of the Uruguay Round, it seemed to promise a much smoother functioning of the multilateral trading system. Subsequent developments have not entirely validated these expectations. The problems engendered are remarkably similar to those faced by the process of deepening integration within the European Union, hence the modalities devised in the latter for overcoming them may offer a very useful source of inspiration.*

### **I. LE MIEUX EST L'ENNEMI DU BIEN? SHORT ACCOUNT OF THE ADVENT AND THE ROAD TO DEMISE OF WTO'S SINGLE UNDERTAKING PRINCIPLE**

The multilateral layer of the world trading system has suffered crucial transformations as a result of the conclusion of the Uruguay Round of multilateral trade negotiations (1986-1994). Apart from putting an end to the provisional character of GATT and establishing a full-fledged international institution (the World Trade Organisation - WTO) to oversee the exchange of concessions and the formulation and implementation of international trade rules, other important novelties have also come to the fore:

- the "Single Undertaking" character of WTO obligations;
- the legalized and quasi-automatic system of dispute settlement; and
- the extension of international trade rules outside the strict realm of trade in goods.

The "Single Undertaking" designates the obligation of all WTO members to accept and apply all the agreements negotiated under the aegis of the organization, in other words to "accept all the WTO acquis".<sup>1</sup> This feature makes the WTO unique among multilateral organizations.<sup>2</sup>

The birth circumstances of this important innovation are not entirely clear. According to some authors, the EC was the main inspirer of this principle, which it insisted to have

\* **Dragoș Negrescu** holds a PhD in International Economic Relations and is a Senior Lecturer at the Academy of Economic Studies in Bucharest. He served as Under-Secretary of State for European Affairs in the Romanian Ministry for Foreign Affairs in 2000.

\*\* **Gilda Truică** is PhD candidate in History of International Relations and she works as a project coordinator within the European Institute of Romania. She is also Secretary-General of the Romanian ECSA since 2003.

<sup>1</sup> Peter Holmes: *The WTO and the EU: Some Constitutional Comparisons*, University of Sussex, Discussion Paper 78, December 2001; p.12.

<sup>2</sup> "The IMF, for example, does not require member countries to adopt a particular exchange rate system. Similarly, countries are allowed to sign human rights treaties and conventions separately and individually". Apud. Kamal Malhotra et al: *Reforms to the Global Governance of Trade*, in "Making Global Trade Work for People", UNDP, 2003; p.78.

included in the Ministerial Declaration launching the Uruguay Round mainly for tactical reasons, i.e. the protection of its agricultural interests by preserving recourse, if need be, to the threat of walking away from the whole negotiations should their evolution not meet its expectations.<sup>3</sup> This is especially ironic now, when the EU is the most articulate voice advocating the negotiation of some issues outside the Single Undertaking. However, while this principle was originally devised for the purpose of negotiations only (“nothing is agreed until everything is agreed”) and the modalities of its eventual emergence as a rule for the application of the results of these negotiations remain rather undocumented.

Of course, in retrospect, one can find several legitimate reasons for having introduced the Single Undertaking as a standing WTO feature. Succinctly put, these would consist of:

#### **a) Discouraging free riding**

The largest part of the results of the Tokyo Round of multilateral trade negotiations (1973-1979), consisting mainly of codes of conduct aiming at disciplining the use of non-tariff measures, was subject to an *à la carte* acceptance by GATT contracting parties. As a result, at the end of the 1980s, membership to the various codes varied between only 20-40% of total GATT membership. Apart from inducing a “balkanization of trading relations”,<sup>4</sup> the GATT had become, in

the words of Frieder Roessler, “a society of trading nations in which over two thirds enjoyed the benefits of obligations assumed by a minority of less than a third”.<sup>5</sup> Equity considerations, albeit not irrelevant, are not the main problem though. Even more serious was the deeply dissuasive effect that such a situation was bound to have on the advancement of world trade rules: a strong incentive was created for withholding one’s own adherence to new rules, safe in the belief that their eventual enactment will offer advantages without having necessitated any concessions in exchange. Conversely, parties interested in new disciplines were bound to shy away from taking on new obligations not reciprocated *in any way whatsoever* by a large majority of GATT’s membership.

#### **b) Facilitating trade negotiations by enlarging the area of issues, hence increasing the scope of potential trade-offs**

The idea behind this is that the Single Undertaking allows linking together issues that would otherwise seem unrelated, thus breaking the unduly restrictive condition that each sector of negotiations should be self-balancing. Widening the scope of negotiations allows escaping this straitjacket. In the words of Duchesne, “if two zero sum games are linked, it becomes possible to trade losses in one game for wins in the other”.<sup>6</sup> Since interests of participants in any specific area are bound to diverge, the

<sup>3</sup> Chandrakant Patel: *Single Undertaking: A Straitjacket or Variable Geometry?*, South Centre, T.R.A.D.E. Working Paper 15, May 2003, p.10.

<sup>4</sup> Raymond J. Waldmann: *Managed Trade. The New Competition Between Nations*, Ballinger Publishing Company, Cambridge, Massachusetts, 1986; p.180.

<sup>5</sup> Frieder Roessler: *The Agreement Establishing the World Trade Organization*, in *The Uruguay Round Results. A European Lawyers’ Perspective*, European Interuniversity Press, Brussels, 1995; p.69.

<sup>6</sup> Erick Duchesne: *Addressing Systemic Issues in the WTO: Lessons from the Singapore Issues*, Department of Foreign Affairs and International Trade of Canada, Trade Policy Research 2004; p.108.

possibility of cross-sectoral payoffs renders an overall agreement possible. The Uruguay Round was described, according to this logic, as a "grand bargain", whereby developing countries acquiesced to the introduction of new issues in the realm of the WTO (most importantly, trade-related intellectual property rights) in exchange for the phase-out of the network of bilateral quantitative restrictions applied by developed countries to their textile imports.

Another advantage of a comprehensive coverage may be inferred from the theory of "multimarket contact" pioneered by Bernheim and Whinston (1990), according to which repeated encounters between game actors increase the likelihood of their cooperation. In this logic, the more sectors there are where countries can interact, the likelier is a successful outcome of international trade negotiations.<sup>7</sup>

Finally, a valuable virtue of comprehensive negotiations pertains to political economy considerations. A broad coverage allows the enlisting of the domestic support of powerful pressure groups, who cannot derive the expected advantages in their own areas of interest unless all other issues in suspension are clarified. From this perspective, the conclusion of sectoral deals may weaken the capacity of negotiators to deliver in other areas. Thus, the conclusion, in the aftermath of the Uruguay Round, of separate side agreements concerning trade in financial services and the liberalization

of trade in IT products risks depriving US negotiators of the countervailing influence of financial lobbyists who, for instance, "might have pushed for a package that bundled financial services with reform of antidumping laws."<sup>8</sup>

### **c) Minimising transaction costs for WTO members**

Most of the Tokyo Round Codes used to have their own dispute settlement procedures, of different effectiveness and equipped with different rules. Some concepts with which these codes operated, however, were common. A significant risk had thus emerged that identical principles take on different meanings in different contexts, thus increasing the cost of conformation for precisely the most active players in the GATT system, i.e. the ones supposed, by definition, to reap the bulk of the benefits of the multilateral trading system, among which the reduction of information and transaction costs feature prominently. A precursor of what Jagdish Bhagwati will later call, in connection with the ascension of regionalism in international trade, the "spaghetti bowl" of criss-crossing rules, had thus taken shape in the aftermath of the first significant attempt to tackle the problem of non-tariff measures in international trade.<sup>9</sup>

### **d) Protecting the cornerstone principle of the multilateral trading system**

Article I of GATT is arguably the most important as it lays down the principle of *unconditional* award, among

<sup>7</sup> B.Douglas Bernheim, Michael D. Whinston: *Multimarket contact and collusive behavior*, RAND Journal of Economics, Vol.21, No.1, Spring 1990.

<sup>8</sup> Philip I.Levy: Do We Need an Undertaker for the Single Undertaking? Considering the Angles of Variable Geometry, in *Economic Development and Multilateral Trade Cooperation* (edited by Simon Evenett and Bernard Hoekman), Palgrave MacMillan & The World Bank, 2006; p.427.

<sup>9</sup> Jagdish Bhagwati Getting to Free Trade: *Alternative Approaches and their Theoretical Rationale*, EIJ Working Paper No.121, March 2001; p.19.

all its members, of the most favoured nation (MFN) treatment. The attractions of this simple rule are incredibly rich, as they encompass economic, political economy and equity considerations, all of which are beyond the scope of this paper. Suffice to say, though, that unconditional MFN is the fundamental rule of GATT/WTO, absent which we would not be able to speak of a multilateral trading system. However, MFN is no panacea. It enjoys a tense relationship with another important principle in GATT: reciprocity. Nowhere was this more obvious than in the case of the generalized free riding on the commitments made by the few in the context of the Tokyo Round codes of conduct. A Delphic statement in the decision concluding the Tokyo Round held that the rights of GATT members not parties to the Codes, "including those deriving from Article I, are not affected" by the Codes.<sup>10</sup> This was read by the non-signatories as a licence to unlimited benefits deriving from those agreements, while several signatories (in particular the United States of America) have disputed this claim and even rejected it outright in the context of the implementation of some particular agreements (e.g., the non-application by the USA of the "injury" test to the non-signatories of the Subsidies Code). This withholding of unconditional MFN treatment vis-à-vis some GATT contracting parties was putting in question an essential principle, but it nonetheless had some compelling justifications. Continuing on this path, however, would have entailed the risk of an irreversible erosion of a

paramount rule of the international trading system.

**e) Facilitating the enforcement of multilateral disciplines by rendering cross-retaliation possible**

The existence of the single undertaking allows a party negatively affected by the measures of another WTO member, once having secured a favourable ruling from the WTO Dispute Settlement Body and absent corrective measures taken by the latter party, to take retaliatory measures in those areas which are more likely to exert an impact on the situation of the member in default, rather than in the area of the dispute itself, where it may well be that the complaining party cannot inflict any significant damage on its adversary, hence cannot dissuade him from pursuing the condemned practice. A good illustration of this situation is Ecuador's request to apply sanctions to the EU, as a result of having prevailed in a most publicized "banana" dispute by suspending its obligations arising from the TRIPs Agreement (i.e., reducing the protection awarded to EU nationals holders of such rights) rather than imposing higher tariffs on EU exports, which are not overly dependent on the Ecuadorian market.<sup>11</sup>

Some authors surprisingly list this feature of the Single Undertaking as a liability, because ostensibly tilted against developing countries. In the words of Aileen Kwa, "most developing countries only export a small range of products, [hence] retaliation against a single product exported by a developing country will have greater effect than it would on a developed country".<sup>12</sup> We

<sup>10</sup> Stefan D. Amarasingha: *The WTO Single Undertaking Under Threat?*, Paper based on a presentation given by the author at the World Trade Institute on 5 June 2004, August 2004.

<sup>11</sup> Robert E. Hudec: *The Adequacy of WTO Dispute Settlement Remedies*, in *Development, Trade, and the WTO: A Handbook*, World Bank, June 2002; p.89.

<sup>12</sup> Aileen Kwa: *The a la carte undertaking: a new form of special and differential treatment?*, Focus on the Global South, August 2000.

fail to see why this should count as a "downside" of the single undertaking. The problem described above is generic for dispute settlement as currently regulated and practiced within the WTO, the effectiveness of which is highly dependent on the economic force of the parties, i.e. on the capacity to inflict damage to one another. Cross-retaliation is, on the contrary, precisely a means to redress this imbalance, at least in part. In the above example, suspension of IPRs protection awarded in Ecuador would not have induced any costs to the Ecuadorian economy (unlike the increase of trade protection), while likely to hurt EU interests most.

At the end of the Uruguay Round, the Single Undertaking seemed to promise a much smoother functioning of the multilateral trading system. In the words of one prominent participant, "many of us thought we were pretty smart when we developed the so-called single undertaking concept".<sup>13</sup> Subsequent developments have, unfortunately, not validated all these positive expectations vested in the virtues of the Single Undertaking. In yet other cases, the solution to one problem entailed the generation of another one, of not necessarily lesser gravity.

Thus, as concerns the positive influence the Single Undertaking is reputed to exert on international trade negotiations, the picture is ambivalent. There are also reasons to expect a negative impact on the successful conduct of trade talks as a result of the single undertaking. In particular, it was asserted that the launching of negotiations on new issues is discouraged because, absent the

possibility of opting out, "members are much more cautious about agreeing to have an issue put on the WTO negotiating table than they were under the previous regime."<sup>14</sup> Hence, insofar as the assent of all Members is required in order to start negotiating particular issues, the single undertaking renders negotiations more difficult. It is not immediately obvious why this should be the case. After all, rather than inducing timidity by causing each country to focus on those things that it most fears, package deals might encourage bold deals by causing each country to focus on those parts of the package that it most dearly desires. The negative outcome may be explained by political economy circumstances, which are well documented, i.e., the fact that parties standing to lose from a particular trade arrangement tend to be more active in their lobbying activities than parties standing to gain. Public sympathy also tends to be with the former rather than the latter,

Having said this, it is important not to mix up the issue of escape clauses with that of non-participation to negotiations. In the former case, we are taking of a device absolutely necessary in order to give parties in a negotiation the comfort needed to make binding commitments: should things go wrong, they ought to have the possibility of reneging on those commitments, provided of course the circumstances of invoking this right are strictly circumscribed and the nature and period of non-compliance are pre-determined. Non-participation, on the other hand, is a bad solution in any case.

<sup>13</sup> Andrew L. Stoler served as Deputy Director-General of the (WTO) from November, 1999 to October, 2002. During the Uruguay Round he was the principal U.S. negotiator for a wide range of WTO Agreements.

<sup>14</sup> Erik Duchesne: *op.cit.*; p. 99.

The cross-sectoral linkages made possible by the Single Undertaking may also play in the opposite direction: rather than facilitating trade-offs, they may enable particular actors (in principle, the major participants) to take the whole negotiation hostage in order to obtain a concession in a particular area that they deem crucially important. As shown above, this seems to have been the birth story of the single undertaking itself, to the extent that it was suggested as a negotiating principle by the EC with a view to enhance its possibilities for protecting agricultural interests.

Then there is also the problem of unmanageable complexity of broad-based negotiating rounds, at least for some of WTO's member countries. This echoes the growing concerns expressed with respect to the lack of full participation by developing WTO members and substantiated by an impressive body of evidence:<sup>15</sup>

- between 25-30 countries (with slight variations in time) have no permanent representation in Geneva, the WTO's Headquarters;

- the average staff of a developing country mission in Geneva is 3.5 persons, relative to double that number in the missions of developed countries;

- many developing countries are accrediting the same diplomatic personnel to several international organizations based in Geneva at once (e.g., WHO, WIPO, ILO etc);

- the working agenda is extremely charged: there are up to 40-50 meetings weekly, many of them convened at short notice, which the staff-strapped missions of the

developing countries cannot follow properly.

The zero-sum nature of the interaction between free riding and other stumbling blocks to international trade negotiations became apparent as countries have shown reluctance to engage in substantive exchanges of concessions not because of the possibility of getting them for free anyway, but rather out of fear that agreements might be reached that would be too demanding on them, hence the preference for blocking them altogether. Also, reaching agreements between fewer parties is always easier than with more. And the Single Undertaking implies that agreement must always be reached by the maximum number of existing players, at least as long as the decision-making process, based quasi-exclusively on consensus, is not reformed. Moreover, this difficulty is growing on a par with the extension of WTO's membership, to 149 countries currently, that is, almost double the number of WTO founding members!

This increase in numbers has also brought about increased disparities between the members' particular situations (in terms of economic development, administrative capacity, cultural preferences), hence an additional difficulty in making them to agree on everything.

Summing up, the problems encountered by the single undertaking pertain to:

- a) a rising number of actors involved;

- b) an inefficient decision-making system, strongly tributary to consensus;

<sup>15</sup> See, inter alia: Mathias Risse: *Fairness in Trade*, J.F.Kennedy School of Government, Working Paper 004, January 2005; Aileen Kwa: *Power Politics in the WTO*, Focus on the Global South, January 2003; Shirang P.Shukla: *The Crisis in MTS: What Is To Be Done*, Third World Network, November 2002; Constantine Michalopoulos: *The Participation of the Developing Countries in the WTO*, World Bank Policy Research Paper 1906, March 1998.

c) the emergence of new challenges calling for the institution of rules in new areas, in respect of which actors tend to be more reticent than relative to the traditional fields of responsibility of the organization;

d) widening disparities as concerns the ability of the various actors to progress at the same speed towards various regulatory objectives, even when these are shared (something that cannot always be taken for granted);

e) shifting emphasis from traditional trade measures, acting at the border and tackled with "proscriptive measures" (the equivalent of "negative integration" within the EU), to "behind the border measures", requiring a "prescriptive" approach, that is, the enactment of elaborate rules of conduct (the equivalent of "positive integration" within the EU). The latter approach being more complex and delicate, the potential for disagreements among the actors crafting the rules is several times larger than in the case of the mere enunciation of the prohibition of certain patently restrictive trade measures.

These problems are remarkably similar to those faced by the process of deepening integration within the European Union, hence the modalities devised in the latter for overcoming them may offer a very useful source of inspiration.

## II. INSTITUTIONALISING FLEXIBILITY IN THE EU: ENHANCED CO-OPERATION MECHANISM

### 1. Flexibility: a sensitive issue, but a necessary solution

The history of the flexible approach of the EU integration project is as long as the project itself. The flexibility idea – *as a possibility for the differentiated deepening of the co-operation between*

*certain Member States, without the participation of others, in some particular policy areas* – has been constantly invoked during the theoretical debates concerning the scenarios of the EU future.

The contexts where the flexibility concept and the different ways of relating to it were brought to front determined a certain ambiguity that in some way strengthened the controversial dimension of this topic and the sensitive nature of its implications for the European matters. The ambiguity of the concept arises also from the fact that it is perceived both as an opportunity to opt-out of certain EU policy areas and as a subtle and discriminating instrument of exclusion. And obviously, within a system originally built upon the principle of monolithic uniformity, in which all states must act in the same way and in the same time – while the only flexibility allowed concerned the transition periods and the differentiated implementation of a unique set of rules and obligations – the idea of flexible EU integration still has to face a lot of susceptibility and reluctance. As in any other project long treated as a taboo subject, the legitimacy and credibility of the flexibility concept depends a lot on the effectiveness of its actual mechanisms, the optimization of the procedures and, consequently, of the EU decision-making process in the current enlarged formula.

Given the new European context after the enlargement, characterized by the diversity of opinions, options and national interests, the possibilities of flexible integration seem to rise again with more pragmatism and credibility in the eyes of the academics (but also of the European officials) concerned in comparatively analyzing various scenarios of the EU future. The first

and foremost reason is that, in the above-mentioned context, the flexible approach of the EU integration project seems to be a necessary path toward the consolidation of that project, a realistic solution for the difficulties recently faced by the EU at a functional level and a way to avoid the crises that appeared and, almost certainly, would keep appearing in the decision-making process.

Without dealing with the concept of flexible integration exclusively with linguistic instruments, a quick review of the key terms in the flexibility vocabulary should be useful. This is important enough, especially that one of the main sources of conceptual ambiguity consists precisely in the extremely divergent interpretations of the ideas of *flexible integration/ differentiated integration/ closer co-operation*, which sometimes create inconsistencies and confusions as

regards the given meanings. Jacques Delors' remark is very illustrative in this respect: "*I say differentiation and in Poland and the Czech Republic one replies they don't want a two-speed Europe*"<sup>16</sup>.

Whether we use terms such as *flexible integration, differentiated integration or closer co-operation*<sup>17</sup>, the larger meaning of these terms refers to diverse forms and models accounting for the differentiation of some groups of Member States that opt for a more integrated approach of certain EU initiatives and policies.

The most analyzed flexibility options among the flexible integration models *inside the treaties' framework* include: 1. *the predetermined flexibility model*<sup>18</sup> (a possible alternative at the primary legislation level where the Treaty itself provides the premises for such flexible arrangement); 2. *micro-flexibility* (based on the *constructive abstention*)<sup>19</sup>

<sup>16</sup> *Bulletin Quotidien Europe*, no. 8636, 3 February 2004, Jacques Delors quoted by Ferdinando Ricardi. A while ago, John Palmer pointed out the same ambiguity of the meanings assigned to the flexibility idea: "President Chirac, Chancellor Kohl and Prime minister Major each support *flexibility*. Each means something different". (*Financial Times*, 11 December 1996).

<sup>17</sup> The original model of the *Europe à la carte* (John Major), according to which the Member States may choose certain policies to cooperate more tightly in, or may opt out of certain co-operation areas, and the *variable geometry* paradigm, within which various groups of MS aim simultaneously different priorities, either common or distinct, are types of flexible integration that may be used on an ad-hoc basis, *inside or outside the framework of the treaties*. Other flexible integration models classified as multi-paced approaches (see Franklin Dehousse, Wouter Coussens, Giovanni Grevi, *Integrating Europe. Multiple-speeds – One direction?*, EPC Working Paper, no. 9, April 2004) are as follows: *two-speed or multi-speed Europe* (a core of MS advances faster than the others); *concentric circles Europe* (the idea of a EU comprising several layers of concentric circles, promoted by the former French Prime Minister Edouard Balladur); *avant garde* (a term associated with the name of Jacques Delors, who imagined a MS group defining the direction and the priorities of the European integration, while guiding this process); *pioneer-group* (concept used by Jacques Chirac to describe a group of Member States having its own secretariat and lead by the French-German motor around which it is built, contributing therefore to a deeper integration); *hard-core* (*Kerneuropa* – advanced by Wolfgang Schäuble and Karl Lamers – that is the model used by the Member States participating to the third stage of the monetary union to advance the integration).

<sup>18</sup> Examples of predetermined flexibility are: EMU, Schengen (after Amsterdam) and the Title IV TEC provisions regarding the UK, Ireland and Denmark. Elements of predetermined flexibility also appear within one of the main innovations of the Constitutional Treaty at the level of security and defence: *structured co-operation* between MS willing and having the military capabilities to subscribe to higher requirements in this field.

<sup>19</sup> The applicability of this instrument is limited to the CFSP field (including ESDP), but it can also be useful in other areas, like economic competitiveness, JHA, environment or social policy, avoiding in specific circumstances the obstruction of a decision by one or two MS.



instrument) provides the Member States with the possibility to refrain from a decision or action, while allowing the other States to advance in that area; 3. *enhanced co-operation* – the most investigated of the instruments used to implement flexibility, introduced in 1997 by the Amsterdam Treaty (under the name of *closer co-operation*) and subsequently amended by the Nice Treaty (since Nice called *enhanced co-operation*).

Although no authorisation request for this mechanism has been recorded until now, the enhanced co-operation instrument is the most complex (and also most difficult) form of institutionalised flexibility. It is also the most elaborate mechanism of differentiated co-operation between certain MS in different policy areas under EU competence. However, its introduction in the treaties does not exclude the flexible integration alternatives *outside the treaties*, under originally informal arrangements enforced only by the EU membership requirements to observe the primacy of EU law and to not entail measures against the objectives in the Treaties.

On the path connecting the *old* with the *new* types of flexibility, as MEP Alexander Stubb states: "enhanced co-operation should be seen as another tool in the decision making arsenal of the Union (...) and, in a sense, it could create a similar negotiating dynamic as QMV."<sup>20</sup> Therefore, the next section will try to further detail the current enhanced co-operation mechanism, emphasizing the purpose, the conditions of application, the logic of participating to a co-operation based on such a mechanism and the risks it could involve.

## 2. Enhanced co-operation: an experimental, useful and perfectible procedural option

The enhanced co-operation mechanism allows a group of Member States to set up a more integrated co-operation in different European policy areas, using the EU framework and meeting a series of conditions, such as: the purpose of the participating MS initiative should be compatible with the EU objectives, should remain within the EU competence, should not concern matters that reach or have consequences in the military and defence field and, furthermore, should comply with the principle of the *last resort condition*. The enhanced co-operation may be established by the interested Member States only if the defined purpose of the action and the proposed objectives cannot be reached "within a reasonable period" using the classical procedures.

Given the possibility to use the EU framework, all Council members may take part in the deliberations, but the decisions are adopted only by those representatives of the Member States participating in the enhanced co-operation. These decisions are mandatory only for the respective Member States that must also fully bear the financial costs related to the implementation of the enhanced co-operation actions.

In order to initiate an enhanced co-operation, the procedure provides a series of mandatory stages: proposal authorisation, consultation and deliberation, proposal adoption or rejection. However, before the authorisation stage, in order to be taken into consideration, a request to establish an enhanced co-operation

<sup>20</sup> Alexander Stubb, *Flexibility in the Convention: "old" or "new"?* and *Negotiating Flexibility in the European Union: Amsterdam, Nice and Beyond*, (2002), Basingstoke.

should satisfy many conditions of substance and several procedural conditions.

#### **a) Conditions, precautions and interdictions**

The conditions related to the actual content of an enhanced co-operation action refer both to its *purpose* and to the *possible risks* and *interdiction areas* of this mechanism. The enhanced co-operation may be subject to authorisation only if its purpose complies with the EU objectives, the promotion and protection of its interests and the consolidation of the European integration process. This condition derives logically from the possibility to use the EU framework to develop these types of flexible arrangements and, consequently, the objectives agreed upon by all Member States should automatically be endorsed by those MS aiming to differentially advance in certain policies or fields.

The potential *risk areas* associated to an enhanced co-operation are related on the one hand to the preservation of the EU coherence, of its policies and institutions (the compliance with the *acquis* and the European institutional framework). On the other hand, any enhanced co-operation should avoid the risk of discrimination and barriers in relation to the non-participating Member States, both within the internal market and as regards the economic and social cohesion (this condition was introduced by the Nice Treaty to diminish the suspicions related to the risk to transform an enhanced co-operation club into a *selfish rich* group). Therefore, the principles of non-discrimination and non-distortion of trade competition should be complied with. Following the successive

amendments of the strict conditions to establish an enhanced co-operation, the non-discrimination condition regarding the non-participating Member States' citizens has been repealed after Nice.

*The interdiction areas* of an enhanced co-operation are as follows: areas outside the EU competence, areas placed exclusively under the EU competence and the military and defence field. The first limitation might be overcome only if a potential review of the enhanced co-operation mechanism would allow the involved states to leave aside the treaty restrictions and to decide "in accordance with their respective constitutional requirements" (article 17 TEU). The second interdiction is somehow redundant as the exclusive competence areas of the EU are those where the MS have entirely transferred their powers to the EU. The third interdiction is related to the sensitive area of the EU defence, where the traditional reluctance to use the enhanced co-operation instrument for the peace-keeping operations (Petersberg tasks) is still substantial.

*The procedural conditions* refer to the *minimum threshold of participation* to an enhanced co-operation, the *last resort stipulation* adopted together with the Nice Treaty and the *opening degree* of the enhanced co-operation. After the Amsterdam Treaty set the minimum threshold of involvement into an enhanced co-operation initiative to the majority of the Member States, the minimum number of Member States has been set at 8<sup>21</sup> after Nice.

The logic of a *minimum participation threshold* can be analyzed from several points of view. Once investigated, these raise certain doubts about the relevance of the current minimum threshold (eight

<sup>21</sup> The Constitution sets a higher threshold for an enhanced co-operation, respectively one third of the EU Member States.

Member States). *The reason of the "critical mass"*, according to which the extent of the enhanced co-operation in the original stage is a necessary premise to attain the pursued objective, seems to be justified. *The reason to limit and control the costs* involved by the development of an enhanced co-operation – by setting a minimum threshold of eight states – seems more relevant for the point of a minimum threshold than for setting it to eight Member States. Therefore, there are voices incriminating the arbitrary character of this minimum threshold and suggesting cost control alternatives: limiting the number of simultaneously allowed enhanced co-operations or raising the minimum threshold to a sufficient level to answer the cost control issues. However, the second solution is unappealing from an operational point of view, as the chances to initiate an enhanced co-operation, already confronted with many other restrictions, diminish.

From another perspective, the minimum participation threshold of an enhanced co-operation may provide a lot of clues on its *legitimacy*, assuming that legitimacy essentially derives from the high number of participating Member States. As regards the *institutional balance*, setting a minimum participation threshold can prevent tensions between the Commission, the Court of Justice and the Parliament. It is assumed that the latter would have the most obstructive force in case the Member States not participating in an enhanced co-operation would try to hinder the respective co-operation initiatives through their representatives within the European Parliament.

The *last resort principle*, originally stipulated in the Amsterdam Treaty<sup>22</sup> is a way to give priority to the *joint and collective approach* of the matters at the EU level, unlike the *flexible or differentiated approach*. The amendment brought forward by the Nice Treaty<sup>23</sup> to that provision – focusing on the enhanced co-operation objectives (instead of the EU/Treaties objectives) – emphasizes the point that such mechanism would be used as a solution in the case of a potential deadlock. Such flexible arrangement based on the enhanced co-operation mechanism is currently not perceived as an instrument to advance certain stagnating policy areas, but rather as a method to avoid paralysis.

#### **b) Authorization: from *frein d'urgence* to *ralentisseur***

Originally, the authorisation to use the EU "umbrella" to establish an enhanced co-operation in any of the three pillars was to be provided by the Council, under the qualified majority vote. Any veto or intention of a Member State to oppose an enhanced co-operation initiative - *emergency brake* – transferred automatically the issue to the European Council (for decision by unanimity). Although the Nice Treaty kept the *emergency brake* for the second pillar, it was replaced by a *ralentisseur* in the other pillars. In case of one Member State opposition, the authorisation proposal is first submitted for information purposes to the European Council and only thereafter the Council decides with a qualified majority whether the enhanced co-operation would be launched or not.

<sup>22</sup> Enhanced co-operation could only be undertaken as a *last resort* when the Union's objectives "could not be attained by applying the relevant procedures laid down by the Treaties". (Article 43.§ 1.C-TEU)

<sup>23</sup> "Enhanced co-operation may only be set up when it has been established within the Council that the objectives of such co-operation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties". (Article 43 A TEU).

### c) Initial and subsequent participation

The membership issue is the most unrestrictive point in the fairly complex and slow-moving procedural arsenal needed to launch that mechanism. The initial participation is based on the logic of *unconditional openness*<sup>24</sup>, and the subsequent participation is open anytime to any Member State that accepts the decisions taken within the enhanced co-operation and has the necessary resources to implement them.

The *unconditional openness* is a method to fight the concerns regarding the transformation of an enhanced co-operation into a closed and exclusivist group (*club of selfish rich, hegemonic core*), which would choose to separate – on elitist principles – and to advance certain policies that pose adjustment issues to the other Member States. That is a necessary premise to prevent the risk of marginalization, of turning the Member States group into a *directoire*, where a strict boundary between “ins” and “outs” would be set up.

However, such logic entails its risks. Member States that do not have the necessary resources to take part in the co-operation may however participate in an enhanced co-operation, only if they have common objectives and the political will to get involved in the respective initiative.

As regards the Member State suspension or exclusion procedures, the treaties contain no provision related to this aspect. The only provisions that might protect a Member States group associated within an enhanced co-operation from attempts to undermine its actions from inside are the general provisions in the treaties related to

Member State loyalty and the penalty applied to a Member State breaching its obligations.

### d) How does the enhanced co-operation mechanism operate?

The institutional and procedural framework of an enhanced co-operation is the same as the EU framework. All Council members take part in the meetings and deliberations, but only the Member States involved in the enhanced co-operation take decisions. Procedural and institutional overlapping presents several advantages, besides the simplification. As complicated the enhanced co-operation initiation procedures may be, as simple the operation of that mechanism appears initially. The participation of all Member States to the deliberations may encourage their subsequent engagement in the enhanced co-operation after the stages of familiarization and partial involvement from the outside. The institutional unity is maintained, the same as the coherence and the supranational dimension of the European Union.

### 3. Risks and disadvantages of flexibility

Both the enhanced co-operation mechanism as a means to institutionalize the flexibility at a European level and the other types of flexibility inside or outside the treaty framework present certain disadvantages and risks. We review only some of the weaknesses that drew particularly the attention of the EU flexibility concept theorists.

As regards the strictly functional disadvantages of the enhanced co-operation mechanism, firstly its limits at

<sup>24</sup> The advantages and disadvantages of the three logical reasons of initial participation in an enhanced co-operation – *discretionary logic, logic of conditional openness and logic of unconditional openness* – are detailed by Eric Philippart in the paper *A new mechanism of enhanced co-operation for the enlarged European Union*, Notre Europe, March 2003.

the *effectiveness* level may be mentioned. As long as the decisions within an enhanced co-operation are unanimous, the other ways to optimize the mechanism are restricted on their turn. Therefore, one of the recommendations is to establish the qualified majority voting procedure within the enhanced co-operation. The effectiveness of the mechanism is also diminished by the fact it doesn't seem to be a very solid "construction". In the current institutional and procedural context, the risk of the enhanced co-operation actions being blocked by the "outs", at the Parliament level, is relatively high. However, this scenario is not very likely.

If the states not participating to an enhanced co-operation have practically the same rights as the participating states, the observations of those who consider this situation being *unfair* and of *doubtful legitimacy* seem grounded enough. They propose the alternative of restricting the access of the non-participating states to the Council meetings<sup>25</sup>. The right of the MEPs from states not participating in an enhanced co-operation to vote on measures not concerning their states of origin seems *non-democratic*, even if, according to the treaties, the MEPs' nationality is not relevant for their European Parliament mandate. Intergovernmental parliamentary subgroups or coalitions may appear in relation to any other European matter, more or less controversial. Moreover, that

point describes in fact the general European approach and it is not a specific case for the operation of the enhanced co-operation.

*The risk of marginalization* is another one that seems to feed the flexibility opponents' reluctance. This is the reason generally invoked by the British who rather traditionally opposed the flexibility concept or the variable geometry scenarios. However, the exclusion concerns are more justified in the case of those flexible arrangement initiatives from outside the treaty framework, originally established on informal bases. Only in those circumstances an *avant garde* group may establish certain discriminating or discretionary criteria for the states interested in a subsequent potential participation<sup>26</sup>.

Again, in the case of the flexibility forms agreed outside the treaties, the establishment of an *avant garde* group might increase the *vulnerability of the Community framework* through a lower role for its institutions. Moreover, a certain "*demythologisation*" of the *acquis communautaire* might take place if the Member States' possibilities to opt-out of the current European policies would increase.

#### 4. A "means" toward a visionary "end"?

However, beyond the vulnerabilities and the lack of credibility of the different flexibility types envisaged and

<sup>25</sup> "The unwilling, for instance, could be kept informed of the development of enhanced co-operation, but have no right to attend the Council meetings. This would not only be more equitable but also diminish the vulnerability of enhanced co-operation and increase centripetal dynamic (assuming that frustration rather than acclimatisation is the most effective means to change the mind of unwilling member states)". Eric Philippart, *A new mechanism of enhanced co-operation for the enlarged European Union*, Notre Europe, March 2003.

<sup>26</sup> In the paper *The strategic implications of the EU malaise: enlargement, variable geometry and a stronger neighbourhood policy* (CER), Charles Grant gives the example of countries having signed the Prüm Treaty in May 2005 – a *super-Schengen* agreement enabling the signatories to share information on fingerprints and DNA and to co-operate on aircraft security. In 2008 the signatories will eventually invite other member states to sign the Treaty of Prüm. A second example would be the "EU-3 plus Solana" group dealing with the Iranian nuclear programme issue.

partially tested until now within the EU framework, the idea of differentiation seems to be more and more related to the visionary project of the enlargement. And not only because an enlarged Europe is a Europe which must confront its own diversity challenges. Should the traditional common approach fight with the diversity obstacle, the key weapon of the “negotiations” in this type of conflict can only be the *differentiated integration built upon the Community institutional framework*.

Questions like “Can flexibility save the enlargement?” or “Does the EU possess solid and credible means for its future political projects?” bring to front the idea of flexibility as a means to pursue these projects. In order to overcome the current stagnation at the level of the visions, projects and political will, the EU needs a more flexible approach, based on effective mechanisms and instruments for the institutionalisation of this flexibility. The enhanced co-operation mechanism may be a perfectible means toward the reinforcement of the decision-making process and the deeper integration of the European policies.

Although – as Neil Walker states – “flexibility is not an end in itself, but an ubiquitous device which can serve quite different – even diametrically opposed – end-games”<sup>27</sup> – the flexibility in the form of enhanced co-operation has to be tested, if only for the “game” of confrontation and subsequent elimination of the adverse effects. The credibility of an effective potential instrument cannot be acquired by avoiding the use of this tool, especially if the vulnerabilities of the classical

instruments and procedures get closer and closer to the certainty of a deadlock. Confronted with a not so optimistic scenario, the political will to resort to such alternative should be more powerful.

### **III. Enhanced co-operation as a guide for institutionalizing flexibility in the WTO**

Not only the problems calling for ways to “flexibilize” the Single Undertaking are similar to those which engendered the enhanced co-operation in the EU. A striking resemblance also resorts from the fact that departures from the principle of uniqueness of obligations have been a long-standing feature within both organizations. The history of the EC/EU is virtually riddled with such examples, starting with the establishment of the Western European Union and of the European Monetary System, until the more recent constructions of the Schengen Area, the Euroland and, finally, the British opt-out from the provisions of the Social Charter. GATT/WTO, for its part, can invoke the precedents of the Special and Differential Treatment awarded to developing countries<sup>28</sup>, of the GATT Article XXIV (and GATS Article V) provisions concerning the formation of regional preferential trade agreements, as well as the “plurilateral” agreements (of which two are still in force: government procurement and trade in civil aircraft) negotiated within the Uruguay Round as explicit exclusions from the Single Undertaking principle. It is clear that, against such a background, introducing a formal

<sup>27</sup> Neil Walker, *Flexibility within a metaconstitutional frame: reflections on the future of legal authority in Europe*, in G. de Burca, J. Scott (eds), *Constitutional Change in the EU – From uniformity to flexibility?*, Hart, Oxford – Oregon, 2000.

<sup>28</sup> Entailing such “favours” as: trade preferences for developing country exports to developed markets; flexibility as concerns the implementation of obligations assumed by developing countries in the context of particular agreements (long transition periods, much rarer full-fledged derogations); technical assistance.

mechanism generating variable geometry can no longer be regarded as the breaking of a taboo.

Another suggestive parallel with EU's situation has the decision-making process at its center. Just like the EU, the WTO has elaborate voting rules but makes seldom recourse to them (even rarer than formal votes are taken within the Council of the EU). Consensus thus remains practically the only way of taking decisions within the WTO, with all the pitfalls this entails. If, in an EU context defined by smaller membership, more effective decision-making rules and more convergence (both economic and cultural) between members, the institutionalisation of flexibility was deemed necessary, *a fortiori* this is a must in the case of the WTO.

But more flexibility is required not only with a view to correct the problems referred to above. There are also intrinsic attractions in this approach. An inventory of the advantages revealed by several authors would yield the following content:<sup>29</sup>

1. economy of effort involved in negotiations;
2. allowing hesitant WTO members to better assess the benefits from and the costs of a particular agreement, before deciding whether to join it or not;
3. crafting the agreements so as to better meet the requirements of the signatories and to accommodate their implementation capacity.

*De facto* flexibility, mainly arising from the legacy of pre-single undertaking decisions, is one thing, while institutionalized flexibility, marking the overturning of the single undertaking itself is quite another. Such a radical change of paradigm may

generate significant problems, a non-exhaustive list of which is presented below.

From the outset, we can distinguish between fears which, in our view, are unlikely to get materialized and consequences which are likely to cause troubles, but while at the same time correcting other problems, potentially more severe. Indeed, the perspective of confining the progress of world trade rules, in an era of fast transformation of economic realities, to the speed that can be afforded by the least capable participants to the world trading system is not an appealing option, and even less so is the complete blockage that can be achieved by using the single undertaking as a means to take hostage the whole process of negotiations. Besides, the problems created by instilling a dose of "variable geometry" into the system can be minimized by devising appropriate safeguards, and this is were EU's conditions and procedures concerning enhanced co-operation may be a valuable source of inspiration.

The fear that we consider over-rated pertains to the risk that agreements among a sub-group of WTO members are used as "Trojan horses" for prying open WTO's doors to currently contentious issues such as trade and investment and competition rules, following which the other countries would be somehow forced to join. The precedent of the "multilateralization", within the Uruguay Round, of most codes of conduct negotiated within the Tokyo Round is especially invoked by the proponents of this thesis. We do not find this parallel very compelling though, and this for several reasons: the collective force of those countries

<sup>29</sup> Andrew Cornford Variable Geometry for the WTO: Concept and Precedents, UNCTAD Discussion Paper no.171, May 2004, p.11; Stefan Amarasinha: *op.cit.*, p.7; Robert Z.Lawrence: *Rule making amidst growing diversity: A club of club approach to WTO Reform and new issue selection*, Paper prepared for the World Trade Forum 2004, p.14-15.

most likely to become the victims of such “bullying”, i.e. the developing countries has greatly increased over the last decade, following their more than doubling in numbers; they have also become far more assertive, as witnessed by the resounding failures of two Ministerial Conferences (Seattle, 1999; and Cancun, 2003) precisely as a result of developing countries refusing to make concessions; finally, the bargaining chips that can now be offered to developing countries seem less attractive than what was on store during the Uruguay Round, when industrial tariffs were still relatively high and world textile trade – subject to a vast array of quantitative restrictions. Moreover, the more recent precedents invalidate this fear. As Stefan Amarasinha aptly questions, “Has anyone so far strong-armed the likes of India and Malaysia into signing up to the Government Procurement Agreement?”<sup>30</sup>

Another reason for concern that we discount is that variable geometry “might create ca WTO with two classes of citizens”.<sup>31</sup> To begin with, the WTO already has two classes of members and, what’s more, it is the members themselves who opted for this differentiation: had no member self-designated itself as “developing country” so as to benefit from the advantages of special and differential treatment, there would be no separate categories within the organization. Also, since it is likely that several side agreements would be entered into in the context of institutionalized flexibility, it would take an extraordinary coincidence to have just “two” classes of members. In fact, each WTO member may turn out having its own menu of rights and obligations, i.e. an own *à la carte* menu,

which is different from a dichotomy between “first class” and “second class” passengers.

But realism is the most convincing counter-argument to this fear. We defer here to Razeen Sally, who has expressed with brutal limpidity a truth that can no longer be re-interpreted or hidden outright: “The political correct pretense of a democratic, inclusive, participatory WTO must be dropped. [...] Stated baldly: only a minority of the WTO membership have the bargaining power and capacity to advance negotiations.”<sup>32</sup>

A more compelling objection to institutionalization of flexibility in WTO stems from the earlier debated issue of free riding. Indeed, side agreements in combination with unconditional MFN guarantee another fragmentation of the multilateral trading system, of the kind found intolerable after the Tokyo Round. However, the true size of this problem should not be over-estimated. First, because it can no longer be enormous *in relative terms*. This is because we are now in the midst of an exponential proliferation of regional trade agreements. There is practically no WTO member left which is not party to at least one such agreement and even traditional “addicts of multilateralism” like Japan and Korea have bitten the bullet since the beginning of this century and entered into their first free trade agreements ever. There are about 200 such agreements in force currently and over half of world trade takes part between partners within such groupings.

Secondly, because there are ways to attenuate the problems so created. A moderate one would be to keep in

<sup>30</sup> Stefan D. Amarasinha: *op.cit.*, p.6.

<sup>31</sup> Robert Z. Lawrence: *op.cit.*, p.16.

<sup>32</sup> Razeen Sally: *Trade Policy and International Order: Imperium, Dominion and the Limits of Multilateralism*, Working Paper, London School of Economics, 2004; p. 6.



place the unconditional MFN regime for non-participants, but use a "critical mass" criterion for allowing such agreements to enter into force. Thus, insiders would have a reasonable assurance that outsiders are not likely to benefit disproportionately from free riding, because most or all actors that count for the matter dealt with by the particular agreement will have been taken on board. This type of safeguard should not pose particular problems, since it has already been used in the framework of the WTO. Such is the case, in particular, of the Information Technology Agreement, signed on 13 December 1996 by 29 WTO members, which provided for the complete elimination of tariffs on various IT products as semiconductors, computers, calculators, IT manufacturing equipment, printers, scanners, optical fiber commercial satellites, cellular phones, modems, and other parts of the information technology complex. This agreement included a trigger clause whereby its entry into force was postponed until signatories were to represent 90% of world trade in IT products. This occurred following the accession of another 13 countries to the ITA, which entered into force on 1 July 1997.<sup>33</sup> It is noteworthy that a version of this « critical mass » condition was adopted in the EU as well: the minimum threshold of participation to an enhanced co-operation initiative, currently set at 8 Member States.

A more radical way of curbing free riding is the application of the side agreements on a conditional MFN basis, i.e. the withholding of their advantages towards non-signatories. This option is far more controversial, as

it is widely equated with yet another way of forcing developing countries into assuming obligations they are not prepared for, lest they get excluded from the benefits of the international trading system. We nonetheless submit that it deserves being considered seriously. First, because the two existing plurilateral agreements already embrace it. Second, because it is preferable to what is already happening, albeit still on a limited scale, in the real world. Thus, as regional trade agreements are continuously expanding their issue coverage so as to include matters not yet regulated within the WTO (such as competition rules), it is no longer rare that developing countries find themselves in one-on-one negotiations with developed countries concerning matters which they are most reluctant to address in the multilateral framework. *Ceteris paribus*, it seems obvious that the specific circumstances of the less developed partners are likelier to be taken into consideration as part of a multilateral negotiation than in a bilateral framework. One can even speculate that some developed countries are not interested in developing multilateral rules in some areas precisely in order to be able to press bilaterally for the adoption by the partner of rules suitable to them. A good illustration is provided by the United States, which insisted that Singapore adopts antitrust legislation as a precondition for the entry into force of the reciprocal free trade agreement signed in 2003, yet has so far declined to support EU's efforts to put competition rules on the agenda of the multilateral trade negotiations. Finally, as Levy aptly notes, there is a big advantage of a conditional MFN agreement under the WTO over a preferential trade agreement: the ease

<sup>33</sup> Barbara Fliess, Pierre Sauvé: *Of Chips, Floppy Disks and Great Timing: Assessing the WTO Information Technology Agreement*, Les Cahiers de l'IFRI, 1998.

with which excluded countries would gain inclusion should they so wish.<sup>34</sup>

We believe unconditional MFN cannot remain a fetish concept and its area of application should be carefully considered, thus implying that it can well be restricted. The EU precedent is very inspiring in this respect as well. The latest reforms of the enhanced co-operation mechanism, adopted in the Nice treaty, took a pragmatic view by eliminating unrealistically strict conditions: the conditions that the *acquis* as well as the competences and rights of non-participating member states should not be “affected” were loosened by saying that they should be respected; and, most importantly, the condition that enhanced cooperation may not discriminate between nationals of member states was abolished.<sup>35</sup>

A middle-of-the road approach between conditional and unconditional MFN (even if aided by the “critical mass” qualification) has recently been suggested by Andrew Cornford: “permitting signatories greater latitude regarding safeguard action where its producers or suppliers could demonstrate injury resulting from transactions or access to the rules covered by the agreement on the part of the non-signatories”.<sup>36</sup> This would have the merit of reversing the burden of proof: whereas, in the conditional MFN logic, non-signatories would be excluded unless they take a pro-active stance and join the agreement, in this suggested approach they would benefit from the agreement unless insiders take an active posture towards expelling them from the benefits, presumably with the fulfilment of some procedural guarantees and allowing for

reinstatement of the privileges once the negative circumstances have faded away. Another middle-of-the road approach that could be considered consists of allowing accession of developing countries to the side agreements under less demanding terms than those that the other participants have to abide by. Combining the additional flexibility given to developing countries adhering to the side agreements with additional flexibility granted to signatories in denying outsiders access to the benefits of the agreement is probably the most that can be done without completely abandoning the unconditional MFN rule. This seems to be precisely the missing ingredient in the current setting: according to a research conducted by VanGrasstek and Sauvé, there is a clear pattern whereby agreements that have been negotiated *à la carte* offer few if any flexibilities for less developed parties, while agreements included in the Single Undertaking are very generous in terms of “special and differential treatment”.<sup>37</sup>

We devote the remainder of this paper to the exploration of various requirements that could be imposed for the institutionalization of flexibility so as to minimize its possible adverse effects.

A first important aspect to be tackled pertains to the areas where such constructions should be allowed. It is worth recalling, in this context, that similar delineations of areas have been operated in the context of EU’s enhanced co-operation as well. Thus, until the Nice Treaty, enhanced cooperation was completely inapplicable to CFSP matters and even now aspects

<sup>34</sup> Philip I. Levy: *op.cit.*, p. 434.

<sup>35</sup> Franklin Dehousse, Wouter Coussens, Giovanni Grevi: *Integrating Europe. Multiple speeds – One direction?*, EPC Working Paper, April 2004; p.10-11.

<sup>36</sup> Andrew Cornford: *op.cit.*, p.8.

<sup>37</sup> Craig VanGrasstek, Pierre Sauvé: *The Consistency of WTO Rules Be Squared with variable Geometry?*, World trade Institute conference, June 2004; p.22.

having military or defence implications remain off limits.

In the WTO context, one should start from the obvious proposition that not all issues are equally adapted to an *à la carte* approach. There have been various proposals concerning what could or not form the object of variable geometry formulas. Robert Lawrence suggests an eligibility test based on two main criteria: the existence of linkages to trade and the existence of adequate expertise, resources and authority in the WTO. Oliver Morrissey considers that the single undertaking should only be waived for issues "that are of lesser importance or that are more contentious, either because the link to trade is ambiguous or because the knowledge of the impacts of the measure is limited".<sup>38</sup> The main problem we see with these two categories of suggestions is the difficulty of rendering operational the criteria they use. Otherwise, we risk simply transferring the blockage from the impossibility of agreeing on the content of new rules in particular areas to the lack of agreement on whether a particular area fulfils the criteria for being excluded from the Single Undertaking. Self-election seems a far better solution: countries wishing to assume new obligations are the best placed to decide whether to do so in a particular area or not. We acknowledge, however, that this freedom of choice cannot be absolute. In particular, it would be impractical and a source of enormous confusion if revisiting existing WTO agreements in an *à la carte* manner would be admissible: one can only envision with horror the prospect of different versions of, say, the Antidumping Agreement, being applied by different sub-categories of WTO membership. Under such circumstances we find eminently sensible the view held by VanGrasstek and Sauvé,

namely that "a return to variable geometry can in all likelihood only be envisaged in a prospective manner, with regard to new issues".<sup>39</sup>

Another procedural safeguard proposed is reminiscent of the "emergency brake" (*frein d'urgence*) or the "slowdown device" (*ralentisseur*) devised in the EU. The idea here would be to ensure the legitimacy of an *à la carte* undertaking by involving a large membership in its preparation. It has thus been suggested that that all WTO members should be allowed to take part in negotiations leading to a new agreement, even if they are not yet ready to accept binding obligations. The gain of legitimacy that this guarantees is an important consideration, probably dwarfing the counter-arguments, which are not trivial: as one wise say holds, it is always tricky to have economy class passengers have a vote on the menu that will be served to business class air travellers.

One final word about the relevance of the "last resort" condition for WTO's circumstances. In the EU, the fulfilment of this condition is to be confirmed by the Council, before the green light is given to an enhanced co-operation initiative. In the WTO context, a formal decision of the Ministerial Conference or the General Council may prove too big a burden, mainly because solidarity is less developed than within the EU and bad faith attempts to block on the part of marginal members are more likely. One might, therefore, wish to consider a fulfilment by default of a WTO-type "last resort stipulation": the failure of the Ministerial Conference to put on the multilateral negotiations agenda an issue supported by a "critical mass" (however defined) of WTO members should count as proof that the "regular" venue had been explored, to no avail.

<sup>38</sup> apud. Simon J. Evenett: *The WTO Rules That We Deserve*, University of St.Gallen, 2004.

<sup>39</sup> Craig Van Grasstek, Pierre Sauvé: *op.cit.*, p. 24.