



DISSERTATION

The EU enhanced cooperation model: possible application to the entry into force impasse of CTBT

Verfasser

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Abstract

Abstract

As the title points out, the main purpose of this dissertation is to address “The EU enhanced cooperation model: possible application to the entry into force impasse of CTBT”.

The delay of the entry into force of CTBT raises attention mostly because of the rigid provisions of the Treaty. The CTBT and EU enhanced cooperation, the origin, the legal precedents and the legal structure of CTBT constitute the main object of this research and study. An attempt to evaluate the possibility of applying the EU enhanced cooperation model to the provisional application of the CTBT is suggested.

The compatibility between rigid and flexible rules and legal provisions is taken into the analysis developed, while at the same time the substantive object of CTBT – all nuclear-explosions-ban – is framed in a more vast scholarship of other disarmament, non-proliferation, and arms control treaties. The flexibility of the uses of concepts will be measured against the purpose of each interpretation.

International law examples will be added whenever of value to illustrate situations or assessments.

Keywords: arms control, CTBT, disarmament, flexibility, enhanced cooperation, entry into force, *erga omnes*, flexibility, *jus cogens*, non-proliferation, provisional application, ratification

Zusammenfassung

Wie schon der Titel hinweist, ist die Absicht dieser Dissertation: Die verstärkte Zusammenarbeit der EU als mögliches Vorbild für einen Durchbruch zur Inkraftsetzung des Vertrages über ein umfassendes Verbot von Nuklearversuchen (CTBT).

Die Verspätung für die Inkraftsetzung des CTBT hängt mit den strengen Vorschriften des Vertrages zusammen. Der Vertrag über ein umfassendes Verbot von Nuklearversuchen und die verstärkte Zusammenarbeit der EU, Herkunft, die rechtmäßigen Voraussetzungen und die rechtliche Struktur des CTBT sind die Inhalte dieser Forschungsarbeit. Diese Arbeit ist ein Versuch die Möglichkeit auszuwerten, ob der Mechanismus der verstärkten Zusammenarbeit in der EU als Vorbild für die vorläufige Anwendung des CTBT sein könnte.

Die Vereinbarkeit zwischen strengen und flexiblen Normen und rechtlichen Voraussetzungen wird im Laufe dieser Arbeit weiter entwickelt und ausgewertet. Zur gleichen Zeit wird der Inhalt des CTBT, ein umfassendes Verbot von allen Nuklearversuchen in Verbindung mit breiteren Studien über Abrüstungs-, Nichtverbreitungs- und Rüstungskontrollverträgen gebracht. Die Flexibilität in der Anwendung der Begriffe wird gemessen an die jeweilige Absicht der jeweiligen Auslegung.

Völkerrechtliche Beispiele werden dann dazugenommen, wenn sie zur Verdeutlichung von Situationen oder zu ihrer Auswertung beitragen.

Schlüsselbegriffe: Rüstungskontrolle, CTBT, Abrüstung, Flexibilität, verstärkte Zusammenarbeit, Inkraftsetzung, *erga omnes*, *jus cogens*, Nichtverbreitung, vorläufige Anwendung, Ratifizierung

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List of Abbreviations

AFSJ – Area of Freedom, Security and Justice

APEC – Asia-Pacific Economic Cooperation

ASEAN – Association of Southeast Asian Nations

CFSP – Common Foreign and Security Policy

CTBT – Comprehensive Nuclear-Test-Ban Treaty

CTBTO – Comprehensive Nuclear-Test-Ban Treaty Organisation

ESDP – European Security and Defence Policy

CSDP – Common Security and Defence Policy

CWC – Chemical Weapons Convention

ECJ – European Court of Justice

ECSC – European Coal and Steel Community

EEC – European Economic Community

EAEC or Euratom – European Atomic Energy Community

EU – European Union

GA/UNGA – General Assembly/United Nations General Assembly

ICAO – International Civil Aviation Organisation

IAEA – International Agency of Atomic Energy

ICJ – International Court of Justice

IDC – International Data Centre

IGC – Intergovernmental Conference

IMO – International Maritime Organisation

IMS – International Monitoring System

INF – Intermediate-Range Nuclear Forces Treaty

JHA – Justice and Home Affairs

NPT – Non-Proliferation Treaty

OJEC – Official Journal of the European Communities

OJEU – Official Journal of the European Union

OPCW – Organisation for the Prohibition of Chemical Weapons

OSI – On-Site Inspections

P5 – The Five Permanent Members of the Security Council: China, France, Russia, United Kingdom and United States of America

PNET – Peaceful Nuclear Explosions Treaty

PrepCom – Preparatory Commission

PTBT or LTBT – Partial or Limited Test Ban Treaty

PTS – Provisional Technical Secretariat

SAARC – South Asian Association for Regional Cooperation

SALT – Strategic Arms Limitation Treaty

SICC – Statute of the International Criminal Court

TEC – Treaty of the European Community

TEU – Treaty of the European Union

TFEU – Treaty on the Functioning of the European Union

Treaties – TEU and TFEU

TTBT – Treaty on the Limitation of Underground Nuclear Weapon Tests

UN – United Nations

WMD – Weapons of Mass Destruction

WTO – World Trade organisation

Introduction

Introduction

It is deceiving that the Comprehensive Nuclear-Test-Ban Treaty that has been concluded as a Treaty aiming at contributing to Peace between States is still not in force after 16 years. It is not a single case in international law, but what makes this case appalling is that it is not because of its content is controversial that it is not in force, but only because of factors that go beyond the Treaty itself. For some parties the negotiation format was the incorrect one, for other parties the Treaty could include extra elements (not that those that have been included are wrong or unacceptable). Some others argue that the requirements for its implementation must be revisited. In reality, it is a political argumentation and it is any sort of legality or normativity that impedes its entry into force.

A party that has signed or ratified the Treaty can hardly oppose to its entry into force. However, disagreement exists regarding CTBT and therefore a solution may need to be found to make the Treaty fully effective. The problem has been identified long ago, but so far no satisfying solution has been put forward, despite a few examples in that sense. When dealing with non-proliferation and disarmament themes, discussions are normally slow and tough, but it is expectable that the CTBT should at least have as many ratifying States as NPT does. Nevertheless, the entry into force has never been taken as an easy step, in fact the CTBT includes a provision intended to favour a reanalysis of the possibilities of entry into force.

1. Main question

As the title points out, the main purpose of this dissertation is to address “The EU enhanced cooperation model: possible application to the entry into force impasse of CTBT”. It is a proposal based in EU and international law.

Western law has been at the basis of international law and has served as an inspiration for several domestic legal orders in the World as well. EU law is one of the major contributions of EU to the world for the last 60 years, not only regarding regulatory principles, but the rule of law as a whole. The legal contribution of EU must

be kept or else the international law system may fall apart if deprived of one of its major roots. Moreover, the EU contribution as far as law is concerned may be one of the major elements of EU external action.

Due to the fact that EU law constitutes a solid *corpus juris* and there is nothing to impede that it sets as an example in different contexts than EU, it is admissible that some of the principles, mechanisms and concepts that the EU has generated could be adopted at different instances and by different organisations. The EU model can serve as a model or, depending on the subject, be directly applicable to international law.

The entry into force of CTBT has been delayed for too long due to the strict disposition of article XIV. However, diverse solutions may be found to advance with the process. The enhanced cooperation mechanism as inspired by the EU treaties may be a good alternative.

Nevertheless it must be stated that any proposal that may be advanced in order to suggest a possible way forward for the CTBT cannot put legitimacy at stake just to privilege effectiveness, otherwise the rule of law could eventually be put into question. It would be a serious mistake to opt for any kind of legal illegitimate alternative, even if politically more comfortable.

2. State of the art

The question of entry into force and provisional applications has been dealt with in the Vienna Convention on the Law of Treaties and in the different works that preceded it. The fact that the dispositions on entry into force and provisional application may help in moving forward to find a solution for the CTBT, although not all States that have signed or ratified the CTBT, or that may do so, have ratified the Convention.

On the other hand, the International Court of Justice judgment, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I. C. J. Reports 2002, para. 258 and in particular para. 264.) which declared article 24 of Vienna Convention on the Law of the Treaties a customary rule of international law, making the entry into force of Treaties a binding procedure for the States that decide to go along with Treaties among themselves, shows

that the engagement of a State regarding ratification and entry into force of Treaties is part of the rule of law principles.

Moreover, the CTBT foresees the possibility to the parties to take a different decision regarding its entry into force than the text of the Treaty approved, and that is in line with the Vienna Convention on the Law of Treaties. This fundamental text will be taken into consideration in the analysis that is intended here.

According to scholarship, there are not so many analyses on non-ratified treaties, although the problem has been raised by few studies on this specific matter. As for CTBT, most of the publications issued so far basically deal with the negotiations period of the Treaty and its technical elements. Only in rare occasions is the problem created by the difficulties regarding the non-entry into force of CTBT treated from a legal perspective. In most of the cases where the matter is tackled it is done mainly as a political question. It is undoubtedly a political question, but it surely involves a legal solution, which implementation can be of some help for the political question of non-ratification.

It must be said that entry into force of treaties and agreements depends on domestic legal order as well. To illustrate this aspect, we will just quote an example close to us, the Portuguese case. The Portuguese Constitution defines the procedures for the ratification act and the delays for the procedures, and both elements may have by themselves in some cases consequences on international law by, for instance, retarding the entry into force of a particular Treaty or agreement.

The Portuguese legal norm distinguishes two different procedures according to the kinds of treaties at stake, to which it gives the name of Treaty or Agreement. The ratification procedures are essentially different, both in terms of the actors involved and the competences attributed to each of them, and also the power to block or not the ratification process, and therefore its entry into force.

In the case of Treaties, the Government has to present a decree to the President who ratifies it. In the case the Treaty deals with Parliament competences, this organ has also to approve the text beforehand by a resolution, which is then ratified by the President. The Constitution is very accurate on defining the competences of each organ, besides, in case of doubt, the Government can always ask the Parliament for its

approval, thus giving it a political strength that may make an opposition by the President more difficult.

On the other hand, the President can ask the Constitutional Court for its opinion on procedural matters, as well as between the compatibility of the signed Treaty and the Constitution. A negative opinion allows the President to refuse signing the ratification, which is then sent back to the Parliament that can ratify it by a 2/3 majority.

In the case of agreements, they are approved by the Government by decree which is presented to the President for signature. The President cannot refuse its signature to the decrees.

The Constitution is silent on the delays regarding the ratification of a Treaty or Agreement as a whole, but when the process has started, the time frames for each of the steps is defined and the different actors must comply with them.

This is just one of many examples of domestic law regarding ratification procedures. The question arising from the diverse procedures of ratification and entry into force in domestic legal orders shall not be addressed in this study, but it must be noted that ratification processes are of different nature from State to State and depend on each constitutional order.

The problem that is at stake in this investigation is to find ways to change the approach to CTBT so that it does not stay, as it is now, hostage of an individualized group of states.

3. Purpose

A proposal will be attempted to provide an answer to the question that guided us all along our research and which we have pursue in this dissertation. This proposal will include a combination of European law and International law as a suggestion for a solution for the implementation of CTBT and to its entry into force. The goal is to develop some of the legal possibilities created by EU enhanced cooperation and suggest its implementation as far as CTBT is concerned. By doing so, a challenge on flexibility will be tried.

Taking into account the precise rules of EU enhanced cooperation; we will try to verify if this mechanism can be used for the entry into force of the CTBT. It will be a theoretical approach with a clear background notion that, in this particular case, any move towards entry into force basically requires the political will from States Signatories and Ratifiers.

Nevertheless, if we were to consider possible ways out from the standstill in which we are at the moment, and even if there is a political will to do so, a legal solution will have to be found. The EU enhanced cooperation mechanism can be a model to overcome the lethargy of the ratification process of the Treaty and thus allowing its entry into force or at least its provisional application.

Despite the truly innovative character of EU enhanced cooperation, it must be also said that the general approach can be found in international law, and especially within the legal framework of other international organisations. This reality makes it easier to try to apply an EU concept outside the EU structures, even if it has to be adapted.

4. Methodology

We have opted to limit the number of quotations and instead refer to the original works and by doing so we have identified the references that somehow are connected with our text in footnotes, in order for the reader to follow our reasoning without disturbances.

The choice made to indicate full bibliographic references in the footnotes intends to facilitate the reading of the text. In the end, the bibliography is divided in two major groups (primary sources and general bibliography), to distinguish official texts from critical literature. The jurisprudence references regarding the cases of the European Court are not all quoted the same way because full information was not available at the ECJ site, namely the page numbers, one of the reasons for that might be the fact they are also not presented in pdf format despite the chorus of bloggers appealing to the ECJ to take measures to solve this problem.

All the mistakes and inexactnesses that may have been engendered in this text are our own sole responsibility.

As far heuristic is concerned, the focus was mainly on more recent literature due to the almost daily changes in EU law and also in CTBT evolution. Although most of the bibliography is in English, it must be noticed that there are many authors of distinct proveniences. Portuguese, French and Spanish literature was also included. There is not much case law on the subject dealt with in this study, i.e., enhanced cooperation and entry into force of treaties.

Regarding hermeneutics, we privileged a contextual reading in time and space, but always trying to establish connections between the different positions expressed both to find similarities and to recognise differences. Conclusions were then taken. To avoid losing track of the main purpose of this study and the fact that there is abundant literature on philosophy of international law and law systems, we shall not deal with any of these concepts here, although they are necessarily at the basis of any legal research, independently of the theme.

As far as reference to numbers that may change over time (like CTBT signatory or ratifier States or number of States participating in an enhanced cooperation), we have set the date of 1 December 2012 as the limit to our updates. It would be impossible to ensure a full update until the date of presentation of this study, due to the fact that numbers may change at anytime.

5. Structure of the dissertation

The dissertation is divided in three distinct parts. The first concerns the Comprehensive Nuclear-Test-Ban Treaty, its origin and nature; the second regards European Union enhanced cooperation mechanism and similarities in international law; and the third is constituted by an attempt to present different possible applications of enhanced cooperation in EU, first, and the potential use of such mechanism as far as the application or entry into force of CTBT are concerned. Concepts are approached all along the dissertation and attention to the definitions and uses is given according to its presence in the text.

Chapter I refers to the genesis and to the background of CTBT. There is an attempt to characterize some concepts that will be used all along the dissertation and, at the same time, to establish an historical perspective of CTBT, as well as its relations with treaties within the same domain. This chapter also includes some theoretical aspects of international law, namely the recognition of *erga omnes* obligations and effects and also the applicability of *jus cogens* within the context under consideration. In terms of concepts regarding non-proliferation, disarmament and arms control, there is an effort to complement the definitions with examples of treaties that somehow deal with an approximate object of CTBT.

Chapter II analyses the provisions of the Comprehensive Nuclear-Test-Ban-Treaty and tries to establish some comparisons with similar provisions in other international treaties. When analysing the Preparatory Commission, some focus will be directed to whether it should be considered, or not, a provisional or interim application of the Treaty. There is no specific jurisprudence regarding CTBT even because it is not in force, but there are some court decisions, mainly from the International Court of Justice that can and should be referred as they deal with matters that are connected with the subject of the Treaty and to procedural dispositions that in some cases are also applicable to the CTBT.

Chapter III focus on the problems regarding the entry into force of CTBT and presents the difficulties arising from the provisions of the Treaty. The discussion of this topic intends to be more of legal than of political nature. This chapter also includes the presentation of proposals that so far have been forward for an early entry into force of CTBT. Another aspect also raised here is the relation with customary international law, namely by referring to previous treaties on a similar domain.

Before moving to the proposal intended to be suggested in the present dissertation, the general question on enhanced cooperation will be taken into account. The main goal of this study is to present a legal proposal to solve a problem of ratification and entry into force of a multilateral Treaty but avoiding the change of the Treaty's text.

Chapter IV intends to explain the changes occurred in enhanced cooperation as far as EU law is concerned, the different nomenclature it has received and the consequences of its adoption, as well the purpose of such an initiative. The historical-

thematic perspective is followed in this chapter with detail. An analysis on flexibility in EU is also offered.

Chapter V scrutinizes the concept of enhanced cooperation on its legal validity, its uses and procedures of implementation. It finalises by presenting the effective examples of enhanced cooperation adopted as foreseen in the treaties and some of the problems arising from its adoption. There is already some jurisprudence dealing with enhanced cooperation and it shall be given adequate attention as far as the theme of this work is concerned. The jurisprudence deals mostly with the application of enhanced cooperation and not so much with its use and implementation mode.

Chapter VI makes an evaluation of the use of enhanced cooperation in international law to conclude that it is not at all an unknown concept, but it is not as developed as in EU law, despite some cases of comparable forms of understanding of the concept, namely by APEC and ASEAN. The differences in the uses of the concept are mainly on its scope of and implementation forms. This discrepancy is also discernible in some cases of domestic laws, where the concept of enhanced cooperation is occasionally used, but never with the same comprehensive character as defined by EU law.

After these two elements of the present work have been presented, the CTBT and EU enhanced cooperation, and without arguing in any syllogistic sense, a combination between the two constituents is then tested. Not that there is any idea of two premises originating a consequence, but a separate explanation of both of those elements was considered necessary by us before starting with the presentation of a concrete proposal.

Chapter VII will review EU enhanced cooperation and will try to identify other areas where the concept could be applied taking into account the evolution of events and EU law. It is a hypothetical approach, even if backed on scholarship. This hypothesis is put forward as a legal possibility and not with any political intent, an intent that would go beyond the purpose of this dissertation. The goal is to reveal some examples of possible enhanced cooperation within EU law. A specific mention will be made to the present problem of the sovereign debt and the discussions in the Council of the European Union on the need of a specific Treaty to handle some of the issues. A

position we do not share, as the recourse to enhanced cooperation could be a better option.

Chapter VIII assesses the application of the EU enhanced cooperation mechanism to the CTBT, both considering provisional application of the Treaty and its entry into force. The aim of the chapter is to identify which elements foreseen in the TFUE/TUE regarding enhanced cooperation can be applied to the CTBT and in which cases there may be a need for changes. A concrete legal proposal is formulated here.

The conclusion of this dissertation will eventually sum up the main questions addressed in this exercise underlining the added-value of EU law for international law.

Part I

The Comprehensive Nuclear-Test-Ban Treaty

Chapter I

CTBT - Its genesis and influences

Chapter I - CTBT- Its genesis and influences

1. Brief remarks on the Comprehensive Nuclear-Test-Ban Treaty: similarities to other multinational Treaties

The Comprehensive Nuclear-Test-Ban Treaty (CTBT) text was adopted in 1996 by a United Nations General Assembly Resolution¹, after two years and a half of intense negotiations² at the United Nations Disarmament Commission (which had been created in 1952) in Geneva. The resolution received 158 votes in favour, 3 against (India³, Libya and Bhutan) and 5 abstentions (Cuba, Lebanon, Mauritius, Syria and Tanzania, 19 States (including North Korea) were absent or prevented from voting for having arrears. The adoption of the Treaty opened it for signature⁴. However, after 16 years the Treaty is still not in force due to the fact that its entry into force depends upon a unique criterion: the ratification of CTBT requires that 44 specific States, listed in Annex 2 to the Treaty, conclude this procedure before the CTBT enters into force. Between 1945

¹United Nations General Assembly Resolution 50/245 of 10 September 1996. The Treaty was opened for signature on 24 September 1996. Voting record

YES	No	Abstention	No Vote - 19	
158	3	5	Voting right suspended - 14	Out of the room - 5
All the others States that are not in any of the other lists	Buthan, India, Lybia	Cuba, Lebanon, Mauritius, Syria, Tanzania	Burundi, Central African Republic, Chad, Dominican Republic, Equatorial Guinea, Gambia, Iraq, Niger, Mali, Sao Tome and Principe, Somalia, Republic Democratic of Congo, Zambia, Comoros	Democratic People's Republic of Korea, Eritrea, Lesotho, Rwanda, Seychelles

² Jonas, David S., "The comprehensive nuclear test ban Treaty: current legal status in the United States and the implications of a nuclear explosion", *New York University Journal of International Law and Politics*, vol. 39, n. 4, 2007: p.1014.

³ India keeps sustaining that the Treaty does not clearly set as the aim the total disarmament and until it happens, India will not sign the Treaty. If it were to keep this position indefinitely, the Treaty will never enter into force. One of India's arguments is that laboratory testing and explosions are not banned by the Treaty, but those are only possible for the States that have recollected sufficient information from previous experiences. For New Delhi this means that the discrimination that it argued on 1968 regarding the NPT remains and it is unacceptable.

⁴ On 23 September 1996.

and 1998, there have been, at least, 2050 nuclear explosions worldwide⁵. In 1998 France acceded to the Treaty thus putting an end to its nuclear essays. It had been the only one of the five nuclear States that had not done it in 1996, while two others (China and USA) haven't still ratified the Treaty.

The Treaty was the end of a process initiated in 1993 by a UNGA resolution imposing the beginning of negotiations of a CTBT⁶. At this stage 183 States have signed the Treaty, 157 have ratified, 36 of annexe 2⁷

In 1994, during the first phase of negotiations, France and UK hardly participated. If the number of papers presented by delegations reveal their engagement, the difference between those two and the other States, specially taking into account that those were two Nuclear States and Permanent Members of the Security Council, is noticeable: USA – 22 papers; Australia – 14; China – 13; Canada – 10; Russia and India – 7 each; Sweden – 6; France – 4, UK – None. The rolling text that was then used for the negotiations Treaty was a mixed of an Australian and a Swedish non paper.

The question of the entry into force will occupy us thoroughly later on. At this stage the intention is only to raise the subject, for its particular importance. Taking into account the provisions of VCLT, in particular its article 24⁸, there are some elements that should be taken into account in all analysis of entry into force clauses, as only with the same criteria is it possible to infer conclusions on similarities and differences. It is of particular importance the ICJ judgment which declared article 24 VCLT as a customary rule of international law⁹, making the entry into force of Treaties a binding condition for the States that decide to go along with Treaties among themselves. We

⁵“Des explosions nucléaires expérimentales ont été réalisées dans tout type d’environnements, produisant des rayonnements en quantités dangereuses au-dessus du sol, sous-terre et sous l’eau. Des essais nucléaires ont été menés sur barge, sur tour, sous ballon, à la surface de la terre, sous l’eau à des profondeurs de 600 mètres, ou sous terre à plus de 2 400 mètres de profondeur et dans des tunnels horizontaux. Des bombes d’essai ont été larguées par des avions et tirées par des fusées dans l’atmosphère, à plus de 320 kilomètres. Partout où des essais d’armes nucléaires ont été réalisés, des problèmes écologiques et sanitaires sont apparus”, Peden, William, Hill, Felicity, “Le Traité d’interdiction des essais nucléaires mis à l’épreuve”, *Forum du Désarmement*, n. 2, p. 17.

⁶United Nations General Assembly Resolution 48/70 of 16 December 1993.

⁷ <http://www.ctbto.org/>

⁸Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 339-348.

⁹ International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Preliminary Objections*, I. C. J. Reports 1998, para. 31 and 32.

shall argue that the VCLT can be assumed as customary rule of international law¹⁰ vested in one Treaty, thus making those States that have not acceded to be bound by its content, exception made to specific procedural aspects.

The rules defined in the Treaties may vary, depending on the substance of the Treaty, the Parties, the impact intended for the Treaty, among other reasons. The following examples: i.e. the UN Charter, the United Nations Convention on the Law of the Sea (UNCLOS), the Statute of the International Criminal Court (SICC), and the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) are a clear sign of this diversity. Two aspects seem of particular importance: the number of Parties needed to make a Treaty enter into force¹¹ and the time frame for it to happen. We assume that the deposit of the ratification instrument is a clear manifestation of the will of the Party to be bound by the Treaty, although we would recall article 18 of VCLT as it considers that, even if a party to a Treaty is not bound before the accomplishment of ratifying or any other concluding procedure contained in the Treaty, it is still under the obligation not to defeat the object and purpose¹² of the Treaty in question. This might be one of the reasons supporting the moratoria from states that have signed the CTBT but which ratification is still pending.

Differently from what it might seem normal, not all States have necessarily the same status regarding the entry into force of a Treaty. In some cases, there is an identification of a few mandatory ratifications by some States, like in the case of the UN Charter¹³, but those are not enough. The UNCLOS speaks only about a number (60)¹⁴, but does not name any State. The same number and without any specific reference to a State is predicted in the Statute of the International Criminal Court (SICC), article 126. The Kyoto Protocol, because it is a very technical Protocol and because it is attached to a previous instrument, the UNFCCC, could define a different set of rules, by including in the number of Parties required for its entry into force some other characteristics¹⁵.

¹⁰ In the sense of Article 38, n. 1.b of ICJ Statute.

¹¹ Lantis, Jeffrey S., *The Life and Death of International Treaties. Double-edged diplomacy and the politics of ratification in comparative perspective*, Oxford: Oxford University Press, 2009, p. 2

¹² Klabbers, Jan, "How to defeat a Treaty's object and purpose pending entry into force: toward manifest intent", *Vanderbilt Journal of Transnational Law*, 2007, vol. 34, n.2, p. 293.

¹³ UN Charter, article 110.

¹⁴ The United Nations Convention on the Law of the Sea, article 308.

¹⁵ The Kyoto Protocol to the United Nations Framework Convention on Climate Change, article 25.

One other aspect of the entry into force is the date set for the effect. The UN Charter, for instance, does not impose a date, but only a fact: the ratification of a certain group and a certain number of States. Ulterior ratifications make the UN Charter in force for those States on the date of the deposition of the ratifying instrument, which means that in reality there will always be some delay between the ratification act and its entry into force and the States are not compelled to hand over the instrument in any particular time frame, it depends exclusively on the will of the State.

The UNCLOS foresees a time frame for the entry into force after all the ratifications needed for the effect have been deposited. It also includes specific rules on this subject for future amendments.

Although with a different time frame, the SICC follows the same logic by defining a date for the entry into force after the fulfilment of procedural conditions, namely ratifications by States and deposit of ratifications. In spite of establishing the possibility of amendments, it does not say anything about their entry force, so it can be assumed that they will enter into force upon their approval.

The CTBT includes a provision on entry into force establishing a number and a nominal list of States which ratification is mandatory before entry into force.

The CTBT is the first Treaty to abolish all sort of nuclear explosion tests, not allowing any exception on magnitude, environment or purposes of the explosion. The fact that it was adopted by a UNGA resolution makes it of normative value.

The pressure for concluding a CTBT was indeed growing in 1995, not only the decision of extending the NPT indefinitely underlined that nuclear explosions had to stop (as it is said in its preamble), but the statement of principles and objectives for nuclear non-proliferation and disarmament included a provision stating the signature of a CTBT should be concluded by the end of 1996¹⁶. Moreover, the ICJ in 1996 corroborated this idea in its advisory opinion on nuclear weapons¹⁷.

¹⁶ The same idea will be repeated in the NPT review conference when it was included in the 13 steps document resulting from the Review Conference of 2000.

¹⁷ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinions, I.C.J. Reports, 1996: para.105(2). It is relevant to note that the ICJ refers in this paragraph to two different elements: to pursue and to conclude negotiations regarding nuclear disarmament. By doing so, the ICJ seems to intend not to exclude any step of the process, making it even stronger and legally valid.

Recognizing that UNGA resolutions may have normative value, the ICJ does not fully endorse the interpretation that the repetition of UNGA resolutions signifies the existence of a rule of international customary law¹⁸, nor does it refuse it, it just simply mentions it. We consider that the ICJ could be more assertive¹⁹, but as the ICJ has always refused to consider in its evaluation the conditions of the adoption and the content of a UNGA resolution²⁰, it cannot recognize UNGA the *opinio juris*²¹ requirement in international law²². Interesting enough, the ICJ does not comment on the validity of its own advisory opinions when they are not endorsed by all the judges.

2. Getting some clarity on concepts

2.1. Arms control, disarmament and non-proliferation

There is often some confusion in literature regarding the concepts of arms control and disarmament. It must be said that they are not necessarily synonyms, especially when the term is translated into other languages but English. The meaning of these concepts is involved in differentiated historical contexts that must be taken into account when these issues are addressed. The concept of arms control seems to be less developed than the concept of disarmament²³. Although CTBT is a disarmament

¹⁸ Burroughs, John, “The Advisory Opinion of the International Court of Justice and the Statute of the International Criminal Court”, *Conference on Nuclear Policy and Security on the eve of the 21st century*, St. Petersburg, 1999: p. 1

¹⁹ International Court of Justice, *Legality of the Threat or Use by a State of Nuclear Weapons in armed conflict*, *Advisory Opinions*, I.C.J. Reports, 1996: p. 254.

²⁰ The ICJ “does not find it necessary to expound the extent to which the proceedings of the General Assembly, antecedent to the adoption of a resolution, should be taken in interpreting that resolution”, International Court of Justice, *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, *Advisory Opinion*, I.C.J. Reports, 1962: p. 156.

²¹ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinions*, I.C.J. Reports, 1996: p.254-255 and Cassese, Antonio, *International Law*, 2nd ed., New York: Oxford University Press, 2005: p.119; Ian Brownlie, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008: p.8-10; Shaw, Malcolm, *International Law*, 6th ed., Cambridge: Cambridge University Press, 2008: p.84

²² Baird, Darren Mitchell, “The changing posture of the international community regarding the threat or use of nuclear weapons”, *Suffolk Transnational Law Review*, n. 22, 1999, p. 557-548.

²³ Baas, Richard, *Negotiating nuclear weapons. A study on the merit of article VI of the Nuclear Non-Proliferation Treaty for Nuclear Disarmament*, Twente: University of Twente – Münster: Westfälische Wilhelms-Universität, 2008: p.16.

Treaty²⁴, namely because it impedes that nuclear tests take place, and without nuclear explosions it is not possible to be sure that the nuclear weapon can be effective²⁵, it is difficult to consider it as an arms control Treaty as there is no reference to specific weapons in the Treaty²⁶, only in a subsidiary way could it be considered a specific arms control Treaty²⁷, like the lists of the multilateral export control regimes like the Wassenaar Arrangement, the NSG, the Zangger Committee²⁸, or the MTCR indeed are²⁹. However, we must recall that those lists include weapons, but also technology and dual use equipment that could be used for explosions³⁰. On the other hand, and despite the fact that some of those lists are prepared by only a few number of States, the fact is that they have an *erga omnes* effect, which will be missing in some treaties, as we shall see, namely because of their bilateral character.

Another concept that is often used in this study is non-proliferation³¹, which is also confused with disarmament³², although being very different. The difference is such

²⁴ Comprehensive Nuclear-Test-Ban Treaty, preamble, paragraphs 4, 5, 6, 7 and 10.

²⁵ This was clearly stated by Richard L. Garwin during the CTBT: Science and Technology 2011 that took place in Vienna between 8 and 10 June 2011. Although from the theoretical point of view computer explosions can be enough, reality is a different game. This need to test was particularly obvious from UK and France side with their proposal for nuclear tests under exceptional circumstances and the last tests by France and China to acquire sufficient information for computer testing (that later would be used by India as an argument for its not ratification of the Treaty, as it does not possess those data), Ramaker, Jaap, Mackby, Jenifer, Marshall, Peter D., Geil, Robert, *The Final Test. A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna: Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 2003: p.25. There are, however dissident views to this approach, Fetter, Steve, *Toward a comprehensive test ban*, Cambridge: Ballinger Publishing Company, 1988: p. 34, 72 and 100.

²⁶ "Unlike arms control treaties that limit the deployment of particular types of weapon systems, restrictions on nuclear testing are an attempt to thwart research and development on new nuclear weapon systems of all kinds", Fetter, Steve, *Toward a comprehensive test ban*, Cambridge: Ballinger Publishing Company, 1988: p. 185.

²⁷ Dekker, Guido den, "The effectiveness of international supervision in arms control law", *Journal of Conflict and Security Law*, vol. 9, n. 3 2004; p. 315-330

²⁸ Schmidt, Fritz W., "The Zangger Committee: its history and future role", *The Nonproliferation Review*, vol.2, n.1, 1994: p. 38-44.

²⁹ *Commitment and Compliance. The Role of Non-Binding norms in the International Legal System*, edited by Dinah Shelton, 2nd. ed., Oxford: Oxford University Press, 2007: p. 472-474.

³⁰ A synthetic but complete explanation on the different regimes of arms trade restrictions can be found in Prenat, Raphaël, "Les régimes multilatéraux de maîtrise des exportations de technologies sensibles à l'utilisation militaire", *Annuaire Français de Droit International*, vol. 44, 1998, p. 293-311.

³¹ To avoid different usages of concepts, and once we are dealing with a Treaty that has been approved by the UNGA, we usually follow the definitions presented in Tulliu, Steve, Schmalberger, Thomas, *Coming to terms with security: a lexicon for arms control, disarmament and confidence-building*, Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2003: 240p. and *Coming to terms with security: a handbook on verification and compliance*, Geneva-London: UNIDIR - United Nations Institute for Disarmament Research – VERTIC – The Verification Research, Training and Information Centre, 2003: 146p. The definitions presented in the NATO site, http://www.nato.int/issues/arms_disarm_nonprol/index.html#Definitions, are particularly clear as well.

that the international Community has preferred to keep the discussions on these issues in two different places³³. Despite the differences, there is a large grey area that eventually is discussed both at disarmament and non-proliferation level³⁴.

2.2. *Erga omnes* obligations and *erga omnes* effects

The concept of *erga omnes* obligation was first recognised by the ICJ in *Barcelona Traction case*³⁵. It refers to obligations that are valid for all, meaning the whole international community; all States have some interest upon specific rights. These obligations designate the scope of the application of the law at stake, as well as the procedural consequences from this. All States - irrespective of their particular interest in the matter - are entitled to invoke State responsibility in case of breach of an *erga omnes* obligation³⁶.

Erga omnes obligations are not restraint to any territorial scope. Unlike contracts' or Treaties' obligations, *erga omnes* obligations grant enforceable powers to all States, which mean that all States can institute contentious proceedings before the court, and thus making the State violator responsible. This "spill-over" effect from the

³² Guillard, Olivier, *Désarmement, coopération régionale et sécurité en Asie du Sud*, Paris : L'Harmattan, 1999 : p. 31 and Baas, Richard, *Negotiating nuclear weapons. A study on the merit of article VI of the Nuclear Non-Proliferation Treaty for Nuclear Disarmament*, Twente: University of Twente – Münster: Westfälische Wilhelms-Universität, 2008: p.3, 15.

³³ It is common to consider Vienna – Austria as the home to non-proliferation, specially because it hosts the siege of IAEA and CTBTO, and Geneva-Switzerland as the home of disarmament, as the Conference on Disarmament has its siege there.

³⁴ Although we consider it is a rather radical opinion, it is worth mentioning, Arundhati Ghose when he sustains that the CTBT, as it is today, is no longer a disarmament treaty but just a non-proliferation instrument, "Maintining the moratorium – a de facto CTBT", *Disarmament Forum*, n.2, 2006: p. 24.

³⁵ "33. (...)In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.", *Case concerning the Barcelona Traction, Light and Power Company Limited*, I.C.J. Reports 1970, p. 3-53

³⁶ This understanding has been a process. We would recall here the advisory opinion by the ICJ, where it was held "only the party to whom an international obligation is due can bring a claim in respect of its breach" *Reparation for injuries suffered in the service of the United Nations*, *Advisory Opinion*, I.C. J. Reports 1949, p. 181-182 and again the *Barcelona Traction Case*. Moreover, it is also significant to look into the position by the International Law Commission, "Fragmentation of International law: difficulties arising from diversification and expansion of International Law", A/CN.4/L.682, 13 April 2006.

ICJ ruling on *erga omnes*, gave rise to a thorough discussion and application of the law of State responsibility³⁷. These kinds of processes are usually settled by the ICJ, as National courts do not have the jurisdiction to enforce those obligations. This does not mean, at all, that just for the fact that those norms are *erga omnes* obligations they are automatically implemented.

The balance between an *erga omnes* obligation and the respect for the principle of *pacta tertiis* has been highlighted by the publicists and also by the ICJ jurisprudence³⁸. This is a question that the CTBT has to deal with as well, once, for instance, a non Signatory State is not obliged to build an IMS Station even if it may negatively impact States Signatories. On the other hand, the *erga omnes* effects of CTBT obligations impede that State Signatories affect non Signatory States. An important remark is that *erga omnes* effects should not be confused with *erga omnes* obligations, as in the case of the CTBT its provisions regarding the basic obligations considering the main goal of Peace have *erga omnes* effects, not because of CTBT but due to international law; the specific obligations, on the other hand, are *erga omnes* for all the Parties. If the nuclear test-ban is a desired *erga omnes* effect of the Treaty, it is an *erga omnes* obligation for all States Signatories, and eventually all States, not to make any explosion. By adhering to the Treaty, States assume the duty of certain obligations towards the other States Signatories or Ratifying States and also to all the States, without any differentiation regarding their status vis-à-vis of the Treaty.

The two characteristic features of obligations *erga omnes* identified in the Barcelona Traction case by the ICJ, that is, universality, binding on all States without exception, and solidarity, all States have a legal interest in their protection³⁹, are both applicable to CTBT reasoning.

Some of the areas where *erga omnes* are perhaps easier to be identified are the environmental⁴⁰ norms, genocide, piracy, Human Rights⁴¹. However, it should be

³⁷ Tams, Christian J., Tzanakopoulos, Antonios, "Barcelona Traction at 40: The ICJ as an Agent of Legal Development", *Leiden Journal of International Law*, vol. 23, 2010: p. 781-800.

³⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16-54.

³⁹ Ragazzi, Maurizio, *The Concept of International Obligations Erga Omnes*, Oxford: Oxford University Press, 2002: p. 17.

⁴⁰ Viñuales, Jorge E., "The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment", *Fordham International Law Journal*, vol. 32, n. 232, 20p.

underlined that *erga omnes* obligations are not *a priori* excluded from any domain. The *Barcelona Traction* case also contributed for the definition of fundamental values that concern the whole international community, as they are at the base of the *erga omnes* obligations. These obligations “are grounded not in an exchange of rights and duties but in an adherence to a normative system”⁴².

Taking into account the content of the Biological Weapons Convention (BWC) and the Convention on the Prevention and Punishment of Genocide (CPPG), we consider that these two Treaties include provisions that are *erga omnes* application and any legal person of the whole international community, namely the States, can take contentious proceedings in case of violations of the universal principles of those Treaties. We would recall here the case of counter claims by Yugoslavia in 1997, which enlightens on the effects of the *erga omnes* obligations, by making them compelling⁴³.

Nevertheless, it must be stated that law suffers a constant evolution and the concepts as well, that is why it is possible to recognize that, for instance, 1951 Convention on the Prevention and Punishment of Genocide contains *erga omnes* obligations, which were only named as such in 1970. The resolution on obligations and rights *erga omnes* in international law⁴⁴ is another enlightening document of the definition of *erga omnes*, though not as binding as the ILC or the ICJ.

It is relevant to notice that unilateral declarations or decisions may also have *erga omnes* effects⁴⁵. That was the case with the French government declarations regarding nuclear tests in South Pacific⁴⁶. These cases involving Australia, New Zealand and France, and unlike it might be suggested by its title, should be considered within the environment scope⁴⁷, and not in the disarmament or non-proliferation ones.

⁴¹ Ragazzi, Maurizio, *The Concept of International Obligations Erga Omnes*, Oxford: Oxford University Press, 2002: p. 135.

⁴² R. Provost, “Reciprocity in Human Rights and Humanitarian Law”, *British Yearbook of International Law*, n. 65, 1994: p. 386.

⁴³ Pegna, Olivia Lopes, “Counter-claims and Obligations *Erga Omnes* before the International Court of Justice”, *European Journal of International law*, n. 9, 1998 p. 724-736

⁴⁴ Fifth commission of *Justitia et Pace* – Institut de droit international, 2005.

⁴⁵ Ragazzi, Maurizio, *The Concept of International Obligations Erga Omnes*, Oxford: Oxford University Press, 2002: p. 175.

⁴⁶ International Court of Justice, *Nuclear Tests (New Zealand v. France)*, Judgement, I.C.J. Reports, 1974: p. 455-478; International Court of Justice, *Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports, 1974: p. 253-274.

⁴⁷ Ragazzi, Maurizio, *The Concept of International Obligations Erga Omnes*, Oxford: Oxford University Press, 2002: p. 187.

2.3. *Jus Cogens*

Taking into account the ICJ position on *jus cogens* norms⁴⁸, as some nuclear States did not sign or ratify the Treaty, it could be difficult to consider CTBT norm, at this stage, a *jus cogens* norm with *erga omnes* effects⁴⁹. Curiously, both concepts were consecrated at the same time. One, *jus cogens*, by the International Law Commission in the VCLT, and the other, *erga omnes*, by the International Court of Justice. Unlike *erga omnes* that refer to obligations and effects, *jus cogens* is applicable to norms. There is a substantive and conceptual difference between the two concepts, which are often used and correctly used in parallel but they cannot be interchanged⁵⁰.

However, the CTBT is inclusive and it is the result of several decades of negotiations and legal opinions on the matter, therefore, unlike PTBT⁵¹, the CTBT will endorse a practice resulting in customary rule⁵², and therefore with *erga omnes* effects but not being *jus cogens*⁵³. It must be recalled, however, that besides the state practice, and in order to be defined as a rule of customary international law it also requires an *opinion juris*⁵⁴ which may be inferred from UNGA and UNSC resolutions.

3. The origins of the Comprehensive Nuclear-Test-Ban Treaty

⁴⁸ ICJ, *North Sea Continental Shelf Cases*, I.C.J. Reports 1969, para. 73.

⁴⁹ Some authors argue that international law is not only treaties but primarily custom and general principles of law, Farrel, Theo, Lambert, Hélène, "Courting controversy: international law, national norms and American nuclear use", *Review of International Studies*, n. 27, 2001: p. 320.

⁵⁰ Ragazzi, Maurizio, *The Concept of International Obligations Erga Omnes*, Oxford: Oxford University Press, 2002: p. 193-210.

⁵¹ Kurosawa, Mitsuru, "The legality of atmospheric nuclear weapon tests. Nuclear tests cases", [http://dspace.lib.niigata-u.ac.jp:8080/dspace/bitstream/10191/14659/1/11\(1\)_87-108.pdf](http://dspace.lib.niigata-u.ac.jp:8080/dspace/bitstream/10191/14659/1/11(1)_87-108.pdf), 24p.

⁵² ICJ, *North Sea Continental Shelf Cases*, I.C.J. Reports 1969, para. 74.

⁵³ Ragazzi, Maurizio, *The Concept of International Obligations Erga Omnes*, Oxford: Oxford University Press, 2002: p. 53 and Orakhelashvili, Alexander, *Peremptory norms in International Law*, Oxford: Oxford University Press, 2006: p. 117-120.

⁵⁴ Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008: p. 8-10; Malanczuk, Peter, *Akehurst's modern introduction to international law*, 7th ed., London-New York: Routledge, 2010: p. 44-46; Cassese, Antonio, *International Law*, 2nd ed., New York: Oxford University Press, 2005: p.157-160; Shaw, Malcolm, *International Law*, 6th ed., Cambridge: Cambridge University Press, 2008: p. 84-89.

Although the exact period of discussion of the text⁵⁵ was not too long (1994-1996), especially taking into account the subject and the usual lengthy discussions on multilateral treaties, it should be taken into account that in reality it was the result of a process that included several political and legal actions and instruments all along several decades. The subject of the Treaty is of extreme sensitivity and the role of the different actors since the first initiatives has changed, sometimes blocking the discussions. This is a Treaty that addresses particular national interests which have been extensively argued that needed to be preserved.

Before the Treaty concluding years, two periods of negotiations may be identified: from 1958 to 1962 and from 1977 to 1982. The question of verification⁵⁶ has always been the most difficult problem. During these periods negotiations were held between USA, USSR and UK, while the two other nuclear States, France and China, proceeded with their tests. It must be said that the UK had decided to make its tests in American soil, and therefore it would be affected by all USA decisions on the matter. Regarding the verification discussion, the means used for the effect, whether national or international, assume the character of one of the most relevant discrepancies.

If we were to define a starting point, we would consider that two events⁵⁷ had a special meaning in this historical path. First US, President Dwight D. Eisenhower's speech *Atoms for Peace* to the UN General Assembly on 8 December 1953⁵⁸ and the appeal by India's Prime Minister, Jawaharlal Nehru, on 2 April 1954 for a standstill agreement on stopping nuclear testing. The CTBT must also be understood in its particular historical context⁵⁹. Even if the need for a CTBT had been expressed decades before the negotiations started, the fact is that the end of the Cold War and the end of the *détente* period that launched the need for a legally binding instrument that would

⁵⁵ As it is contained in the United Nations General Assembly document A/50/1027.

⁵⁶ "Adequate verification" is usually understood to mean procedures that would reduce an acceptable level risk that clandestine test programs of military significance could be conducted, although there is some disagreement over what is meant by "accepted level" and "programs of military significance", Anderson, David, *Is nuclear testing nearly over?*, *Current Issues Brief*, n. 2 (1995-1996), Canberra: Parliament of Commonwealth of Australia, 1995: p.2 and Dahlman, Ola, Mykkeltveit, Svein, Haak, Hein, Jenifer Mackby, *Detect and deter: can countries verify the Nuclear Test Ban?*, Wurzburg: Springer, 2011, p. 182-183.

⁵⁷ We prefer to quote two positive events than the most obvious ones which are the Little Boy over Hiroshima and the Fat Man over Nagasaki.

⁵⁸ After the failure of the Baruch Plan of US President Truman.

⁵⁹ Summers, Robert S., *Essays on the Nature of Law and Legal Reasoning*. Berlin: Duncker & Humblot, 1992: 217p.

replace the arms control regime existing so far⁶⁰, facilitated the beginning of negotiations of a comprehensive Treaty on test ban on all⁶¹ nuclear tests⁶². The role of civil society in these matters was also very relevant from the beginning by putting pressure on governments and organisations, either condemning⁶³ or supporting nuclear explosions and proliferation⁶⁴. The contribution of the civil society has proved to be both very useful in terms of theoretical discussion regarding concepts and in defining policies.

From the legal point of view, the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater of 1963⁶⁵ should be taken as the first example of an attempt to create a legal instrument that would impede at least some sorts of nuclear explosions. This Treaty was the possible result of the negotiations between USSR and USA. Nevertheless, the adoption of such a Treaty was a clear sign towards Peace⁶⁶. Like the CTBT, the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater mentions nuclear weapon tests, and any other nuclear explosions⁶⁷, but in its article I, al. a) it restraints the scope of the prohibition to a few environments, which the CTBT does not.

⁶⁰ *Generic aspects of arms control Treaties: Does one size fit all?*, Brussels: European Commission, 2004: 46p.

⁶¹ Asada, Masahiko, "CTBT: legal questions arising from its non-entry-into-force", *Journal of Conflict and Security Law*, vol. 7, n. 1, 2002: p. 87.

⁶² Weston, Michael, "Les négociations sur l'interdiction complète des essais: une perspective de Genève", *Revue de l'OTAN*, vol. 43, n. 5, 1995: p. 17.

⁶³ The examples of the 1955 Russell-Einstein manifesto and the 1957 first Pugwash Conference on Sciences and World Affairs are just two of a long series of initiatives.

⁶⁴ As it was the case of General Pierre Marie Gallois, advisor to Charles de Gaulle or the American Professors Kenneth Waltz and John Mearsheimer. Although with differences between them, the general approach was similar.

⁶⁵ Unless stated otherwise, the dates referring to Treaties are the dates when they were opened for signature.

⁶⁶ Benjamin S. Loeb reminds that this Treaty allowed the "doomsday clock" of the *Bulletin of the Atomic Scientists* to be set back from seven to twelve minutes to midnight, *The politics aspects of arms control Treaty ratification*, edited by Michael Krepon and Dan Caldwell, New York: St. Martin's Press, 1991: p. 169

⁶⁷ The opposition by French Prime-Minister Édouard Balladur to prohibit nuclear weapons conditioned the CTBT negotiations, even if he stated that he did not oppose to prohibit testing and testing while negotiations were taking place were not incompatible. It is important to note that France never signed the 1963 Treaty and only ratified the NPT in 1992. The doubts of Balladur were the same expressed by the American Senate before the ratification of PTBT. Most of the authors refer these approaches to reflect how the understanding of one same Treaty by two equally nuclear countries generated different approaches. Ramaker, Jaap, Mackby, Jenifer, Marshall, Peter D., Geil, Robert, *The Final Test. A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna: Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 2003: p. 55, Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*. Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: p.61.

Another important legal instrument at the basis of the CTBT is the Non-Proliferation Treaty (NPT), which was opened for signature in 1968. The NPT provisions define some concepts and establish a norm on how to understand non-proliferation and disarmament⁶⁸, principles that will also be reiterated in the CTBT. If the 1963 Treaty is a specific legal instrument that the CTBT will use for its technicalities, in reality it will be the NPT that creates the legal grounds for a CTBT.

Other Treaties were equally important to set the basis for the CTBT, like the Treaty on the Limitation of Underground Nuclear Weapon Tests (1974) or the Treaty on Underground Nuclear Explosions for Peaceful Purposes (1976)⁶⁹, but these two are just bilateral treaties.

In 1989, according to article II of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater, the depositary governments received the necessary number of requests to initiate a conference intended to extend the prohibitions of the Treaty to all environments. The conference was mostly the result of civil society, by Parliamentarians for Global Action, who were supported by some non-nuclear states (Indonesia, Mexico, Peru, Sri Lanka, Venezuela and Yugoslavia). If the proposal had passed the PTBT would have been transformed into the CTBT. That was not the case⁷⁰.

The conference however took place in 1991⁷¹, but the United States and the United Kingdom refused to move forward. In this same year the Soviet Union announced a moratorium on nuclear tests⁷². The moratorium, while from the Peace point of view is very laudable, has a perverse effect by delaying the negotiations of legal binding instruments, on the alleged basis that they are not needed. Once moratoria are instruments that only depend on the States will that decide to impose one and do not

⁶⁸ Quinlan, Michael, *Thinking About Nuclear Weapons: Principles, Problems, Prospects*, New York: Oxford University Press, 2009: p. 161-164, 167-177.

⁶⁹ Jun, Wang, "CTBT Verification Regime: Preparations and Requirements", *Disarmament Forum*, n. 3, 1999: p. 40.

⁷⁰ Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*. Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: p.38-39.

⁷¹ Implementation date of START (Strategic Arms Reduction Treaty) I. Jun, Wang, "CTBT Verification Regime: Preparations and Requirements", *Disarmament Forum*, n. 3, 1999: p. 39.

⁷² Collina, Tom Z., Kimball, Daryl G., *Now more than ever. The Case for the Comprehensive Nuclear Test Ban Treaty*, Washington: Arms Control Association, 2010: p. 1.

result from a legally binding instrument⁷³ and do not have any punitive or coercive measures for its violation, they are a very fragile measure regarding non-proliferation and disarmament⁷⁴. Moratoria have been used over and over to ensure that the aim of the negotiations be kept alive.

Along with the moratoria, the no-first-use principle has been suggested by China, as a guarantee to non-proliferation and disarmament processes, but again, it is a principle solely based on the will of a State that can unilaterally decide to review it. It was India that officially included it in its nuclear strategy⁷⁵, which coming from a nuclear State that is not part to the CTBT gives some assurances. The USA have adopted this policy and instead of referring to the first use of the nuclear weapon, they sustain they will not be the first to make an explosion (not testing, as they do it in a subcritical way)⁷⁶.

The changes in the World Order that took place in the beginning of the Nineties, namely the end of the Cold War and the end of the existing deterrence⁷⁷ – *si vis pacem, para bellum*⁷⁸ -, forced the international community to find ways to ensure that Peace⁷⁹ would not be put at stake⁸⁰. While negotiations for a CTBT had started, in 1995⁸¹, the NPT was extended indefinitely⁸². This was a remarkable sign of the international

⁷³ This was the position, for instance, expressed by former US Secretary of State, Condoleezza Rice in a letter to the Senate, as quoted in Medalia, Jonathan, "Comprehensive Nuclear-Test-Ban Treaty: Background and current developments", *Crs - Report for Congress*, 2010: p.4

⁷⁴ The problem with moratoria is that, although producing legal effects (*Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports, 1974: para. 43-44), it can be revised only by one party, which makes the judge and the criminal one same entity, which can not last.

⁷⁵ Mohan, C. Raja, "No First Use and India's Nuclear Transition", *Pugwash Meeting no. 279*, London, 2002: p.1.

⁷⁶ Medalia, Jonathan, "Comprehensive Nuclear-Test-Ban Treaty: Background and current developments", *Crs - Report for Congress*, 2010: p. 2.

⁷⁷ "The threat of nuclear retaliation is perceived as the most reliable guarantee against a nuclear attack by another country. This notion is called the doctrine of nuclear deterrence", Arbatov, Alexei, *Non-First Use as a Way of Outlawing Nuclear Weapons*, Geneva: International Commission on Nuclear Non-proliferation and Disarmament, 2008: p. 2; Shultz, George P., Perry, William J., Kissinger, Henry, Nunn, Sam, "A World free of nuclear weapons", *The Wall Street Journal*, 01.04.2007, p. A15 .

⁷⁸ "If you want peace, make ready for war".

⁷⁹ Yunhua, Zou, *China and the CTBT negotiations*, Stanford: Center for International Security and Cooperation, 1998:p.6.

⁸⁰ Paupp, Terrence Edward, J.D., *The Nuclear Crucible: the moral and international law implications of weapons of mass destruction*, http://www.nuclearfiles.org/menu/keyissues/ethics/issues/political/paupp_nuclear-crucible.htm, p.1; Cotta-Ramusino, Paolo, "Disarmament and Non-Proliferation", *Pugwash - Conferences on Sciences and World Affairs*, 2009: 11p.

⁸¹ MacLean, George, *Advancing the Comprehensive (Nuclear) Test Ban Treaty: Capabilities, Implementation and Entry into Force*, Ottawa: International Security Bureau – Department of Foreign Affairs and International Trade, 2002: p. 1.

⁸² Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*. Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: p. 64, 74.

community that it was looking for means to replace the former antagonistic balance of the Cold War, often named *détente*⁸³, by a confidence system based on principles of international law vested into Treaties signed and ratified by the Parties. The CTBT itself in its Preamble refers to the new World outlook⁸⁴ and considering it an opportunity.

The 1995 Revision Conference of NPT fulfilled its tasks, and its outcomes changed the NPT and the assurances of the non-proliferation and disarmament regimes. The CTBT also has a “revision” mechanism, its article VIII, but so far it has not been possible to be used. As for article XIV, it has not been used to its limit, being used only for events where good intentions and principles are reiterated, but without any concrete measures to overcome the deadlock imposed by the restrictive Annex 2 to the Treaty. It is admissible to consider that the “revision” mechanism of article XIV was inspired in article X, like article VIII was, of NPT⁸⁵, although, and unlike the NPT, without defining the exact purpose for the conference foreseen in article XIV.

The though negotiation period⁸⁶ of the CTBT uncovered that in 1995 there were still many confidence problems that needed to be exorcized if a Treaty was to be reached. Some of those problems still remain for some States after 16 years. The negotiations all along 1994-96 revealed that there was a common will within the international community, but different opinions on how to reach it, its meaning and the possible scope of a Treaty. The question of detection and verifiability⁸⁷ was, and still is, one of the major arguments for the disagreements and constitutes one of the obstacles for its ratification. For the USA, for instance, this has been an utmost important point impeding its ratification.

⁸³ Quinlan, Michael, *Thinking About Nuclear Weapons: Principles, Problems, Prospects*, New York: Oxford University Press, 2009: p. 20-21

⁸⁴ “Convinced that the present international situation provides an opportunity to take further effective measures towards nuclear disarmament and against the proliferation of nuclear weapons in all its aspects”

⁸⁵ “Article X - 2. Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.”

⁸⁶ The following studies present a solid background on the CTBT negotiations, even if in some cases with personal judgments, the facts are very well explained and documented. It is not our intention to repeat what others have already done in depth. Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*. Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: 363p.; Ramaker, Jaap, Mackby, Jenifer, Marshall, Peter D., Geil, Robert, *The Final Test. A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna: Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 2003: 291p.; Dahlman, Ola, Mykkeltveit, Svein, Haak, Hein, *Nuclear Test Ban. Converting political visions to reality*, Wurzburg: Springer, 2009, 278p.

⁸⁷ *Final Review of the Comprehensive Nuclear Test Ban Treaty (Treaty Doc. 105-28)*, Washington: United States Congress- Senate Committee on Foreign Relations, 2000: p.137p.

It is also of major importance that the ICJ in 1996 also recovered article VI of NPT, thus also creating an undisputed legal basis for the CTBT⁸⁸.

A small detail but revealing how far the CTBT was intended to go is the option for its name CTBT (Comprehensive-Test-Ban Treaty) and not CNTBT (Comprehensive Nuclear Test-Ban Treaty), while in reality it only deals with nuclear explosions. In 1995, the question of testing was of more importance than that of nuclear, even if the Treaty only refers to nuclear explosions. However, undoubtedly, the most important modifier of the Treaty was comprehensive. For the first time, as we have seen, a Treaty did not put any limits on the prohibition of nuclear explosions, thus including all environments, all purposes, all quantity and all quality of explosions.

4. Preceding Treaties – legal and substantive background

4.1. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater

The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater is normally known as PTBT (Partial Test Ban Treaty) or LTBT (Limited Test Ban Treaty). In order to negotiate the PTBT, USSR and USA agreed on a test suspension that would allow the negotiating Parties (including the UK) to proceed without any pressure. From the very beginning two questions were at stake: to detect and to identify the explosion⁸⁹. Regarding the detection there were no major difficulties, the same cannot be said on the identification, which, for the USA could only be properly done by a verification system that included inspections on site. This raised another question which only later would be answered positively⁹⁰. It must be recalled

⁸⁸ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions*, I.C.J. Reports, 1996: para. 2F

⁸⁹ Fischer, Georges, "L'interdiction partielle des essais nucléaires", *Annuaire Français de Droit International*, vol. 9, 1963, p.6.

⁹⁰ "The difficulty is not in detecting and locating a low yield explosion, but in identifying the occurrence as a nuclear explosion and not alone of the thousands of other seismic events - earthquakes etc - which occur annually in the world at a magnitude of around 1 kiloton. Test ban advocates claim that the large majority of small earthquakes could readily be identified as such because they occur under the oceans or at depths too great to be nuclear tests. However, the problem is heightened by the various methods of concealing explosions, e.g. by "cavity decoupling", the use of a large underground cavity to muffle or

that we were in 1963 and the tension between USA and USSR had considerably diminished after 1962 Cuban missiles crisis, but the negotiations had begun 8 years before. The Treaty between USA, URSS and UK entry into force in 1963, the same year it was signed and was opened for signature by the States willing to so⁹¹.

The PTBT was also intended to answer some fears of the international community regarding the effect of the explosions due to the radiation. The case of the Japanese vessel Fukuryu Maru in 1954 (the crew of the ship was contaminated while fishing in the Pacific Ocean because of US nuclear activities in the South Pacific) has most probably contributed for the adding of al. b of n. 1 of article I of PTBT⁹². The same arguments were later used by Australia⁹³, and New Zealand, against France for its nuclear tests in the pacific. From the beginning the idea of a CTBT was present as an ultimate goal, and although it was not established, due provisions were adopted to impede any blockade to possible negotiations in that sense.

The PTBT uses an enumerative terminology which is not intended to be limitative but only illustrative, that is, it was not supposed to deduct from what is not enumerated in the Treaty that all the rest was allowed or forbidden⁹⁴. In reality, the formulation used also allowed the States to keep the right to use nuclear weapons in case the situation demanded them⁹⁵. The ICJ will endorse this position in its advisory opinion⁹⁶. It is a very simple Treaty just prohibiting some kinds of explosions, but not establishing any mechanism of verification and control.

reduce the seismic signal”. Anderson, David, *Is nuclear testing nearly over?*, *Current Issues Brief*, n. 2 (1995-1996), Canberra: Parliament of Commonwealth of Australia, 1995: p.2-3

⁹¹ *The politics aspects of arms control Treaty ratification*, edited by Michael Krepon and Dan Caldwell, New York: St. Martin’s Press, 1991: p. 167.

⁹² “1. Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control: (b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted. It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a Treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the Parties have stated in the Preamble to this Treaty, they seek to achieve.”

⁹³ ICJ, *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports, 1974: p. 253-274.

⁹⁴ That would be a “hard Lotus” reading that the court refused in its advisory opinion on the legality use or threat of nuclear weapons. Richard Falk, “Nuclear Weapons International Law and the World Court: A Historic Encounter”, *American Journal of International Law*, vol. 91, n.1, 1997: p.65-66, 70

⁹⁵ Maia, Elísio Borges, *Armas Nucleares e Direito Internacional. O parecer consultivo do Tribunal Internacional de Justiça de 8 de Julho de 1996*, Porto: Publicações Universidade Católica, 2003: p.111.

⁹⁶ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions*, I.C.J. Reports, 1996: p. 226-267; *Legality of the Use by a State of Nuclear Weapons in armed conflict, Advisory Opinions*, I.C.J. Reports, 1996: p. 66-85.

The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater proved that the superpowers were able to find an agreement regarding nuclear weapons; showed respect for the rest of the world where the test did not take place; launch the challenge that will be accomplished in 1968 with the NPT⁹⁷.

Once there already was a Treaty on nuclear explosions, the first possibility would have been to review the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater and make it a comprehensive one⁹⁸ or terminate that Treaty and replace it for a new one. None of these options were taken, although efforts were made in both those senses.

Despite the fact that not all States that are parties to CTBT are parties to VCLT, the truth is that the Convention should always be taken into account for those who are parties to that instrument and even those that are not⁹⁹, and the reality is that its content, even if not legally binding for all, constitutes at this stage international custom, as evidence of a general practice accepted as law and reflect general principles of law recognized by civilized nations¹⁰⁰. Therefore even if not literally, the principles of VCLT can be assumed as the most generalized legal understanding of specific questions in law.

It is true that the Vienna Convention on the Law of the Treaties (VCLT) provides for the automatic termination of treaties, but this is not the case here. VCLT admits this automatism for the cases where the treaties themselves set a date for their termination or if the aim of the Treaty has been undoubtedly accomplished. Neither of the situations is applicable to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater. Moreover, the conditions envisaged by article 59, 1, a), of VCLT cannot be applied to the present case. First, the Treaty must relate to the same subject-matter, and that is not the case¹⁰¹. If it is true that CTBT

⁹⁷ Thomson, David B., *A Guide to the Nuclear Arms Control Treaties*, Los Alamos: Los Alamos Historical Society Publications, 2001: p. 19; Dahlman, Ola, Mykkeltveit, Svein, Haak, Hein, *Nuclear Test Ban. Converting political visions to reality*, Wurzburg: Springer, 2009, p. 62.

⁹⁸ As it can be inferred from GA resolution A/RES/49/69.

⁹⁹ As the International Court of Justice has established in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I. C. J. Reports, 2002: p. 303-458.

¹⁰⁰ Statute of the International Court of Justice, article 38.

¹⁰¹ Study Group of the ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682, 13 April 2006, pp. 129-131 ("the test of whether two treaties deal with the 'same subject matter' is resolved through the

covers part of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater attributions, it does not address them all, and therefore we cannot consider that it replaces it. Even if some of the clauses might be incompatible, it does not necessarily lead to the any Treaty's abrogation¹⁰², nor was there any decision by the Parties in that sense.

The recourse to the principles envisaged in article 31, 3, a) of VCLT presupposes four conditions:

- i) The act must be included in the extension of the expression agreement; ii) the agreement must be between the parties;
- ii) The agreement must be subsequent;
- iii) It must regard the interpretation or application of the Treaty¹⁰³.

The only condition that can be admissible is that the CTBT was indeed posterior to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater.

Neither France, nor China, two nuclear States, had ever become parties to the 1963 Treaty, while India and Iran, for instance, were parties to PTBT but did not sign (India) or ratify (Iran) the CTBT. The fact that France was not part to the PTBT allowed it to pursue atmospheric tests, resulting in the ICJ processes moved by Australia and New Zealand that argued the fall out of radiation in their territories, while France discarded this argument by saying the amounts were of no relevance and that France was not bound by any international law impeding nuclear tests, but was bound by its own declarations and statements¹⁰⁴, a position the ICJ endorsed but underlined that those were not the only binding instruments.

assessment of whether the fulfillment of the obligation under one Treaty affects the fulfillment of the obligation of another.”).

¹⁰²Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 727.

¹⁰³ Linderfalk, Ulf, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of the Treaties*, Dordrecht: Springer, 2007: p. 162.

¹⁰⁴ “The French Government has consistently maintained, for example in a Note dated 7 February 1973 from the French Ambassador in Canberra to the Prime Minister and Minister for Foreign Affairs of Australia, that it “has the conviction that its nuclear experiments have not violated any rule of international law”, nor did France recognize that it was bound by any rule of international law to terminate its tests”, (*Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports, 1974: para. 51).

However, the UNGA adopted resolutions urging states to review that Treaty¹⁰⁵ and to start negotiations within the Conference on Disarmament towards a new and comprehensive Treaty regarding nuclear tests. The CTBT text would eventually include the modifier “comprehensive”, a reference to nuclear weapons tests, as well as other nuclear tests and will also specifically refer to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater¹⁰⁶, thus bringing back a legal instrument that was only valid for some States. By doing so, in practical terms, it also allowed that all documents, studies, etc. produced for the negotiation of that Treaty could legitimately be used for the CTBT negotiations, thus avoiding lengthy discussions on some conceptual and technical definitions. Since the resolution on the text of CTBT and since it received the first signatures, the UNGA has passed several resolutions exhorting States to ratify the Treaty and to duly fulfil its purposes.

4.2. Treaty on the Non-Proliferation of Nuclear Weapons

The Treaty on the Non-Proliferation of Nuclear Weapons is commonly known by its short form, Treaty on the Non-Proliferation or NPT. It was opened for signature on 1 July 1968 and came into force on 5 March 1970. The Republic of North Korea withdrew from the NPT in 2003. 189 States are parties to the Treaty. Four non-party States are known or presumed to have nuclear weapons: Israel, India, Pakistan and North Korea (some States, like the EU Member States and Japan, argue that North Korea did not withdraw from NPT, only suspended its membership).

The NPT¹⁰⁷ includes three basic chapters: non-proliferation, disarmament and peaceful use of nuclear energy. It is generally considered that the non-proliferation articles are the main aspects of the Treaty¹⁰⁸. However, it may be the

¹⁰⁵ The Treaty concluded between USSR, USA and UK was then opened for signature and accession by all states, but the negotiations were secret between those three States. Fischer, Georges, “L’interdiction partielle des essais nucléaires”, *Annuaire Français de Droit International*, vol. 9, 1963, p.3

¹⁰⁶ Comprehensive Nuclear-Test-Ban Treaty, preamble, paragraph 8.

¹⁰⁷ “The period witnessed some crucial developments in multilateral non-proliferation and bilateral arms control, of which the most important was the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)”, Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*. Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009:p. 17

¹⁰⁸ Baas, Richard, *Negotiating nuclear weapons. A study on the merit of article VI of the Nuclear Non-Proliferation Treaty for Nuclear Disarmament*, Twente: University of Twente – Münster: Westfälische Wilhelms-Universität, 2008: p. 38

case, the fact is that reality has proven that the other two chapters go hand in hand with non-proliferation, even if for negotiations between the parties. If we want to proceed negotiations in any of the fields of the Treaty, it is absolutely necessary to take the three chapters together all along any negotiation, as it is commonly seen at the annual General Conference of the International Atomic Energy Agency.

We could understand the CTBT as a complementary Treaty to NPT, not only because of its multilateral nature, but also because it stems from the NPT (and the PTBT for that matter)¹⁰⁹. On the other hand, the NPT includes in the Preamble the systems of delivery, thus confirming its disarmament character, which are not referred to in CTBT's text, nor it was expected, but it should be underlined that the change in delivery systems does not necessarily imply a change in the nuclear warhead, but may contribute to its efficiency¹¹⁰.

The literature regarding NPT is extensive, detailed and covers most of the facts of the Treaty, which overall are the same at stake in CTBT, but the approach is a radically different one. While the NPT is an extremely generalist and large Treaty, the CTBT is extremely specific on its purposes. It must be said that during the NPT negotiations, the question of nuclear explosions was also object of discussions¹¹¹, but the mild result on this particular aspect was only the wording of article VI of NPT, where it is stated that "Each of the parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament". In 1975 and 1985 the revision conference of NPT refers in its concluding document the need to move forward towards a CTBT. In 1980 and in 1990 it was not possible to reach agreement regarding the final document also because of the inclusion of CTBT, or not.

Always accused of double standards, the CTBT will be a proof that nuclear weapon States clearly sustain their obligations according to article VI of NPT¹¹², which

¹⁰⁹ Howlett, Darryl, Simpson, John, "The NPT and the CTBT: an Inextricable Relationship?", *Programme for promoting nuclear non-proliferation*, n. 1, 1992: p. 1-12

¹¹⁰ Fetter, Steve, *Toward a comprehensive test ban*, Cambridge: Ballinger Publishing Company, 1988: p. 42.

¹¹¹ Mallin, Maurice A., "CTBT and NPT: Options for U.S. Policy", *The Nonproliferation Review*, vol.2, n.2, 1995: p. 1-11.

¹¹² Kurosawa, Mitsuru, "A comprehensive approach to nuclear non-proliferation", *Osaka University Law Review*, n. 42, 1995: p. 13-30.

were basically to ensure a disarmament policy¹¹³. Moreover, the fact that the purpose¹¹⁴ of CTBT is already mentioned in the Preamble of the Treaty is by itself already a convincing proof that a CTBT is a major element in the non-proliferation and disarmament policies.

The CTBT, following on the steps¹¹⁵ of NPT will be an important contribution for the change from the MAD (Mutual Assured Destruction) policy to MAS (Mutual Assured Safety)¹¹⁶. The NPT did not define the approach on whether to adopt a direct or incremental approach towards a CTBT. Both options have been taken into account, but the CTBT as such could only be possible in the framework of negotiations, even if several bilateral and multilateral instruments have contributed by launching initiatives, that would be used for the discussions regarding the CTBT and the non-proliferation and disarmament efforts¹¹⁷. Some argue that the NPT was not really the result from multilateral negotiations¹¹⁸.

Unlike the CTBT, the NPT establishes two different legal regimes for nuclear and non nuclear States, and from those regimes a whole set of rights and obligations derive causing serious divergences between the States Parties. This differentiation between nuclear and non nuclear States has become such a serious issue that although CTBT does not reproduce this distinction¹¹⁹, the fact is that for many States (like India), that principle is still at the basis of CTBT¹²⁰.

¹¹³ *The politics aspects of arms control Treaty ratification*, edited by Michael Krepon and Dan Caldwell, New York: St. Martin's Press, 1991: p. 304

¹¹⁴ Regarding the definition of the object and purpose of a treaty, there are several means to do it, as Alain Pellet as summarized, International Law Commission, *Tenth report on reservations to treaties*, A/CN.4/558/Add.1, p. 11.

¹¹⁵ In reality the entry into force of CTBT is the first of the 13 steps regarding disarmament that have been agreed on the NPT Review Conference in 2000 following on article VI of NPT.

¹¹⁶ Kurosawa, Mitsuru, "A comprehensive approach to nuclear non-proliferation", *Osaka University Law Review*, n. 42, 1995: p. 8.

¹¹⁷ "Implementing incremental steps towards it, such as: voluntary moratoria; reducing testing yields; reducing annual numbers of tests; and encouraging regional testing bans, appear politically easier than moving directly to a CTBT", Howlett, Darryl, Simpson, John, "The NPT and the CTBT: an Inextricable Relationship?", *Programme for promoting nuclear non-proliferation*, n. 1, 1992: p. 9.

¹¹⁸ Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*. Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: p.19

¹¹⁹ Weston, Michael, "Les négociations sur l'interdiction complète des essais: une perspective de Genève", *Revue de l'OTAN*, vol. 43, n. 5, 1995: p. 19.

¹²⁰ Athanasopoulos, Haralambos, *Nuclear disarmament in International Law*, Jefferson: McFarland & Company, Inc. Publishers, 2000: p. 46-48

With the exception of article V, the NPT includes a safeguards strategy, based upon IAEA, which was set as a means to assure all State Parties that the criteria for the implementation of the principles of the Treaty would be generalized to all¹²¹.

4.3. Treaty on the Limitation of Underground Nuclear Weapon Tests

This is a strict bilateral Treaty between USA and USSR signed in 1974 and which entered into force in 1990¹²². This Treaty intended to be a complement to the PTBT once that Treaty did not include underground explosions. The Treaty is also known as Threshold Test Ban Treaty and became known as TTBT. It has been considered as another mean of the “law of détente”¹²³ that ruled the balance of power during the Cold War.

The TTBT establishes a threshold, by prohibiting nuclear tests of devices having a yield exceeding 150 kilotons (equivalent to 150 000 tons of TNT). This threshold calculated in terms of exploding power and not in terms of effect by recurring for instance to seismic magnitude indicators like the Richter scale impeded the parties to try to make larger tests in grounds that might have less significant seismic magnitude indicators, but using a larger explosive¹²⁴. The threshold is militarily significant once it annulled the possibility of testing new or already existing nuclear warheads beyond the fractional megaton range, thus reducing the explosive force of new nuclear warheads and bombs that otherwise could be tested for weapon systems. It must be acknowledged, however, that the limitation set by this Treaty is considerably less than what was allowed under PTBT¹²⁵.

The TTBT included a Protocol on procedures for the exchange of technical data and limiting weapons testing to specified test sites to assist in verification. Data

¹²¹ Thomson, David B., *A Guide to the Nuclear Arms Control Treaties*, Los Alamos: Los Alamos Historical Society Publications, 2001: p. 84, 87.

¹²² Fischer, Georges, “Le Traité américano-soviétique relatif à la limitation des essais souterrains d’armes nucléaires”, *Annuaire Français de Droit International*, vol. 20, 1974, p.153-172.

¹²³ Athanasopoulos, Haralambos, *Nuclear disarmament in International Law*, Jefferson: McFarland & Company, Inc. Publishers, 2000: p. 27

¹²⁴ Fischer, Georges, “Le Traité américano-soviétique relatif à la limitation des essais souterrains d’armes nucléaires”, *Annuaire Français de Droit International*, vol. 20, 1974, p.158.

¹²⁵ Hansen, Keith A., *The Comprehensive Test Ban Treaty. An insider perspective*, Stanford: Stanford University Press, 2006: p.7

exchanges include geographical boundaries and geological information of the test areas, as well as geographic coordinates of test locations to assist in yield determination. The verification was foreseen by national means only. If either the United States or URSS were to resume nuclear explosive testing beyond the threshold, this Treaty would authorize resumption of the on-site monitoring and inspection of such tests by the other side. For the first time USA and USSR agreed to exchange data on explosions.

The reason for mentioning this bilateral Treaty – once there are many more in the realm of disarmament, non-proliferation and arms control – is that it also deals with nuclear explosions and it includes in its structure elements that will later be used in the CTBT, namely a reference to a verification system. Unlike the PTBT, it was not opened for signature, ratification or accession by any other State. As we have seen with the PTBT, it was not the fact that it was not discussed in a multilateral forum that impeded it to be open to the other States.

This was the first Treaty to clearly deal with underground tests. Tests in other environment have been dealt with in PTBT and the Outer Space Treaty, although in this latter case only in a subsidiary way.

The logic of this Treaty, unlike the PTBT, was dramatically different, even if at first glance it could seem another break in the wall. With the TTBT, it was no longer intended to prohibit explosions, but, instead to clearly define the allowed ones. We consider this Treaty as a breach in the disarmament and non-proliferation logic initiated by the PTBT and then reinforced by the NPT. It opened the door to some sort of explosions. Although they were not forbidden, the fact of defining a limit for the allowed explosions reveals that the disarmament and non-proliferation efforts were not as strong as they had been few years before.

4.4. Treaty between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes

Again this is a bilateral instrument only. The Treaty was signed in 1976 between USA and USSR and only entered into force in 1990. Like the 1974 Treaty, this Treaty

also defined a threshold of 150 kilotons and 1500kt for group explosions (a kind of explosions that are required, for instance, to open canals). It was not open to other States, including the nuclear ones (besides USA and URSS, the other P5, UK, France and China). Soon it was perceived that the TTBT was missing something and therefore the two opposing States decided to agree on a Treaty that would allow explosions for peaceful purposes¹²⁶. One of the obstacles for the implementation of this Treaty was the verification system¹²⁷. The question of the difficulties of verification¹²⁸ will also be argued by the American Senate to impede the ratification of the CTBT¹²⁹.

Unlike the TTBT that defined environments for explosions, the PNET was valid for the environments, being the limitation imposed by its purposes. The nuclear explosions for peaceful purposes would remain a possibility¹³⁰ as long as the TTBT would be in force.

The PNET also included a Protocol similar to the one of the TTBT, but the area of intervention was no longer restricted to testing fields known and identified by both parties. According to article VII, the PNET finds its legal basis in article V of the NPT, moreover the IAEA, that has been given the responsibility and technical competence to make studies on nuclear explosions for peaceful purposes, is equally mentioned in article VII. However, article III of TTBT stated that it did not deal with explosions for peaceful purposes, which be subject to a further agreement¹³¹.

We would also consider that both the TTBT and the PNET were mostly established in order to create a verification regime that article V of NPT did not include,

¹²⁶ A PNE (peaceful nuclear explosions) is used for several purposes all non military ones like the contruction of dams and canals, development of water reservoirs, creation of underground cavities for toxic waste, to search for useful mineral, breaking up ore bodies, stimulating the production of oil and gas, and forming underground cavities for storing the recovered oil and gas. Singh, Amarjit, "Feasibility and Legality of Using Peaceful Nuclear Explosions to Plug Oil Leaks Emanating from Deep Reservoirs", *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, Volume 2, Issue 4, pp. 185-187.

¹²⁷ Athanapoulos, Haralambos, *Nuclear disarmament in International Law*, Jefferson: McFarland & Company, Inc. Publishers, 2000: p. 52.

¹²⁸ As Jan Klabbers writes, "trust byt verify", "How to defeat a Treaty's object and purpose pending entry into force: toward manifest intent", *Vanderbilt Journal of Transnational Law*, 2007, vol, 34, n.2, p. 301.

¹²⁹ Although the negative position by the USA Senate included other arguments, namely of internal politics. The Treaty was rejected in a vote of 48 for and 51 against, with one senator voting "present", the equivalent of an abstention. USA ratification requires the approval of at least two-thirds - that is, 67 votes - of the Senate.

¹³⁰ Fischer, Georges, "Le Traité américano-soviétique sur la limitation des explosions nucléaires souterraines à des fins pacifiques", *Annuaire Français de Droit International*, vol. 22, 1976, p. 14.

¹³¹ Fischer, Georges, "Le Traité américano-soviétique sur la limitation des explosions nucléaires souterraines à des fins pacifiques", *Annuaire Français de Droit International*, vol. 22, 1976, p. 9.

especially because the UNGA by then only spoke about prohibiting military use of nuclear weapons, nothing saying about peaceful nuclear explosions¹³².

The question of peaceful explosions, which are not allowed by the CTBT, was argued by China¹³³ not to ratify the Treaty¹³⁴, especially because it is allowed under NPT. The fact that the PNET was not opened to other States did not help to give confidence to Beijing on this matter. It is worthy to recall that for India the main potential nuclear threat has always been China¹³⁵ and not Pakistan¹³⁶ that was given nuclear technology by China and then smuggled it worldwide by the Khan network.

4.5. Nuclear Weapon Free Zones

One different type of treaties also connected with disarmament and non-proliferation efforts regards the creation of weapon free zones¹³⁷. The creation of these zones also constitutes an element of non-proliferation and disarmament policies inspired by the revision conferences of NPT. However, and although the Peace nature of those treaties is unquestionable, these treaties escape to the object of our study. It is relevant to mention them, as well as other treaties that refer to areas instead of States: on the one hand, Antarctic (in force since 23.06.1961), Outer Space (in force since 10.10.1967), Seabed (in force since 18.05.1972), and, on the other hand, and specifically on nuclear weapon free zones, Tlatelolco (Latin America and Caribbean) (in force since 25.04.1969), Rarotonga (South Pacific) (in force since 11.12.1986), Bangkok (ASEAN States) (in force since 28.03.1997), Mongolia (in force since 28.02.2000), Semei or Semipalatinsk (Central Asia) (in force since 21.03.2009), Pelindaba (Africa) (in force since 15.07.2009). The most complicated situation has always been the Middle East where a nuclear weapon free zone has intensely and unsuccessfully been promoted for

¹³² United Nations General Assembly Resolution 30/3478 on the conclusion of a Treaty on the complete and general prohibition of nuclear weapon tests, of 11 September 1975: 2p.

¹³³ Anderson, David, *Are we finally on track for a Comprehensive Test Ban?*, *Current Issues Brief*, n. 42 (1994-1995), Canberra: Parliament of Commonwealth of Australia, 1995: p. ii

¹³⁴ See Chapter II.

¹³⁵ Lambers, William, *Nuclear Test Ban Treaty: A Better Shield Than Missile Defense*, 2001: p.15

¹³⁶ Synnott, Hilary, *The causes and consequences of South Asia's Nuclear Tests*, Adelphi Paper 332, London: International Institute for Strategic Studies, 1999: p. 14.

¹³⁷ Thomson, David B., *A Guide to the Nuclear Arms Control Treaties*, Los Alamos: Los Alamos Historical Society Publications, 2001: p.98-100

years. A conference on this subject with the participation of all States of the Region has been postponed to 2013 due to the lack of agreement between those States.

These treaties are the closer treaties to a prohibition of nuclear weapons, but they only concern parts of the Globe¹³⁸. Unlike biological and chemical weapons, which are forbidden by international treaties, nuclear weapons are not and even the ICJ recognizes its use in its advisory opinions under specific circumstances, being one of them self-defence. The ICJ did not, however, define self-defence.

Within this context we shall evoke here two General Assembly resolutions that for their content go together with the upper mentioned treaties: UNGA resolutions 30/3472 A and B on a comprehensive study of the question of nuclear weapon free zones in all its aspects and 30/3471 on the Implementation of the Declaration of the Denuclearization of Africa.

Treaty of Tlatelolco (Latin America and the Caribbean) - In 1963, after the Cuban missile crisis, Bolivia, Brazil, Chile, Argentina and Peru made a first statement calling for the creation of a nuclear weapons free zone, which was to be established in 1967. However, Brazil only ratified it 27 years later and Cuba was the last State of the region to join the Treaty in 2002. The Treaty entered into force in 1992, when France, the last of the P5 to do so, ratified the Treaty. The Treaty is flexible allowing bilateral cooperation frameworks and even the participation of States not belonging to the geographic area. Moreover, its recognition by the UNGA was important, especially for your complete universalisation. The Treaty does not allow reservations, although Brazil, to join, demanded that in order to come into force, the Treaty and its two protocols were signed and ratified by all Member States of the region.

Treaty of Rarotonga (Pacific and Oceania) - the Treaty entered into force in 1986, it was signed by 13 States¹³⁹ and its complete ratification is done. The reasons that led to the creation of this NWFZ were the frequent holding of nuclear tests in the region (the USA, the United Kingdom and France often tested on the atolls of the Pacific). The creation of this NWFZ had much more to do with environmental issues

¹³⁸ Dahlman, Ola, Mykkeltveit, Svein, Haak, Hein, Jenifer Mackby, *Detect and deter: can countries verify the Nuclear Test Ban?*, Wurzburg: Springer, 2011, p. 184

¹³⁹ From the region, only Palau, the Marshall Islands and the Federation of States of Micronesia have not signed it, but they can join at any moment.

and safety arising from testing and related transportation of nuclear materials and consequent pollution than with the issues of non-proliferation.

Treaty of Bangkok (Southeast Asia) - The scope of the Treaty falls within ASEAN. The Protocol on the negative guarantees has not been ratified by the P5, which were not involved in the negotiations. This is a Treaty that does not accept reservations, but admits withdrawals. On the other hand, the main concern is the non-proliferation in the context of the NPT.

Treaty of Pelindaba (Africa) - at this moment, only 34 African states have ratified the Nuclear Treaty and only 4 of the P5 have also done so. The Treaty prohibits the possession and development of nuclear programs, testing and dumping. Its area of operation extends to the islands and hence the existing litigation with Spain in the Canary Islands. The Treaty is an enforcement mechanism that is the African Commission on Nuclear Energy, which verifies the denuclearization of the region.

Semipalatinsk (Central Asia) – Its members are the five Central Asian States (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan). Work began in 1993, finishing only in 2006 (the IAEA and UNODA were involved and played a central role in the formation of this NWFZ). In 2009 the Treaty entered into force but the last national ratification (Uzbekistan) took place in 2011. The P5 have not signed the protocol on negative assurances. This is a very sensitive NWFZ once it is the first in the northern hemisphere and there are nuclear weapons in its immediate neighbourhood.

Chapter II

Analysis of the main aspects of the text of the Treaty

Chapter II - Analysis of the main aspects of the text of the Treaty

1. Structure of the Treaty

Negotiations started very well and in a speedy way¹⁴⁰, based on existing work done for other treaties and by the Conference on Disarmament. It was possible to have a rolling text soon, even if with numerous brackets. The discussions regarding the text within the brackets involved all the States, but some of the States had a more active role, even of not all from the beginning, as we have seen: USA, Russia, France, UK, Iran, India, China, and Australia. It seemed clear from the beginning that the States would not allow any wording that created any sort of discrimination between parties (like the NPT)¹⁴¹, nor would they allow that the Treaty could result from discussions among just a few¹⁴². Several ad-hoc groups were set to deal with specific chapters of the Treaty. The chairpersons of the ad-hoc groups circulated extensive questionnaires among the negotiation parties and then compiled the answers in rolling texts presented for the negotiations. It was a very effective way of work, once it was possible to have a very approximate idea of the red lines of each negotiating party.

The Comprehensive Nuclear-Test-Ban¹⁴³ Treaty is composed by 17 articles, 2 annexes, 1 Protocol and 2 annexes to the Protocol, all annexes and the Protocol being integrative parts of the Treaty (article X). Not taking into account all of these elements, the Treaty cannot be considered complete and effective for the accomplishment of its purposes. The two annexes to the Treaty include, the first, the geographical distribution of the States, including them in regional groups for the definition of the number of

¹⁴⁰ China commented by then that the negotiations were moving too fast, like a bullet train, Ramaker, Jaap, Mackby, Jenifer, Marshall, Peter D., Geil, Robert, *The Final Test. A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna: Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 2003: p. 19

¹⁴¹ Ramaker, Jaap, Mackby, Jenifer, Marshall, Peter D., Geil, Robert, *The Final Test. A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna: Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 2003: p. 35 and 56.

¹⁴² Ramaker, Jaap, Mackby, Jenifer, Marshall, Peter D., Geil, Robert, *The Final Test. A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna: Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 2003: p. 31 and 35.

¹⁴³ *Comprehensive Nuclear-Test-Ban Treaty*, 10 September 1996, http://www.ctbto.org/fileadmin/content/treaty/treaty_text.pdf.

representatives in the Executive Council, and, the second, the list of States which ratification is mandatory for the entry into force of the Treaty. These were the States members of the Conference on Disarmament in 1996 and that by then had a nuclear reactor. Both conditions were mandatory to be in the list. Some of the critical studies tend to refer just one or the other conditions, but there is no doubt that a cumulative rule was at stake¹⁴⁴. The 17 articles are divided in numbers and alineas and articles II and IV stand out for the impressive number of paragraphs there contained: 57 and 68, respectively.

The discussion on the type of legal instrument which is CTBT seems superfluous, as it calls itself a Treaty, and there has been no contestation to this. As for the concept of Treaty itself, we shall follow the definition of the 1969 Vienna Convention on the Law of Treaties, (article 2, 1 a)) combined with the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, (article 2, 1 a)). We shall not try to engage in definition of a Treaty from the legal point of view, once we consider it can only be classified according to its purpose and object and according to its parties¹⁴⁵, these ones making it a clear multilateral Treaty and not a bilateral to which other parties can become members.

The Treaty bans all nuclear explosions in respect of four parameters identify in the Treaty: number, yield, location and time. All of these parameters are equally treated, and in all circumstances explosions are banned¹⁴⁶. However, scholarship has argued that there may be some types of explosion that the Treaty does not ban (some States – like India - argue in the same sense)¹⁴⁷, as it fails to provide a clear differentiation between prohibited nuclear explosions and non-prohibited activites, especially because nuclear explosion is not defined in the Treaty¹⁴⁸.

¹⁴⁴ Apart from the annex itself, a complete explanation on this matter can be found in Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*, Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: 363p.

¹⁴⁵ Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008: p. 636-638.

¹⁴⁶ Hafemeister, David W., "Effective CTBT verification: the evidence accumulates", *Verification Yearbook 4* London: Verification Research, Training and Information Centre (VERTIC), 2004: p. 29.

¹⁴⁷ Jones, Suzanne L., Hippel, Frank N. von, "The question of pure fusion explosions under the CTBT", *Science and Global Security*, vol. 7, 1998: p. 129-150.

¹⁴⁸ Jones, Suzanne L., Hippel, Frank N. von, "The question of pure fusion explosions under the CTBT", *Science and Global Security*, vol. 7, 1998: p. 129.

The Protocol is essentially of technical nature and it is divided in three distinct parts, each one dedicated to elements of the Verification Regime, as contained in article IV, 1 a), c) and d). The consultation and clarification procedures foreseen in article IV, 1 b) of the Treaty are only developed in the Treaty, article IV, 29 to 33, and not in the Protocol, even if these activities may require or generate technical inputs and may even determine the sequence of events leading to an on-site inspection. The Annexes to the Protocol refer, the first, to the details of the monitoring assets (stations and laboratories) associated to the International Monitoring System (IMS), the second to the characterization parameters for the International Data Centre (IDC) standard event screening. This annex is of particular importance once it regards one of the controversial means of the Treaty, especially regarding its usage and availability of data and establishing parameters for the identification of a nuclear explosion.

Apart from the details included in the Treaty regarding the Verification Regime and the set up of the organisation to handle the Treaty, the fact is that the substantive part of CTBT is quite limited, if not incomplete. Without challenging David S. Jonas general position on his perception of long treaties¹⁴⁹, we would consider that the CTBT should not be hostage of its own text and it should be seen an exception, once most of it is more of procedural or administrative nature than political and therefore it should be considered a mistake to evaluate the effectiveness of the Treaty just because of its size without considering the text in detail.

The major difficulties of CTBT result from the fact that it lacks some conceptual definitions (nuclear explosion or test, to start)¹⁵⁰. Moreover, some of the technical nature elements change with time, as does the accuracy of data that lead to some of the concepts and procedures included in the Treaty and in its Protocol. Some of the missing aspects of the Treaty would eventually be given an answer in the Resolution

¹⁴⁹ Jonas, David S., "The comprehensive nuclear test ban treaty: current legal status in the United States and the implications of a nuclear explosion", *New York University Journal of International Law and Politics*, vol. 39, n. 4, 2007: p.1035.

¹⁵⁰ "There seemed to be an unspoken agreement from the beginning that a definition of "nuclear explosion" would not be included in the Treaty", and the same would apply for test and peaceful explosion. Ramaker, Jaap, Mackby, Jenifer, Marshall, Peter D., Geil, Robert, *The Final Test. A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna: Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 2003: p. 55; Koplow, David, *Testing a Nuclear Test Ban: What Should Be Prohibited by a "comprehensive" Treaty?*, Sudbury: Dartmouth Publishing Co Ltd, 1996: p. 148-149

establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization¹⁵¹.

The structure of the Treaty does not follow the rules of the IAEA for a comprehensive nuclear law¹⁵² in domestic terms: apart from the Preamble, which some may argue that its legal effects are not translated into direct effects due to its theoretical approach, it leaves out the concrete definition of the objective and scope of the Treaty and the definition of key terms. This is why we consider that an extra assessment must be given to the preamble and to try to find in its wording some of the answers the Treaty fails to provide autonomously.

In terms of general concepts¹⁵³ and definitions regarding the purposes of the Treaty, the preamble and article I are the parts that deserve more attention, while article IV clearly defines the Verification Regime, which clarifies the executive means for the implementation of the Treaty. Taking into account the aim of the Treaty, article IV on the Verification Regime constitutes, though, a key part of the Treaty¹⁵⁴. The other articles are basically the normal articles regarding the procedures relating to the Treaty itself, even if they contain some special features as we shall see further. Article II is also very specific, once it deals with the organisation to be established for the execution of the Treaty. The article on the organization, independently of its specificities, is just the necessary legal instrument for the organization being set in motion. Most of the article would somehow be reproduced in the Resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization.

It must also be noted that article V refers to sanctions (even if not using this expression), a term which must be clearly defined within the context of such a delicate domain, along with the concrete situations in which they can be applied. Finally, a note must be made about article XIV on entry into force, for its novelty and special features. The Treaty will only enter into force 180 days after the deposit of the instrument of the

¹⁵¹ *Resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization*, adopted by the States Signatories on 19 November 1996, http://www.ctbto.org/fileadmin/user_upload/public_information/2009/prepcom_resolution.pdf.

¹⁵² Stoiber, Carlton, Baer, Alec, Pelzer, Norbert, Tonhauser, Wolfram, *Handbook on Nuclear Law*, Vienna: International Atomic Energy Agency, 2003: p. 17

¹⁵³ Koplow, David, *Testing a Nuclear Test Ban: What Should Be Prohibited by a "comprehensive" Treaty?*, Sudbury: Dartmouth Publishing Co Ltd, 1996: p. 132.

¹⁵⁴ "The likelihood of detection, of course, is an effective deterrent to cheating", Jonas, David S., "The comprehensive nuclear test ban treaty: current legal status in the United States and the implications of a nuclear explosion", *New York University Journal of International Law and Politics*, vol. 39, n. 4, 2007: p.1021.

44th ratification of the States individually identified in the list of Annex 2 to the Treaty (and never before two years).

The Treaty bans all nuclear weapon test explosion or any other nuclear explosion. It is clear that it is not only the test that is the concern, but the explosion. The notion of test is circumscribed to weapons only. The notion of nuclear explosion¹⁵⁵, although it will be constructed all along the Treaty by the means of identification (we know how and what exploded by the means of verification), is missing in the Treaty as there is no absolutely clear definition of nuclear explosion (or test)¹⁵⁶, for some authors this is another reason that does not sustain CTBT¹⁵⁷. In particular, the question of laboratory tests or very low-yield tests¹⁵⁸, that can pass undetected by the verification regime, is a matter of debate between States, once only States that have done real tests can be able to technically use the information just with a much smaller test. The aim of the explosion/test has been also object of controversy. China, for instance, pledged all along the negotiations that explosions for peaceful purposes¹⁵⁹ should be left out of the Treaty¹⁶⁰; this was not accepted by negotiating parties. China only accepted the Treaty if there were an agreement to review the issue at least at a later stage, so the Treaty would eventually include a provision (article VIII, n.1) suggesting an ulterior revision of the matter. On the other hand, the Stockpile Stewardship Program developed in the USA could be a reliable substitute for nuclear explosions¹⁶¹, as far as USA are concerned

The Treaty does not say anything on the use of nuclear weapons¹⁶² in case of war, which had been considered by the ICJ as legal¹⁶³, nor was it supposed to¹⁶⁴. The

¹⁵⁵ The Semipalatinsk treaty includes a definition of nuclear explosion (article 1, b.). Even if the CTBT does not include one, at least its quotation may bring some light into what is here being discussed: “any weapon or other nuclear explosive device capable of releasing nuclear energy, irrespective of the military or civilian purpose for which the weapon or device could be used”. Roscini, Marco, “Something old, something new: the 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia”, *Chinese Journal of International Law*, vol. 7, n. 3, 2008: p. 596.

¹⁵⁶ Dahlman, Ola, Mykkeltveit, Svein, Haak, Hein, Jenifer Mackby, *Detect and deter: can countries verify the Nuclear Test Ban?*, Wurzburg: Springer, 2011, p.30-31

¹⁵⁷ Bailey, Kathleen C., “The Comprehensive Test Ban Treaty. The costs outweigh the benefits”, *Cato Policy Analysis*, n. 330, 1999: p.13-14

¹⁵⁸ That is, tests that do not trigger a self-sustaining nuclear chain reaction that would cause an explosion

¹⁵⁹ Yunhua, Zou, *China and the CTBT negotiations*, Stanford: Center for International Security and Cooperation, 1998:p.10

¹⁶⁰ Koplow, David, *Testing a Nuclear Test Ban: What Should Be Prohibited by a “comprehensive” Treaty?*, Sudbury: Dartmouth Publishing Co Ltd, 1996: p. 44-56

¹⁶¹ Joseph, Jofi, “Renew the drive for CTBT ratification”, *The Washington Quaterly*, vol. 32, n. 2 2009: p. 87

¹⁶² *A new look at the Comprehensive Nuclear-Test-Ban Treaty (CTBT)*, The Hague: Netherlands Institute of International Relations Clingendael, 2008: p.6

Treaty does not refer to any military exception, but “other nuclear explosions” should not be understood as referring to the use of nuclear weapons in case of war. Here we would distinguish two different cases¹⁶⁵.

As far as *jus ad bellum* is concerned, in fact there is nothing to impede the use or threat of nuclear weapons, especially in cases of self-defence¹⁶⁶. The same cannot be said regarding *jus in bello*¹⁶⁷, once this concerns the war scenery itself and other norms of international law¹⁶⁸, namely humanitarian law, as Judge Weeramantry demonstrated, are then applied, making the use of nuclear weapons – because of its effects – illegal. Although the argument raised by Judge Weeramantry deserves to be accommodated, it nevertheless goes beyond the question at stake. The question put to the ICJ was on the right to use nuclear weapons and not on the effects of such weapons. In reality States are not forbidden to use nuclear weapons¹⁶⁹, but, and according to Judge Weeramantry, as sustained in the 1925 Geneva Gas Protocol, any weapons that can have those destructive and poisonous effects are illegal. The Advisory Opinion, in a very subtle way, somehow incorporated this idea¹⁷⁰, after all it was recognised that *jus ad bellum* and *jus in bello* had to be taken together in the evaluation done by the ICJ.

This has been an important factor to bring the States to ratify the Treaty. This was the case when President Clinton transmitted the Treaty to the Senate¹⁷¹. Just to clarify some recurrent misunderstandings, the American Senate does not ratify treaties

¹⁶³ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions*, I.C.J. Reports, 1996: p. 266. On the other hand, the dissenting opinions by judges Weeramantry and Koroma reflect a different and opposing view to the matter. Dissenting opinion of Judge Weeramantry, I.C.J. Reports, 1996: p. 508 and Dissenting opinion of Judge Koroma, I.C.J. Reports, 1996: p. 556-582. The arguments used by these two judges are not the same, but the result is.

¹⁶⁴ *International law, the International Court of Justice and nuclear weapons*, edited by Laurence Boisson de Chazournes and Philippe Sands, Cambridge: Cambridge University Press, 1999: p. 438.

¹⁶⁵ *International law, the International Court of Justice and nuclear weapons*, edited by Laurence Boisson de Chazournes and Philippe Sands, Cambridge: Cambridge University Press, 1999: p. 445.

¹⁶⁶ *International law, the International Court of Justice and nuclear weapons*, edited by Laurence Boisson de Chazournes and Philippe Sands, Cambridge: Cambridge University Press, 1999: p. 277

¹⁶⁷ *International law, the International Court of Justice and nuclear weapons*, edited by Laurence Boisson de Chazournes and Philippe Sands, Cambridge: Cambridge University Press, 1999: p. 281-284.

¹⁶⁸ *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, Oxford: Oxford University Press, 2010: p. 495-497.

¹⁶⁹ Farrell, Theo, Lambert, Hélène, “Courting controversy: international law, national norms and American nuclear use”, *Review of International Studies*, n. 27, 2001: p. 309.

¹⁷⁰ “States do not have unlimited freedom of choice of means in the weapons they use”, International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions*, I.C.J. Reports, 1996: para. 78, p. 257

¹⁷¹ Jonas, David S., “The comprehensive nuclear test ban treaty: current legal status in the United States and the implications of a nuclear explosion”, *New York University Journal of International Law and Politics*, vol. 39, n. 4, 2007: p.1016.

(according to USA Constitution, art. II, para. 2, cl.2), but provides advice and consent to the President to do so.

One important remark is that the CTBT reflected a growing need since the 1950s to consolidate in a legal instrument obligations, that otherwise would not be upheld by the States. This is a change in international law and the fact that a Treaty was required, a “hard law” instrument, it also reflects the need to make it clearly legally binding¹⁷² with universal value.

Like all other Treaties there have been expressions of support and of opposition to the CTBT, whether for military or technical reasons, the same arguments, or almost, have been used by both sides, but in fact the question is merely political¹⁷³.

Like in the NPT, withdrawal is a possibility given to the States Parties. This withdrawal must be reasonably justified on reasons of national interest that may be compromised by being party to the Treaty. Unlike the NPT, the CTBT is of unlimited duration since the very beginning. The arguments that have been used both to support and to depreciate CTBT are mostly the same, depending only on the arguments used to sustain them. In some cases, it has been considered that the Treaty is irrelevant¹⁷⁴ because it is redundant with other treaties or that it fails to generate the necessary means, namely verification ones, that would make it an added-value to arms control¹⁷⁵.

¹⁷² *Developments of International Law in Treaty making*, edited by Rüdiger Wolfrum and Volker Röbens, Heidelberg: Springer, 2005: p. 463-464.

¹⁷³ Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*. Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: p. 3

¹⁷⁴ *The Comprehensive Nuclear Test Ban Treaty. Technical issues for the United States*, Washington: The National Academies Press, 2012: 18p; *The Comprehensive Nuclear Test Ban Treaty. Technical issues for the United States*, Washington: The National Academies Press, 2012: 204p.

¹⁷⁵ Kathleen C. Bailey establishes a self explaining list of antagonist positions regarding test ban, which is at the basis for any agreement regarding the CTBT. “The Comprehensive Test Ban Treaty. The costs outweigh the benefits”, *Cato Policy Analysis*, n. 330, 1999: p.3:

For	Against
Constrains modernization of nuclear weapons (modernization is bad)	Constrains modernization of nuclear weapons (modernization is vital)
Ends development of new nuclear weapons (new weapons are bad)	Ends development of new nuclear weapons (new weapons may be necessary)
Helps prevent proliferation	Has little or no impact on proliferation
Moves us towards nuclear disarmament (disarmament is good)	Moves us towards nuclear disarmament (disarmament is presently foolhardy)
A ban is verifiable (it freezes other nations' nuclear capabilities)	A ban is not verifiable (if other nations cheat, it does not freeze their nuclear capabilities)

and also Paine, Christopher, “Facing Reality. A Test Ban Will Benefit U.S. and International Security: A Reply to Kathleen Bailey”, *Cato Policy Analysis*, n. 330, 1999: 27p.

2. The Preamble

The Preamble, along with article I, defines the object and purpose of the Treaty. One of the first questions addressed in Treaty's law is the difference between purpose and object of the Treaty. It is a united notion in the German, Austrian, English and American traditions, but not in the French legal doctrine¹⁷⁶. This is more of a taxonomic squabble than a real legal problem and although the definition of concepts is of utmost importance, in this particular case we consider that in reality that is more a question of language usage than of numeric or phenomenal definitions of concepts¹⁷⁷.

Even admitting a consensus¹⁷⁸ over the definition of object and purpose of the Treaty, it is not certain that there will be an agreement on the acts that may defeat either the object or the purpose¹⁷⁹ of the Treaty. Still regarding the option for object or purpose, it should be underlined that the Vienna Convention on the Law of the Treaties (articles 18, 19 (c), 20 (2), 31, 33, 41, 58 (1), 60), as the CTBT also does, always mention both concepts together¹⁸⁰.

In a simplistic way, we could say that the object of the Treaty is defined in its title, a comprehensive test ban, and the purpose is the nuclear disarmament and non-proliferation as contained in the Preamble. But in reality, a comprehensive test ban is an element of disarmament and non-proliferation, so indeed it is the enumeration of somehow the same in both cases, even if a "technical" distinction can be made. It could be envisaged that the Verification Regime in article IV could be considered the main object of the Treaty, once it defines the means to achieve the aim of the Treaty¹⁸¹.

¹⁷⁶ Buffard, Isabelle, Zemanek, Karl, "The "Object and Purpose" of a Treaty: an enigma?", *Austrian Review of International and European Law*, (A.R.I.E.L.), vol.3, n.3, 1998: pp. 325.

¹⁷⁷ The treaty helps solving the problem in article XV by referring both to the object and purpose of the treaty.

¹⁷⁸ We follow UNCLOS' definition of consensus in its article 161, n.8, al.e) that is, the consensus is the absence of any formal objection. Boyle, Alan, Chinkin, Christine, *The Making of International Law*, Oxford: Oxford University Press, 2007: p. 157

¹⁷⁹ Klabbers, Jan, "How to defeat a Treaty's object and purpose pending entry into force: toward manifest intent", *Vanderbilt Journal of Transnational Law*, 2007, vol. 34, n.2, p. 283-331; Jonas, David S., Saunders, Thomas N., "The object and purpose of a Treaty: three interpretative methods", *Vanderbilt Journal of Transnational Law*, vol. 43, n. 3, 2010: p. 569.

¹⁸⁰ Jonas, David S., Saunders, Thomas N., "The object and purpose of a Treaty: three interpretative methods", *Vanderbilt Journal of Transnational Law*, vol. 43, n. 3, 2010: p. 565-609.

¹⁸¹ MacLean, George, *Advancing the Comprehensive (Nuclear) Test Ban Treaty: Capabilities, Implementation and Entry into Force*, Ottawa: International Security Bureau – Department of Foreign Affairs and International Trade, 2002: p.11.

However, article II is of equal importance once it defines the actor for the Treaty's implementation. The organization created by the Treaty becomes itself part or a distinct object of the Treaty, but equally important, as it is meant to execute the Treaty.

According to the Preamble of the CTBT, it supports disarmament, but it does not define any target or benchmark, unlike the NPT, INF or SALT do, nor does the rest of the Treaty. It refers only to one element that may have implications in the development and sustainment of nuclear weaponry¹⁸².

In reality, although clearly a non-proliferation and disarmament legal instrument, the Treaty does not prohibit the use or the development of nuclear weapons, but recognizes that it will have an effect of constraining such kind of activities. Nothing in the Treaty impedes States of exercising the right to self defense as foreseen in article 51 of the Charter of the United Nations.

The negotiation of the Treaty started with the Preamble which was eventually put on hold until the substantive part of the Treaty was agreed (that is, articles II and IV). This was the only possibility to make sure that there would not be any inconsistencies regarding the definition of concepts. The fact is that the rest of the Treaty was agreed based on definitions that should have been inserted in the beginning of the Treaty – like nuclear explosion – but they weren't. Some States argued they wanted to finish the Preamble before moving ahead, but the majority opted otherwise. Deciding the Preamble right at the beginning would have probably meant to fail in the negotiations, as the result would probably be too limited.

The use of some modifiers in the text might suggest that there is universal understanding of its usage, but it is not true, once the interpretation and scope of a modifier is always very questionable, not to mention that differences may arise with translation¹⁸³. One particular example is the reference to “positive measures” in paragraph 2 of the Preamble. The use of “positive” suggests different assessments: it may refer to measures that have been decided to be executed, opposing to the option of not doing anything. Nevertheless, we consider it refers to measures that may commonly

¹⁸² Hansen, Keith A., *The Comprehensive Test Ban Treaty. An insider perspective*, Stanford: Stanford University Press, 2006: p. 79

¹⁸³ Lessig, Lawrence, “Fidelity in Translation”, *Texas Law Review*, vol. 71, n. 6, 1992-1993, p. 1165-1269 and Buffard, Isabelle, Zemanek, Karl, “The “Object and Purpose” of a Treaty: an enigma?”, *Austrian Review of International and European Law*, (A.R.I.E.L.), vol.3, n.3, 1998: p.315-317.

be considered as actions that tend to reinforce the purpose of the Treaty¹⁸⁴. The reference to positive measures contrasts with the options taken so far as disarmament and non-proliferation are concerned, namely the NPT¹⁸⁵.

All along the Preamble the reference to measures is recurrent, but there is no indication of which measures it refers to (specially in case of paragraph three), if only those agreed in multilateral treaties, or if those adopted only bilaterally, within the same spectrum, should also be taken into account, we tend to assume that, although not clear, the undefined vocabulary used allows a much more comprehensive approach than any restrained listing. The fact is that these measures follow the reference to international agreements. We assume that it mostly refers to other political and legal acts that may not have a binding effect but which concern the same matter. One of this is acts is the ICJ advisory opinion on Legality of the Threat or Use of Nuclear Weapons.

The second paragraph clearly defines that the Treaty is to be seen as a disarmament and non-proliferation instrument, although limiting it to the nuclear field. This is an important aspect, once it must be retained that CTBT does not include any reference or purpose regarding conventional weaponry.

The Preamble in its fourth paragraph includes a declaration of the States Parties engaging themselves to non-proliferation and disarmament; this is a clear statement of the purpose of the Treaty. Moreover, the act of producing a declaration gives rise to legal obligations¹⁸⁶, and the Preamble is in itself as legally binding as the rest of the Treaty once it is an integrative part of the Treaty¹⁸⁷. Paragraph five reinforces that declaration by adding some major modifiers: globally, complete, general but also stating an obligation for all Parties to control it. This paragraph refers the reduction of nuclear weapons with a view to global disarmament; it does not impose immediate disarmament or any time frame for it.

¹⁸⁴ Beside the linguistic definition of the word positive, it is also necessary to verify the word used in the different translations of the Treaty and the political assessment that is intended to be done. *Generic aspects of arms control Treaties: Does one size fit all?*, Brussels: European Commission, 2004: p. 3.

¹⁸⁵ Bunn, George, *Strengthening nuclear non-proliferation security assurances for non-nuclear-States*, Washington: Lawyers Alliance for World Security, 1993: p. 3

¹⁸⁶ *Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports, 1974: para. 43, p. 267.

¹⁸⁷ Kelsen, Hans, *The Law of the United Nations. A critical analysis of its fundamental problems – with supplement*, New York: Frederick A. Praeger Publisher, 8th ed., 2009: p.9

It is important to note that the Treaty is not, according to its own wording, solely a disarmament or non-proliferation instrument, but both, even if it does not directly impede the development of nuclear weapons or its usage¹⁸⁸.

Nevertheless, in the Preamble, in its sixth paragraph, the Treaty establishes a linkage between nuclear explosions and the development and qualitative improvement of nuclear weapons, and its consequences for the disarmament and non-proliferation efforts. This is one of the disagreed aspects that have always originated controversy.

The end of nuclear explosions is presented as one step to achieve nuclear disarmament. It is not the only one, the most important or essential, but just one, though meaningful, according to paragraph seven. The use of the expression systematic process in this paragraph, as it already did in paragraph five, underlines the fact that disarmament is a process, but a systematic one.

The CTBT sets right from the Preamble of Treaty, in its eighth paragraph, a precondition for the efficiency of the Treaty by considering that a comprehensive nuclear-test-ban must be based on a universal and internationally effective verifiable Treaty¹⁸⁹. If during the Cold War the two enemies controlled each other, the fact is that since then Treaties need independent verification structures¹⁹⁰. Moreover, a Treaty seemed to be clearly necessary after the Cold War¹⁹¹ to replace the former dual control and as means to justify countermeasures¹⁹², as is the case of CTBT. An OSI, although intrusive, should not be seen as one of those countermeasures¹⁹³ which should be understood only as the measures contained in article V of the Treaty.

In the Preamble there is a concrete reference to another Treaty regarding non-proliferation and disarmament (Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater,) while there is no specific reference to NPT, but there is a mention to the principles stated in that Treaty (in particular in

¹⁸⁸ *Technical issues related to the Comprehensive Nuclear Test Ban Treaty*, Washington: National Academy Press, 2002: p. 15

¹⁸⁹ The question of verifiability will be extensively developed in article IV and the Protocol.

¹⁹⁰ Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*. Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: p. 207

¹⁹¹ *Making Treaties Work. Human Rights, environment and arms control*, edited by Geir Ulfstein, Cambridge: Cambridge University Press, 2007: p.4-7

¹⁹² Williamson Jr., Richard L., "Hard law, soft law, and non-law in multilateral arms control: some compliance hypotheses", *The Chicago Journal of International Law*, vol. 4, n. 1, 2003: p. 65.

¹⁹³ The CTBT defines some measures to be taken in case of non-compliance, which have been complemented by the adoption by the International Law Commission in 2001 of the articles on State responsibility.

article VI of NPT). None of those two instruments includes a definition on nuclear explosion as such.

In the NPT preamble, the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater is also quoted and in a more incisive way than it is in CTBT. The NPT refers to the continuation of negotiations towards a comprehensive test ban Treaty, while CTBT naturally does not, but the fact is that the peaceful nuclear explosions may be revisited in the future, which means the comprehensive character of CTBT may be compromised.

Divergences regarding mentioning the NPT in the Treaty were eventually taken into account and no direct reference to the NPT can be found in the Treaty. Some concerns included in the NPT have been included in the Treaty namely the special preoccupation on the inclusion of the references to non-proliferation (one), disarmament (seven) and nuclear weapons (nine) in the preamble of the CTBT; and also to nuclear weapons (four, three in the basic obligations and one in the OSI) in the *corpus juris* of the Treaty¹⁹⁴. To illustrate the differences between the treaties, let's note here the text of all of those treaties regarding their purposes, and the influence of one Treaty upon the following one is pretty obvious.

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water - Preamble	NPT – Article VI	CTBT - Preamble
Proclaiming as their principal aim the speediest possible achievement of an agreement on general and complete disarmament under strict international control in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate	Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the	Convinced that the present international situation provides an opportunity to take further effective measures

¹⁹⁴ It seems useful to compare Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, NPT and CTBT texts, taking into account that several years passed between the texts, but some of the problems remained.

the incentive to the production and testing of all kinds of weapons, including nuclear weapons. Seeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end, and desiring to put an end to the contamination of mans environment by radioactive substances	nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.	towards nuclear disarmament and against the proliferation of nuclear weapons in all its aspects, and declaring their intention to take such measures.
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The reference to previous treaties might suggest in some cases that the new Treaty would replace the former ones, which is not necessarily the case, especially if they deal with *jus cogens* norms¹⁹⁵. VCLT provides for the automatic termination of treaties, but this is not the case here. VCLT admits this automatism for the cases where the treaties themselves set a date for their termination or if the aim of the Treaty has been undoubtedly accomplished. If the automatic procedure is not used, in order to terminate a Treaty, the termination has to be invoked, which was not done in this case.

As for the legal reasons on the fundamental change of circumstances (*rebus sic stantibus*)¹⁹⁶, according to article 62 of VCTL, it cannot be used as a legal basis for the termination. The change of circumstances must be as such as to impede the application of the Treaty or replacing it.

Regardless of the fact that the Preamble, in its sixth paragraph, refers to nuclear weapon tests and to all other nuclear explosions, the doubt remains, can the CTBTO intervene in the case of natural disasters or human errors resulting in nuclear accidents that may provoke explosions?¹⁹⁷ Apparently yes. By isolating the world test for

¹⁹⁵ Orakhelashvili, Alexander, *Peremptory norms in International Law*, Oxford: Oxford University Press, 2006: p.192-194.

¹⁹⁶ Cassese, Antonio, *International Law*, 2nd ed., New York: Oxford University Press, 2005: p.181.

¹⁹⁷ Although the Treaty does not predicts this, the fact is that reality has shown that CTBTO means have been used in the case of natural disasters, like it happened on the 11th March 2011 accident at Fukushima, Japan, with a significant success.

weapons and by including all other nuclear explosions, it is admissible that CTBT can be used for accidental explosions and for non-military purposes¹⁹⁸.

The Preamble ends by articulating the purpose of the Treaty, once again, and extending it by adding other values, namely peace and security. It might seem obvious that a Treaty dealing with nuclear disarmament and non-proliferation¹⁹⁹ would necessarily be connected to peace and security issues, but in international law it is always better to mention if some action is required. Moreover, these references to peace and security clearly make the CTBT in accordance with the UN Charter principles.

It could be argued here that law, moral and ethics cannot be opposed, and the Human interest as whole should prevail²⁰⁰.

3. Article I – Basic obligations

The heading of the article – basic obligations – is self-explaining, but it is even more if we take into account the declaration in the preamble. There is a clear intention to create specific and legally binding obligations for the States Parties²⁰¹ from the beginning of the Treaty, one of the reasons being, probably, the fact that the Treaty lacks some major definitions. It may be (wrongly) assumed that the repetition of an expression might solidify its definition.

The notions of nuclear weapon test explosion and nuclear explosion had been previously referred to in the Preamble but no definition was presented. As it has been demonstrated since its signature and ratification of the Treaty, the understanding of the

¹⁹⁸ In the Preamble of the Treaty it is said “noting also the views expressed that this Treaty could contribute to the protection of environment”. It is a vague and far from concluding expression, but it would make sense to adopt a treaty that would put certain dangers of similar origin inside. Moreover, the ICJ had recognized the limits imposed to States regarding the affection by their actions of other territorial areas that do not fall under their jurisdiction, *Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports, 1974: p. 253-274, and in particular the dissenting opinion of judges Onyeama, Dillard, Jimenez de Aréchaga and Sir Humphrey Waldock, paragraphs 18, 28, 113, 114 and 117. It is also relevant to mention the ICJ Order of 22 June 1973.

¹⁹⁹ Krieger, David, Ong, Carah, *Back to Basics: Reviving nuclear disarmament in the Non-Proliferation regime*, Washington: Nuclear Age Peace Foundation, 2005: p. 1.

²⁰⁰ Raz, Joseph, *The Authority of Law*, 2nd ed., Oxford: Oxford University Press, 2009: p. 140; Goldsmith, Jack, Posner, Eric A., *The Limits of International Law*, New York: Oxford University Press, 2005: p. 181-184; *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, Oxford: Oxford University Press, 2010: p. 559.

²⁰¹ With a special reference to the States Parties of the Vienna Convention on the Law of Treaties, because of its article 27.

scope of these notions is diverse. For some States, laboratory tests or explosions may be excluded from the Treaty²⁰², while for some others²⁰³ they should have been included. Without a definition in the Treaty, both interpretations may be valid, but this means that the scope of the Treaty itself is therefore very different. China argued that according to article V of NPT, peaceful explosions should not be included.

Unlike the PTBT of 1963, the CTBT includes all environments, even if, at least for some States, not all kinds of tests and explosions are. The wording is, however, similar to 1963 Treaty (article I). “Any other nuclear explosion” is too vague and the fact that the CTBT verification regime is only prepared for 1 Kt explosions demonstrates that some smaller explosions may pass unidentified. The same is valid for laboratory tests. Moreover, the use of decoupling²⁰⁴ techniques may put the IMS/IDC data at stake.

Paragraph two extends the prohibition expressed in the first paragraph by imposing a ban on any encouragement or participation in nuclear explosions. This idea was already part of article I of PTBT and of article I of NPT. However, it must be said that there may be room for a question on compatibility regarding article IV of NPT and the access to nuclear technology. This is the kind of provision that States like India reclaim. With this paragraph States are not only forbidden to make explosions but to help others to conduct an explosion.

On the other hand, CTBT lacks a provision similar to article II of NPT by which States are also forbidden to receive or to allow the transfer of elements allowing a nuclear explosion. Having said this, it must be retained that the way the Treaty is drafted puts the onus on one side only, the suppliers, ignoring the intermediaries and the receptors.

If it is true that the aim of CTBT is to ban explosions and not to deal with other aspects regarding nuclear technology and weaponry, nevertheless, we must not forget that explosions are only done with materials and technology, and its reference might have been an added value for the Treaty. This loophole in the Treaty does not allow the

²⁰² Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*. Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: p.58, 79, 83

²⁰³ In particular India.

²⁰⁴ Tulliu, Steve, Schmalberger, Thomas, *Coming to terms with security: a lexicon for arms control, disarmament and confidence-building*, Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2003: p. 106

Treaty to provide the assurances some States want. Despite the fact there are several arms control regimes in place, not all members of CTBT are part to those regimes, nor there is one including both nuclear materials and delivery technologies.

Although the Treaty does not discriminate, and opts for the vague word “all”, we admit that the modifier “comprehensive”²⁰⁵ – which is only used in the title, in the Preamble and in article 1 – refers either to fusion²⁰⁶ and fission²⁰⁷ explosions.

4. Article II – The Organization

Article II refers to the organization created by the Treaty to implement it²⁰⁸. It is a common procedure in this kind of treaties²⁰⁹. This article intends to create the organization, to define its basic competences, and its organs in order to establish a permanent structure that can assure the performance of the necessary duties to enforce the principles of the Treaty²¹⁰. The case of the CTBT also creates obligations for the States, not only by banning explosions, but also by promoting sharing and cooperation to identify acts of non compliance, not to mention the national authorities, major actors in the context of IMS/IDC.

This was one of the most disputed articles in the negotiations in Geneva, not only because it defines the organs of the organization, but also because it defines the access conditions to some of them by the States Parties, namely the Executive Council

²⁰⁵ Koplow, David, *Testing a Nuclear Test Ban: What Should Be Prohibited by a “comprehensive” Treaty?*, Sudbury: Dartmouth Publishing Co Ltd, 1996: p. vii and p. 138.

²⁰⁶ Nuclear fusion is the process by which two or more atomic nuclei join together, or “fuse”, to form a single heavier nucleus. When the two nuclei fuse they produce energy. Tulliu, Steve, Schmalberger, Thomas, *Coming to terms with security: a lexicon for arms control, disarmament and confidence-building*, Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2003: p.108.

²⁰⁷ Nuclear fission is a nuclear reaction in which the nucleus of an atom splits into smaller parts and by doing so it produces energy. Tulliu, Steve, Schmalberger, Thomas, *Coming to terms with security: a lexicon for arms control, disarmament and confidence-building*, Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2003: p. 107

²⁰⁸ Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*, Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: p. 172-173.

²⁰⁹ Examples, among others, may be the OPCW or even the IAEA, that already existed, but which is considered for the implementation of some of the most important aspects of NPT.

²¹⁰ Amerasinghe, Chittharanjan Felix, *Principles of the Institutional Law of International Organizations*, 2nd ed., Cambridge: Cambridge University Press, 2005: p. 48 and “Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice”, *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion*, I.C. J. Reports 1949, p. 180.

(paragraphs 27-40), and by doing it defines competences and attributes power to the States. The organization will be chaired by a Director-General. The structure of the organization is similar to the one created by the Chemical Weapons Convention²¹¹ for its own organization (the Conference of the States Parties, the Executive Council, and the Technical Secretariat).

The Technical Secretariat (paragraphs 42-53) was also subject of large discussions among negotiating parties. One of the problems was the competences that were attributed to the Technical Secretariat, once some States did not want to give the full control to an international organization, nor was the case in the end. In reality, the more States and national authorities collaborate with the Technical Secretariat, the easier and more rewarding are the efforts of the organization. Moreover, the problem of intrusiveness was questioned by some States, in particular by China that argued that an inspection should not serve any intelligence purposes. This was not new, during the 1963 PTBT negotiations, even without an organization behind the concerns over a possible loss of sovereignty were immediately raised.

Giving some assurances to States Signatories, paragraph 6 refers that the verification activities will be handled in the least intrusive manner. However, as we shall see, the possibility of on-site inspections will have, at least to some extent, to be quite intrusive. Even though, daily routine activities will be dealt with in a very non-intrusive way.

The issue of confidentiality is addressed in paragraph 7 and this will constitute one of the arguments for those who want to block the advance of the implementation of the Treaty, not because the way it is drafted in the Treaty, but because it is a theme that keeps popping up during different negotiations, namely the manuals (as contained in paragraph 44). The fact is that the IMS network is so wide and it is up to national authorities or the diplomatic missions accredited to the CTBTO to require access to data, which cannot be denied by the Technical Secretariat. The data made available does not concern only the State requiring those data.

The possibility of establishing special arrangements with other International Organizations (article II, n.8) has become very pertinent with the Fukushima accident in Japan on 11 March 2011. This enabled the Provisional Technical Secretariat to set up

²¹¹ <http://www.opcw.org/chemical-weapons-convention/>, in particular article VIII.

special mechanisms of cooperation with other International Organizations (like WMO – World Meteorological Organisation or WHO – World Health Organisation). Regarding the cost efficiencies benefices, it is relevant to note that a special relation is being developed with WFP - World Food Program for the setting up of an Enterprise Resource Planning. The cooperation with WMO, for instance, has produced tangible results regarding atmospheric transport modelling²¹².

Paragraph 11 deals with the relation between voting rights and payment of assessed contributions, giving a two year margin period for those who are in arrears. A State that does not fulfil its financial obligations for more than two years loses its voting rights in the General Conference (like it happens in other International Organizations like IAEA or UNIDO, jus to mention a few that also have their siege in Vienna). Until the State has paid back it is also impeded to receive the unutilized balances, which will only be returned after the accounts have been cleared.

Two major organs are defined: the Conference of States Parties and the Executive Council. This article also institutes a Technical Secretariat which will be responsible for running the daily operations, namely the monitoring system and the data centre.

The Conference of States Parties is supposed to meet annually in regular sessions, but it may have special sessions upon a decision by the Conference, by a request from the Executive Council or by a request from a State party with the support of the majority of the other States Parties. It is up to the conference to decide on the budget, the scale of assessments of States Parties, to appoint the Director-General of the Technical Secretariat, to elect the members of the Executive Council and to approve the rules of this organ. The scale of assessments will repeat the decision taken by the General Assembly of the United Nations on this subject, even if the CTBTO is not an organ, program or institution of the United Nations, but an autonomous agency within the UN system.

The Executive Council shall be formed by 51 States Parties, following a set of criteria: number of monitoring facilities of IMS, experience and expertise in monitoring technology (although nothing is said on the method of evaluation for this) and the contribution for the budget of the organization. The States will be, as usual in UN,

²¹² That is, the propagation through the atmosphere of chemical elements.

nominated by each regional group, which are defined in the Treaty. It must be recalled that in the case of CTBT, to change from one regional group to another one it requires the agreement of both groups and it must be a consensual decision from both.

The rules of decision in the Conference of States Parties are the majority of States Signatories present and voting, in case of procedural matters, and consensus for matters of substance. If no consensus is reached the President of the Conference will impose a 24h delay and then a decision is taken by a 2/3 majority if not by consensus. All matters on which there may be doubts whether they are substance or procedural will be taken as substance. The same rules apply to the Executive Council, except the 24h delay which is not envisaged. These are the same procedures envisaged for the Conference of States Parties of OPCW.

Besides the executive role, one of the major tasks of the Executive Council is to receive and take action regarding on-site inspections requests, being able to replace the Conference of States Parties in case of urgency. It is also responsible for the facilitation and consultation procedures as contained in article IV.

5. Article III - National implementation measures

Article III on national implement measures is a recurrent provision in multilateral treaties once it establishes the relation between the States Parties and the organization, besides imposing an obligation to the parties not to jeopardize the aim of the Treaty and to implement the Treaty. Until the entry into force, the Executive Secretary of the Provisional Technical Secretariat reports to the Preparatory Commission on the national measures adopted by the States.

This article somehow consolidates what the VCLT already contained in its article 18 - obligation not to defeat the object and purpose of a Treaty prior to its entry into force²¹³ - , especially for those parties that have neither ratified the VCLT nor the CTBT. This understanding is even more valid if we consider that article 18 is of

²¹³ *Technical issues related to the Comprehensive Nuclear Test Ban Treaty*, Washington: National Academy Press, 2002: p.16.

declaratory nature of customary law²¹⁴, which means that article III only does the same on this matter. The moratoria adopted by some of the Signatory States also intend to fulfil the obligation of article 18 VCLT, even if the States are not parties to VCLT.

This national obligation is probably also the result of the larger effort to prevent, pre-empt or persecute terrorist activities²¹⁵. In fact, the CTBT can be useful to detect the use of nuclear weapons by terrorists, including in territories of States that are not parties to the Treaty, because of its extended IMS²¹⁶.

It also refers to the obligation of the States Parties to nominate a National Authority and to put it in contact with the Technical Secretariat. Besides to make sure that confidentiality is not violated, one of the purposes of this article is that there is a national institution responsible for the coordination of the monitoring system at national level. The national authority shall be the national focal point for liaison with the Secretariat, the other organs and the other States, as far as technical questions are concerned, for the rest it is the competence of the diplomatic missions accredited to the organization. This national authority is the entity responsible for transmitting to the Organization any information regarding explosions, thus being a fundamental element for one of the 4 measures for the Verification Regime of article IV, namely regarding the confidence-building measures and the consultation and clarification elements there stated.

The national authority is also responsible for providing the data obtained by national technical means of verification, which although not being fully described in article IV, are clearly mentioned as being able to be used the same way as the IMS data. The other State Parties cannot interfere with other Parties' national technical means of verification. China expressed some doubts on this reasoning, but eventually the provision was adopted.

A special note should be made about the first paragraph of the article, which imposes the obligation of execution of the Treaty. Although a general principle of

²¹⁴ Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p.247

²¹⁵ Tabassi, Lisa, Spence, Scott, "Improving CWC implementation: The OPCW action plan", *Verification Yearbook*, 2004: p. 45 and *Global non-proliferation and counter-terrorism. The impact of UNSCR 1540*, edited by Olivia Bosch and Peter van Ham, Baltimore: Brookings Institution Press, 2007: p. 208.

²¹⁶ *Global non-proliferation and counter-terrorism. The impact of UNSCR 1540*, edited by Olivia Bosch and Peter van Ham, Baltimore: Brookings Institution Press, 2007: 253p.

International Law, it has been always included in treaties²¹⁷ of this kind. Article III reiterates the obligations of States regarding control measures. Apart from IMS and OSI, in fact the primary control is naturally left to the States. It is also up to the States to decide upon criminal law in case of violation of the obligations of the Treaty. The Treaty itself does not include any measure on this, but article III, in paragraph 2, refers to the need of States to work together regarding the enforcement of their own domestic prohibitions that reflect the Treaty obligations.

As far as criminal law is concerned, the US has made a clear point on assuming that the Treaty requires State Parties to extend the prohibitions to their nationals even if outside their borders, but the same does not apply to corporations, to which extra-territorially is not applicable.

6. Article IV - Verification

Apart from the purpose of the Treaty, this is probably the most important article of CTBT, not because of its 68 paragraphs, once most of them are the necessary definitions of the Verification Regime different components (as contained in paragraph 1: an International Monitoring System (IMS); Consultation and clarification; On-site inspections; confidence-building measures), but because it creates the needed mechanism to fulfil the purpose of the Treaty, without which the verification – like it happened with previous treaties as the PNBT or PNET – would remain only with national means and, especially in case of a multilateral Treaty, that would not be enough to ensure the independence and reliability of data. The independence of the Verification Regime is a fundamental issue to confirm any possible intervention (namely an on-site inspection) based on commonly agreed data. With the Verification Regime in force, a blockade to an OSI based on alleged data cannot be accepted. This is a means to make the transgressor State be obliged to bare the onus of the counterproof, but not the proof²¹⁸, which is presented by the claimant.

²¹⁷ Daillier, Patrick, Pellet, Alain, Forteau, Mathias, Müller, Daniel, *Droit International Public*, Paris: Librairie LGDJ, 2009 : p.239.

²¹⁸ Clark, Roger S., “International Court of Justice: Advisory proceedings on the legality of the threat or use of nuclear weapons (question posed by the General Assembly): The laws of armed conflict and the use or threat of use of nuclear weapons”, *Criminal Law Forum*, vol. 7, n. 2, 1996: p. 279.

Verification involves two distinct moments which require different operations: detection and identification²¹⁹. Article IV includes the systems for both cases, the IMS mainly for detection and on-site inspection for identification. The detection element is the one that thwarts States from cheating²²⁰. Taking into account the Treaty refers to all nuclear explosions and is intended to be comprehensive, it must be sustained that even non-detectable explosions, either because of very low yield, or because using a low yield method, like hydronuclear experiments, are also considered to be a breach to the Treaty, even if some States (like Russia) do not fully agree with this assessment²²¹.

The article will be supplemented *in extenso* by the Protocol to the Treaty. The verification regime is the essential element to detect non-compliance²²². The four elements of the Verification Regime are equally important to determine the non-compliance by a State and, and from the legal point of view, article IV defines the right of reply of the defendant. Even if the Treaty does not deal with criminal law, in terms of procedure, a great transparency and adequate balance of the roles of both parties (the defendant and the plaintiff) is assured by the Treaty.

This article is of particular interest for the way intrusiveness is addressed and the limits imposed to it. The only aspect of the International Verification Regime that can be intrusive is an OSI²²³, not any other of the elements contained in article IV. Moreover, an on-site inspection can only take place if it follows the strict procedures of the Treaty and its protocol.

Article IV can only be fully read and understood together with the attached Protocol to the Treaty. Verification cannot be defined by itself; it can only be judge according to the decisions made by the States regarding what they want²²⁴. In the context of CTBT, verification is a process very well defined beforehand and not

²¹⁹ Coxhead, Malcolm, Jepsen, David, "Putting the CTBT into practice", *Vertic Brief*, 2009:p.8

²²⁰ Jonas, David S., "The comprehensive nuclear test ban treaty: current legal status in the United States and the implications of a nuclear explosion", *New York University Journal of International Law and Politics*, vol. 39, n. 4, 2007: p.1021.

²²¹ Koplow, David, *Testing a Nuclear Test Ban: What Should Be Prohibited by a "comprehensive" Treaty?*, Sudbury: Dartmouth Publishing Co Ltd, 1996: p. 80-106.

²²² *Coming to terms with security: a handbook on verification and compliance*, Geneva-London: UNIDIR - United Nations Institute for Disarmament Research – VERTIC – The Verification Research, Training and Information Centre, 2003: 146p.

²²³ Kreps, Sarah Elizabeth, Arend, Anthony Clark, "Why States follow the rules: toward a positional theory of adherence to international legal regimes", *Duke Journal of Comparative and International Law*, vol. 16, n. 2, 2006: p. 354.

²²⁴ Dahlman, Ola, Mykkeltveit, Svein, Haak, Hein, Jenifer Mackby, *Detect and deter: can countries verify the Nuclear Test Ban?*, Wurzburg: Springer, 2011, p. 181-184.

adjusted to circumstances. The question of compliance was absent from NPT²²⁵, but the CTBT refers to compliance²²⁶ on several occasions, both regarding procedures for its implementation, and enunciating some legal measures to address the violation of compliance. Non compliance with the Treaty goes further than violation of the Treaty, as this may refer to material breaches not indeed affecting the object and purpose of the Treaty. The judgement of non-compliance²²⁷ will be grounded on effective data and declared by the Executive Council (article II, paragraph 8, al. a). This has also been one of the arguments used by USA not to ratify the Treaty, as it does not want to hand over to an international organization the responsibility to decide upon compliance or non compliance²²⁸.

One aspect of international supervision that is not addressed by CTBT is the publicity given to the non-compliance judgements, thus not forcing States to make those judgments public. This is not a single case, most of arms control treaties avoid including publicity for these acts in their texts. This option may be understood taking into account the extreme sensitivity of the matter and of the concerned data (that may include technological, topographic, geographic, geological and other elements that States often consider being of special national interest).

There are several techniques that can be used in the verification process, but they are conditioned by their cost, availability and ownership. However, the list of techniques is a living instrument susceptible to the necessary updating. The CTBT created an International Monitoring System, which is a fundamental part of the verification regime and it reflects the growing perception among the international community that verification should be based on independent systems, unlike the PTBT, even if national technical means can also be taken into account, at least to launch a suspicion somehow justified.

²²⁵ *Assessing compliance with arms control Treaties*, Paris: Centre d'études de sécurité internationale et de maîtrise des armements, 2007 : p. 19

²²⁶ Kreps, Sarah Elizabeth, Arend, Anthony Clark, "Why States follow the rules: toward a positional theory of adherence to international legal regimes", *Duke Journal of Comparative and International Law*, vol. 16, n. 2, 2006: p. 333.

²²⁷ Dekker, Guido den, "The effectiveness of international supervision in arms control law", *Journal of Conflict and Security Law*, vol. 9, n. 3 2004; p. 322.

²²⁸ Dorn, A. Walter, Scott, Douglas S., "Compliance mechanisms for disarmament treaties", *Verification Yearbook 2000*, London: Verification Research, Training and Information Centre (VERTIC), 2000: p. 237.

One important element is that national technical means may include elements that are not part of the Treaty – like satellite collection systems - , but the data can be used by the members that have access to those data, if the State decide to share it, especially in the cases where national means are used. It must be clarified that the IMS uses satellites²²⁹ (namely Vsats²³⁰) for transmission of data, but not to recollect data, once this technique was excluded from the very beginning due to its cost, despite China and Pakistan insistence, that argued that only the use of satellite and electromagnetic monitoring could make the system valid for all environments, namely the outer-space²³¹.

The possibility of decoupling²³² is a very challenging one for the IMS and from the beginning it has been considered by the Secretariat and the experts involved in the negotiations, even if not all consider it is a real effective method that could allow undetected explosions²³³. Paragraphs 92 to 96 of article IV foresee an excluded area from an OSI, in reality the explosion spot itself could be excluded, but paragraph 96 rests the rights of the inspection team, even if in a restricted way. This restriction is also intend to preserve the integrity of installations of the inspected State that may be located sufficiently near the explosion site, but may not have any relation²³⁴.

Although the negotiations²³⁵ regarding IMS were not easy, those concerning IDC were much more difficult. Only when these were over, was it possible to agree on the IMS. The IMS is composed by 50 primary seismic stations and 120 auxiliary seismic stations; 80 radionuclide stations, of which 40 are to be equipped with

²²⁹ Mines, Ben, "The Comprehensive Nuclear Test Ban Treaty: Virtually Verifiable Now", *Vertic Brief*, 2004: p.6.

²³⁰ Vsats – Very Small Aperture Terminals

²³¹ Yunhua, Zou, *China and the CTBT negotiations*, Stanford: Center for International Security and Cooperation, 1998:p.14-15

²³² When an explosion is done in a large cavity to reduce the seismic signal. The use of salt mines is of particular value, once the salt itself cushions the signal.

²³³ O'Hanlon, Michael, "Resurrecting the Test-Ban Treaty", *Survival*, vol. 50, n. 1, 2008, p. 123.

²³⁴ As, for instance, is the case of Nellis Air Force Base near the Nevada test site. Kane, Christian D., *Key issues in the emerging U.S. debate on the Comprehensive Test Ban Treaty*, Monterrey: Naval Postgraduate School, 2009: p.5

²³⁵ On the negotiations period, Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*, Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: 363p. is probably when very good option. As for the technicalities of the verification regime, and apart from the documentation that can provide both by the national authorities and the Provisional Technical Secretariat, it is worth to mention Dahlman, Ola, Mykkeltveit, Svein, Haak, Hein, *Nuclear Test Ban. Converting political visions to reality*, Wurzburg: Springer, 2009, 278p. and Dahlman, Ola, Mykkeltveit, Svein, Haak, Hein, Jenifer Mackby, *Detect and deter: can countries verify the Nuclear Test Ban?*, Wurzburg: Springer, 2011, 271p.

technology to monitor noble gases²³⁶; 11 hydroacoustic stations; and 60 infrasound stations. Moreover, 16 radionuclides laboratories are also foreseen in the Treaty. No indication of the kind of technology used is mentioned in the Treaty, but the location of all stations and laboratories is undoubtedly identified (although it can be changed by consensus). The Treaty and the protocol missed the opportunity to clarify how the counter-check of data, especially in the case of an on-site inspection, should be done²³⁷. This is a matter that the discussions for the on-site inspections manual have been dragging on for some time.

A nuclear explosion produces different signals from an earthquake²³⁸ as well as from a nuclear reactor signal. In the latter case because of the distinct kind of isotopes that are released in the two cases²³⁹. The CTBTO has a running project to be able to ensure the quality and rigour of data²⁴⁰, the International Noble Gas Experiment²⁴¹. But still, the system has to be improved in order to clearly establishes possible contaminations.

This article also establishes the relation between national authorities, as referred to in article III, and the Organization and defines the competences of each one of them. Moreover, the role of States Parties is also mentioned within this context.

In paragraph 13, the compatibility with article IV of NPT, even if without a direct reference to that Treaty, is the basic principle for the development of atomic energy for peaceful purposes.

If the IMS is basically the responsibility of the States that host stations, although under the authority of the Technical Secretariat, the fact is that the IDC is the Secretariat responsibility and strict competence. It is interesting to note that the CTBTO has two different definitions of assets. On the one hand, and from the legal point of view, these

²³⁶ There are six noble gases that occur naturally (Helium, Neon, Argon, Krypton, Xenon, and Radon). These noble gases, in particular Argon and Xenon are released after a nuclear explosion.

²³⁷ For instance, should a sample be divided and analyzed by two different laboratories or should the same sample be analysed by two laboratories.

²³⁸ Medalia, Jonathan, "Comprehensive Nuclear-Test-Ban Treaty: Background and current developments", *Crs - Report for Congress*, 2010: p.12

²³⁹ *A new look at the Comprehensive Nuclear-Test-Ban Treaty (CTBT)*, The Hague: Netherlands Institute of International Relations Clingendael, 2008: p. 15

²⁴⁰ Ringbom, Anders, "Verifying the Comprehensive Nuclear-Test-Ban Treaty by Radionuclide Monitoring", *International Conference on Nuclear Data for Science and Technology*, College Park-Maryland: American Institute of Physics, 2005: p.1693-1697.

²⁴¹ Dahlman, Ola, Mykkeltveit, Svein, Haak, Hein, Jenifer Mackby, *Detect and deter: can countries verify the Nuclear Test Ban?*, Wurzburg: Springer, 2011, p. 64-67.

assets, i.e. the stations, are the property of the States; on the other hand, and from the contabilistic point of view they are CTBTO assets, once they are run by the CTBTO (through contractors). The IMS by itself is useless without a data centre. States Parties can provide data from other stations than those of IMS. The treatment of data by IDC is also a way to make data of universal value once the means for its evaluation have been agreed by all State Signatories of the Treaty. This means that all data collected by the IDC are given exactly the same kind of analysis.

Consultation and clarification are not to be considered as part of an on-site inspection, not even as a first stage²⁴². It is a voluntary mechanism, unlike the on-site inspection, which is clearly intrusive. Although voluntary, it has a time limit (48h) and the State asking for an on-site inspection must include the results of the consultation and clarification procedures in its request. The consultation and clarification may well avoid an on-site inspection, but they also may lead directly to the steps in article V (as contained in paragraph 33) if there is clear confirmation of non compliance.

The on-site inspections follow the same scheme of the challenge inspection of the Chemical Weapons Convention, including the role attributed to the Executive Council and the Director-General. The CTBT does not include any other type of inspections (routine, short-notice or random) but only inspections intended to certify a violation of the Treaty and for that reason they are the most intrusive kind. The on-site inspection main goal is to provide the Executive Council enough elements allowing it to take a decision, maybe involving sanctions as contained in article V. It should be taken as a last recourse.

Usually two approaches regarding on-site inspections are considered by CTBT analysts: on the one hand, the red light approach, meaning an on-site inspection moves forward unless the Executive Council decides otherwise; on the other hand, the green light approach which requires a prior approval by the Executive Council. The Treaty also considers two different kinds of on-site inspections: on the one hand, the cases of inspections to characterize the explosion; on the other hand, to identify the perpetrator, in cases where the explosions takes place in a common territory, like the high seas²⁴³.

²⁴² Ramaker, Jaap, Mackby, Jenifer, Marshall, Peter D., Geil, Robert, *The Final Test. A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna: Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 2003: p. 130.

²⁴³ *A new look at the Comprehensive Nuclear-Test-Ban Treaty (CTBT)*, The Hague: Netherlands Institute of International Relations Clingendael, 2008: p.25

This is a controversial reading, although supported by many defenders of the Treaty (a combination of part II, paragraphs 105-108 of the Protocol, and article IV, paragraph 35 of the Treaty).

The time frame for an on-site inspection²⁴⁴ is very well defined along this article and it is complemented by the Protocol provisions referring to on-site inspections. The question of which data to use (from national means or just from the IMS), as well as who would be given the authority to launch an on-site inspection were some of the issues on which a compromise was difficult to reach²⁴⁵.

The fall out aspects of a nuclear explosion is not part of the inspections task, but of IMS. Nevertheless, it is still the verification regime ascertain in the Treaty that contribute to evaluate the disproportionate magnitude of the health effects of nuclear weapons, that is, the data recollected by the verification system contribute to the definition of the event thus allowing public health authorities to intervene in due time in an effective manner²⁴⁶. The level of radiation detected is equally relevant to make prospective analysis of its effects²⁴⁷.

The question of verification has been argued by some States as being the only added value of CTBT, if it were to be effective. The American Senate has used this argument for several years to impede the ratification of the Treaty by the USA²⁴⁸, which will have a major impact on the future of the Treaty²⁴⁹.

It is of common perception that the verification systems and regimes are one of the most controversial areas of non-proliferation and disarmament treaties. One of the

²⁴⁴ ICJ, *Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports, 1974: p. 253-274; ICJ, *Nuclear Tests (New Zealand v. France)*, Judgement, I.C.J. Reports, 1974: p. 455-478, Kurosawa, Mitsuru., "The legality of atmospheric nuclear weapon tests. Nuclear tests cases", [http://dspace.lib.niigata-u.ac.jp:8080/dspace/bitstream/10191/14659/1/11\(1\)_87-108.pdf](http://dspace.lib.niigata-u.ac.jp:8080/dspace/bitstream/10191/14659/1/11(1)_87-108.pdf), 24p., Mackay, Don, "Nuclear testing: New Zealand and France in the International Court of Justice", *Fordham International Law Journal*, vol. 19, n. 5, 1995: p.1856-1887.

²⁴⁵ Ramaker, Jaap, Mackby, Jenifer, Marshall, Peter D., Geil, Robert, *The Final Test. A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna: Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 2003: p. 166.

²⁴⁶ Scobbie, Iain, "Discontinuance in the International Court: the enigma of the *Nuclear Tests* case", *International and Comparative Law Quarterly*, vol. 41, 1992: p. 808-840; ICJ, *Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports, 1974: par. 60-61.

²⁴⁷ Wilson, Nicholas, Baker, Michael, "Nuclear weapons illegality: the public health case", *Medicine and Global Survival*, vol. 2, n.2, 1995: p.115-121.

²⁴⁸ *Final Review of the Comprehensive Nuclear Test Ban Treaty (Treaty Doc. 105-28)*, Washington: United States Congress- Senate Committee on Foreign Relations, 2000: p. 79-85.

²⁴⁹ Labbé, Marie-Hélène, "Les essais nucléaires indiens et pakistanais et la non-prolifération", *Politique Étrangère*, n. 3, 1998, p.538.

most complicated aspect is the validation of data, while some States argue that only data provided within the boundaries of the Treaty may be used by the organisation, others (like USA) tend to insist on evoking *inter alia* wording to justify the use of different sources of information. This is not a single question of CTBT or CTBTO but it has been seen elsewhere, for instance, in the IAEA.

The last element of the International Verification Regime – confidence building measures (paragraph 68) – is complemented by the Protocol and it regards the duty of the States Parties to inform the CTBTO of chemical explosions that may originate signals that can be detected by IMS and by doing so avoiding noise in the IMS. Ideally, the information should be conveyed before the explosion takes place. Nothing is said in the Treaty on confidence building measures the CTBTO may engage to reaffirm the certainty of IMS and its independence. It seems there is some unbalance in the Treaty regarding the duties of the States Parties and the organization.

7. Articles V - Measures to redress a situation and to ensure compliance including sanctions and VI - Settlement of disputes

The Conference of States Parties or, in case of urgency, the Executive Council can take a violation of the Treaty to the attention of the United Nations. It is not identified to which organ it should be brought to the attention, but it is assumed that it is the Security Council. This is an extreme measure that can only be envisaged if it is not possible to redress and remedy the situation by other means, like consultation and clarification as contained in article IV, paragraph 1 b. This possibility of sanctions is what, somehow, justifies the existence of a Treaty, as without it the measures there contained would be illegal²⁵⁰. The States Parties can also adopt measures according to international law within the Conference to punish an offender State. Moreover, the Treaty refers to a very specific measure that deals with the Treaty itself (article V, n.2), that is, the restriction or suspension of the State Party to exercise its rights and privileges.

²⁵⁰ Williamson Jr., Richard L., “Hard law, soft law, and non-law in multilateral arms control: some compliance hypotheses”, *The Chicago Journal of International Law*, vol. 4, n. 1, 2003: p. 74

Article V reinforces the legal and political constraints that States must consider when they form their judgements about national defence policies²⁵¹, as with CTBT the nuclear option is much more difficult, once the States Parties cannot ensure that hypothetical nuclear weaponry could be test to assure its functionality.

The disputes that may arise are supposed to be handled in a peaceful way, as article 33 of the Charter of United Nations establishes. According to article VI disputes regarding the interpretation or the application of the Treaty can be taken to the International Court of Justice for an advisory opinion. Contentious processes are also possible, if both parties (whether two States Parties or a State Party and the organization) agree to do so²⁵². It remains to be analysed the applicability of article 34 of the International Court of Justice in these situations, only States can be parties to proceedings in Court. Besides the ICJ, both the Executive Council and the Conference of States Parties²⁵³ have been empowered to settle disputes. It is important to note that article VI sustains that this is without prejudice to articles IV and V. These disputes relate only to the application or interpretation of the Treaty, and not to the compliance with the Treaty (for that, the procedures are included in articles IV and V)²⁵⁴.

Article VI refers extensively to the role of the Executive Council and the Conference of Parties regarding the settlement of disputes, but it does not confer any power or competence to those organs to impose a resolution of a dispute. Bearing in mind that international organisations cannot be parties to a dispute before the ICJ, the CTBTO can, however, according to paragraph 1 of article 65 of ICJ Statute, ask for an advisory opinion.

8. Articles VII Amendments and VIII - Review of the Treaty

251 Hafemeister., David W, "Assessing the Merits of the CTBT", *The Nonproliferation Review* , vol. 16, n. 3, 2009: p. 480.

252 Wellens, Karel, *Remedies against International Organisations*, Cambridge: Cambridge University Press, 2007: p. 225.

253 It is not clear why some authors consider that Conference in article VI refers to the Conference on Disarmament (Jonas, David S., "The comprehensive nuclear test ban treaty: current legal status in the United States and the implications of a nuclear explosion", *New York University Journal of International Law and Politics*, vol. 39, n. 4, 2007: p.1018), once article II, para. 12 of CTBT states that Conference in the treaty refers to the Conference of States Parties.

254 *Assessing compliance with arms control Treaties*, Paris: Centre d'études de sécurité internationale et de maîtrise des armements, 2007 : p. 41 and *Making Treaties Work. Human Rights, environment and arms control*, edited by Geir Ulfstein, Cambridge: Cambridge University Press, 2007: p. 257.

The Treaty can be amended at any time after the entry into force, but in principle not before that (including the strict rule of article XIV²⁵⁵), according to procedures and delays contained in article II. Moreover, there must be no negative vote cast by any State Party. There is a lighter or simplified procedure for amendments regarding matters of administrative or technical nature. There is not any provision allowing any amendment before its entry into force, but there is no exclusion of such as well.

The possibility of revision of the Treaty is set for ten years after the entry into force, if not decided otherwise by the Conference of States Parties, and every ten years from then on. This will be an opportunity to update the Treaty on the basis of new scientific and technological developments. The possibility of underground tests for peaceful purposes may be revisited²⁵⁶. This may be a set-back in the disarmament and non-proliferation, although there is not only a mention to peaceful purpose explosions, but also that any amendment will also preclude any military benefits from those explosions.

States can veto the amendments in two different occasions: in the moment of the approval of the amendment or by failing its ratification, thus impeding its entry into force. There is a clear norm to impede there is dual track on the Treaty's legal effect, meaning that amendments are only valid if ratified by all Parties to the Treaty.

Due to technical character of the Treaty, the possibility to revisit the text seems to be very reasonable, once not only the technical means change, but also the procedural rules may be adapted to overcoming new situations.

9. Articles IX - Duration and withdrawal, X - Status of the Protocol and the Annexes, XI - Signature , XII - Ratification, XIII – Accession

²⁵⁵ Anastassov, Anguel. "Can the Comprehensive Nuclear-Test-Ban Treaty Be Implemented before Entry into Force?", *Netherlands International Law Review*, 2008: p. 84.

²⁵⁶ After all, the notion of test is only associated to weapons, not necessarily to explosions, which mean that, at least theoretically, tests without explosions are not covered by the treaty.

As usual, the Treaty ends with the standard clauses²⁵⁷ of duration, the status of the different parts of the Treaty, that is, its text, its annexes and its Protocol and annexes, and the procedures regarding signature, ratification, accession, reservation, deposit and the definition of the authentic texts.

Article IX deals with two important aspects: the duration of the Treaty, which is unlimited, (the NPT, for instance, was not), and the possibility of withdrawal. The Treaty admits the figure of withdrawal (article IX), in the same terms the NPT does, with a mandatory notice to the Security Council, the other States Parties and the Executive Council six months in advance. It leaves to the party the responsibility to indicate the facts that justify its decision²⁵⁸, like the NPT does. The inclusion of withdrawal can be seen as a persuasive element for States to accede to Treaty once the compromise established with the accession does not become mandatory forever, but only until the State wants it²⁵⁹. On the other hand, it makes the Treaty too flexible regarding its accomplishment, as North Korea withdrawal from NPT has proven. The withdrawal clause in reality ensures that the States are given the last option²⁶⁰, a situation that has been contested by the more diligent opponents to nuclear explosions and tests. If we were to consider the Treaty an example of hard law, once it codifies principles and defines behaviours and is legally binding²⁶¹, the fact is that article IX²⁶² is more an example of soft law²⁶³, as it is an example of a fragile or weak certainty for the fulfilment of the Treaty. This approach towards soft law seems to gain importance in international legal scholarship²⁶⁴

²⁵⁷ Treaty Section of the Office of Legal Affairs of the United Nations, *Final Clauses of Multilateral Treaties*. New York: United Nations, 2003: 125p.

²⁵⁸ Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007: p. 282.

²⁵⁹ Dorn, A. Walter, Scott, Douglas S., "Compliance mechanisms for disarmament treaties", *Verification Yearbook 2000*, London: Verification Research, Training and Information Centre (VERTIC), 2000: p. 240.

²⁶⁰ Mahoney, Curtis J., "Treaties as contracts: textualism, contract theory, and the interpretation of Treaties", *The Yale Law Journal*, vol. 116, n. 4, 2007: p. 842-843.

²⁶¹ Pronto, Arnold N., "Some Thoughts on the Making of International Law", *European Journal of International Law*, vol. 19, n. 3 (2008): p.613.

²⁶² Though referring to the Moscow Treaty of 1963, as the wording is the same, the comments made by Prosper Weil regarding this are particularly clear, "Towards relative Normativity in International Law?", *American Journal of International Law*, vol. 77, n. 3, 1983: p. 414.

²⁶³ Malanczuk, Peter, *Akehurst's modern introduction to international law*, 7th ed., London-New York: Routledge, 2010: p.54.

²⁶⁴ D'Aspremont, Jean, "Softness in International Law: A Self-Serving quest for new legal Materials", *European Journal of International Law*, vol. 19, n. 5, 2008: p. 1075.

Article X makes the Protocol and its annexes an integral part of the Treaty, although, as we shall see, in the case of reservations, for instance, not all the rules apply evenly.

Article XI makes the Treaty an open Treaty for all the States without exception, after all the text had been adopted by a UNGA resolution and it would be strange that this would not be the case. Moreover, the text was negotiated in a multilateral forum by all the States that wanted to do so.

Article XII imposes the ratification obligation to the States Parties, while article XIII provides for the accession after the entry into force by any State. The fact that ratification is clearly inserted in the Treaty as a mandatory step for the entry into force of the Treaty contributes for a more clear interpretation of article 24 of VCLT and also makes sure that not only the Signatory entity endorses the Treaty, but the State reconfirms it²⁶⁵, thus avoiding questions like the ones raised in the case opposing Cameroon to Nigeria regarding their land and maritime border²⁶⁶. The ratification thus ensures the fulfilment of the domestic procedures²⁶⁷. Ratification may be more difficult depending on the intrusiveness of the Treaty, as the CTBT includes on-site inspections; its level of intrusiveness may be, upon certain circumstances, considered difficult to be accepted²⁶⁸.

10. Article XIV - Entry into force

Article XIV concerns the entry into force of the Treaty. Because of its unique character and being one of the reasons for this dissertation, we shall deal with it in a separate chapter, bearing in mind that the period between the signature and entry into

²⁶⁵ Lantis, Jeffrey S., *The Life and Death of International Treaties. Double-edged diplomacy and the politics of ratification in comparative perspective*, Oxford: Oxford University Press, 2009, p.2-3.

²⁶⁶ International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I. C. J. Reports 2002, para. 258 and in particular 264.

²⁶⁷ Jonas, David S., Saunders, Thomas N., "The object and purpose of a Treaty: three interpretative methods", *Vanderbilt Journal of Transnational Law*, vol. 43, n. 3, 2010: p. 595.

²⁶⁸ Kreps, Sarah Elizabeth, Arend, Anthony Clark, "Why States follow the rules: toward a positional theory of adherence to international legal regimes", *Duke Journal of Comparative and International Law*, vol. 16, n. 2, 2006: p. 348.

force of arms control treaties requires special attention²⁶⁹. The article imposes the ratification by 44 States identified in Annex 2 to the Treaty and corresponding to the States that were members of the Conference on Disarmament by then and which had a nuclear reactor according to IAEA list. India opposed to such a strict list²⁷⁰. This opposition is not of legal but of political nature and must be understood within the history of international relations and in particular the context of multilateral negotiations. In the following chapter an analysis of this article along with the questions of ratification and enter into force will be further developed.

Article XIV defines the possibility of a Conference of ratifying States every two years on the anniversary of the Treaty in order to find ways to move forward with the entry into force of the Treaty. This kind of conference has taken place every two years since 1999 and it has been supported by Ministerial meetings in alternate years. The reference date is 24 September (anniversary date of CTBT). Although the Conference and the Ministerial meetings are supposed to be only for ratifying States, the fact is that all Signatory States are invited, and even some observers to the PrepCom (like Pakistan) if they show interested on participating.

11. Articles XV - Reservations, XVI - Depositary and XVII - Authentic texts

The possibility of reservations²⁷¹ (article XV) is excluded regarding the Treaty and its annexes, but it is established concerning to the Protocol and its annexes, as long as they are not incompatible with the object and purpose of the Treaty²⁷². The reservation clause only mentions the impossibility for a kind of reservation but it is

²⁶⁹ Michie, Andrew, "The provisional application of arms control treaties", *Journal of Conflict and Security Law*, vol. 10, n. 3, 2005: p. 352.

²⁷⁰ Yunhua, Zou, *China and the CTBT negotiations*, Stanford: Center for International Security and Cooperation, 1998:p.21.

²⁷¹ Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008: p.612-615.

²⁷² Buffard, Isabelle, Zemanek, Karl, "The "Object and Purpose" of a Treaty: an enigma?", *Austrian Review of International and European Law*, (A.R.I.E.L.), vol.3, n.3, 1998: pp. 312; and International Law Commission, *Tenth report on reservations to treaties*, A/CN.4/558 /Add.1.

silent regarding procedures²⁷³ for the allowed reservations (with the exception above mentioned).

Nothing is said on the obligation of the other parties to accept the reservations²⁷⁴ and what would be the relations among the Parties and the validity of the Treaty²⁷⁵. On this matter it must be clarified the existence of two views, a classical one inspired in the ICJ Advisory Opinion²⁷⁶, that argues that the acceptance by all the other States Parties is mandatory, and another one, based on the VCLT (Articles 19-23) which admits a certain flexibility on this matter²⁷⁷. However, in the case of CTBT, it seems that once there is a clause impeding all reservations, if a reservation were to be accepted, it would in fact require an amendment to the Treaty, thus changing the legal nature of the act²⁷⁸ from a reservation from one party to an amendment of all parties.

The problem of the persistent objector²⁷⁹ is avoided once the Treaty clearly impedes reservations. The advantage of this clause is that it contributes for the clarity regarding the law²⁸⁰, which is always of extreme importance and in particular in international law where different legal regimes participate. However, in case of a non-signatory or non-ratifying State – like India – a problem arises on whether to accept the persistent objector rule if the ban on nuclear explosions could be considered as a customary law. It must be recalled that from the very beginning India objected to the Treaty, even if not because of its main purpose²⁸¹.

One question that has not been fully addressed or answered both by the ICJ and in literature is the acceptance of a reservation definition and its consequences²⁸², despite

²⁷³ *The Vienna Convention on the Law of Treaties: A Commentary*, edited by Olivier Corten, Pierre Klein, vol.I, New York: Oxford University Press, 2011: p. 405-482.

²⁷⁴ International Law Commission, *Tenth report on reservations to treaties*, A/CN.4/558.

²⁷⁵ Fitzmaurice, G.G., “Reservations to Multilateral Conventions”, *International and Comparative Law Quarterly*, vol. 2, 1953: p. 1-26

²⁷⁶ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C. J. Reports 1951, in particular p. 21, 26 and 29.

²⁷⁷ Redgwell, Catherine, “Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties” *British Yearbook of International Law*, vol. 64, n. 1, 1994: p. 245-282.

²⁷⁸ This would be ruled by articles 39 to 41 of VCLT. Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 269.

²⁷⁹ Elias, Olufemi, “Some remarks on the persistent objector rule in customary international law”, *Denning Law Journal*, vol. 5, 1991, p. 40.

²⁸⁰ Jonas, David S., Saunders, Thomas N., “The object and purpose of a Treaty: three interpretative methods”, *Vanderbilt Journal of Transnational Law*, vol. 43, n. 3, 2010: p. 569.

²⁸¹ Ragazzi, Maurizio, *The Concept of International Obligations Erga Omnes*, Oxford: Oxford University Press, 2002: p. 63.

²⁸² Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 267.

article 20 of VCLT. If this is a problem that does not concern the Treaty and its annexes, it should be taken into account for the Protocol and its annexes.

Concerning reservations, it is important to mention that they are not possible regarding customary international law²⁸³ and in the case of nuclear explosions, although they are not an object of customary international law, we would consider that its prohibition might be considered as such. Again the inclusion of this clause on the Treaty underlines the universal obligation without any questioning.

The fact that test is not defined in the Treaty it might allowed interpretative declarations, which might be assimilated to reservations. This is a means that some States have used this trick sometimes with success and sometimes not²⁸⁴.

The fact the UN Secretary-General is the depositary of the Treaty confirms its multilateral character²⁸⁵, for instance the PTBT was deposited with the governments that had started the Treaty²⁸⁶, a fact that *per se* raised suspicions on some States on the equality of all the Parties. The fact that the UN Secretary General is its depositary²⁸⁷ is also an assurance there is no secrecy regarding the Treaty (although it would be impossible in practical terms in this case due to the way negotiations were handled). However, it must be clarified that this secrecy avoidance is guaranteed by the act of registration with the UN (according to article 80 of VCLT), therefore the two acts should not be confused, although in the case of CTBT one act implies the other as the depositary and the instance of registration is the same.

Regarding the authentic texts, the usual formula applied in UN was incorporated in the Treaty text, which means that the text is equally authentic in all of the six UN official languages (Arabic, Chinese, English, French, Russian and Spanish).

²⁸³ International Court of Justice *North Sea Continental Shelf Cases*, I.C.J. Reports 1969, para. 71 and Fitzmaurice, Malgosia, "Third parties and the law of the Treaties", *Max Planck Yearbook of United Nations Law*, edited by R. Wolfrum J. A. Frowein, Dordrecht: Kluwer Law International, vol. 6, 2002: p. 59.

²⁸⁴ Bowett, D. W., "Reservations to Non-Restricted Multilateral Treaties" *British Yearbook of International Law*, vol. 48, n. 1, 1976-1977: p. 72

²⁸⁵ Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007: p. 109.

²⁸⁶ As the text of the treaty states in its article V, <http://disarmament.un.org/TreatyStatus.nsf/44e6eeabc9436b78852568770078d9c0/35ea6a019d9e058a852568770079dd94?OpenDocument>

²⁸⁷ Malanczuk, Peter, *Akehurst's modern introduction to international law*, 7th ed., London-New York: Routledge, 2010: p. 136.

12. Annexes to the Treaty (Annex 1 to the Treaty – List of States pursuant to Article II, paragraph 28; Annex 2 to the Treaty – List of States pursuant to Article XIV), Protocol to the Comprehensive Nuclear Test-Ban Treaty, and its annexes (Annex 1 to the Protocol, Annex 2 to the Protocol - List of Characterisation Parameters for International Data Centre Standard Event Screening)

The annexes to the Treaty, the Protocol²⁸⁸ and its annexes are used to better define some contents expressed in the Treaty, as well to provide details in terms of procedures, for instance regarding on-site inspections. From the strict legal point of view, they do not make any inflexion or deflexion from what the Treaty defines.

Annex 1 to the Treaty distributes the States among regional groups, as referred in article II, para. 28. This distribution is different from the usual one and puts Israel in the Middle East and South Asia Group. If geographically it is a correct option, politically it would reveal to be a *faux pas* once it has impeded that group from taking decisions²⁸⁹ from the very beginning. The six groups created are different from the UNGA division, but similar to IAEA division.

Annex 2 defines the list of the States which ratification is mandatory for the entry into force of the Treaty and the criteria for the establishment of the list. The first was to be a member of the Conference on Disarmament on the date of the approval of the Treaty and the other criteria was to have a nuclear power reactor on that date as well.

The Protocol is particularly important in defining the rules for inspections, taking into account that they are one of the compliance measures of verification, as it happens with other arms control treaties²⁹⁰. Moreover it also elaborates on the basic rights and obligations of the States regarding IMS and IDC and complements with details on those two systems. The technical questions raised in article IV are more developed in the Protocol, which provides the procedural, technical and scientific guidance for the use of data and products of IDC and the use of IMS. It is relevant to

²⁸⁸ Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007: p. 27.

²⁸⁹ McGrath, Keegan, *Battle lines being drawn in the CTBT debate: An analysis of the strategic posture commission's arguments against US ratification*, Washington: Monterey Institute for International Studies - James Martin Center for Nonproliferation Studies, 2009: 16p.

²⁹⁰ *Making Treaties Work. Human Rights, environment and arms control*, edited by Geir Ulfstein, Cambridge: Cambridge University Press, 2007: p. 262.

note the distinction between data and products, as confidentiality and technical matters are not necessarily identical.

13. The preparatory organs²⁹¹

Once the Treaty requires several measures to be taken into force it was decided, as it has been, for instance, the case with OPCW, to create a Preparatory Commission and a Provisional Technical Secretariat that could develop the different tasks required before the entry into force of the Treaty (paragraph 14). The Preparatory Commission was given the statute of international organization²⁹², thus being able to negotiate and enter into agreements, not to mention the capacity to exercise the intended functions before the entry into force of the Treaty.

The fact of having legal personality²⁹³ also imposes an increased responsibility to accomplish the tasks, as there are not any arguments – apart from decisions by the Preparatory Commission – to impede any action. Some of the activities can only take place after the entry into force, namely the on-site inspections, but there is a large technical work that is needed to be done before it happens. These tasks include the preparation of manuals²⁹⁴, the definition of technologies, the calibration of equipments, testing equipment and procedures, among others.

The creation of the Preparatory Commission is based on the UN General Assembly Resolution, but most of the aspects defining its status, rules and competences are to be found in the annex to that resolution. This resolution and its annex are of utmost importance on the question of the entry into force and application of the Treaty, once the creation of the Preparatory Commission had as its fundamental aim to fulfil some of the Treaty tasks that have been referred before and which are often taken for an example of provisional application of the Treaty. The resolution is the necessary

²⁹¹ *Resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization*, adopted by the States Signatories on 19 November 1996, http://www.ctbto.org/fileadmin/user_upload/public_information/2009/prepcom_resolution.pdf

²⁹² Michie, Andrew, “The provisional application of arms control treaties”, *Journal of Conflict and Security Law*, vol. 10, n. 3, 2005: p. 375.

²⁹³ Amerasinghe, Chittharanjan Felix, *Principles of the Institutional Law of International Organizations*, 2nd ed., Cambridge: Cambridge University Press, 2005: p. 68 and 412-413.

²⁹⁴ *Assessing compliance with arms control Treaties*, Paris: Centre d'études de sécurité internationale et de maîtrise des armements, 2007 : p. 39

agreement for the creation of a Preparatory Commission that will further the accomplishment of the Treaty until its entry into force²⁹⁵, namely setting up the IMS and the IDC.

The Preparatory Commission works as the Organization will work²⁹⁶, with similar organs and similar procedures, though with some specificities owe to the fact that it is based on a constitute text which is a resolution taken among States without any support from any organization. Many of the voting States were not parties to the Treaty by then. One important difference from the provisions of the Treaty has to do with the lost voting rights of States Parties, as the Treaty refers to two years of arrears, but the resolution only to one year.

The rules of decision by the Commission are similar to the rules regarding the Conference of States Parties, including the suspension of the session if no consensus can be reached. Clearly the option for consensus generally prevails, as choosing a voting procedure may put the initiative in danger, as States may accept to be part of a consensus decision, but if called to a vote they may fail to approve²⁹⁷ it.

One of the major advantages of the consensus rule – known as the Vienna rule - is that it ensures more legitimacy to the decision²⁹⁸. It is true that it involves further negotiation and diplomacy than any voting system. Moreover, and specially for treaties that are not in force, it is a very useful means to secure a widest support for the decisions, thus contributing for the development of International Law.

The policy making organs, besides the Preparatory Commission are the Working Group A, which deals with political, financial and administrative issues, and Working B, that handles the technical discussions. There is also an Advisory Group that deals with financial and administrative issues and gives counselling to the Executive Secretary of the Provisional Technical Secretariat.

In terms of procedures Working Groups A and B make recommendations to the Preparatory Commission while the Advisory Group makes recommendations to

²⁹⁵ Quast, Anneliese, *The binding force and legal nature of provisionally applied treaties*, London: Law Department, Queen Mary, University of London, 2010: p. 56

²⁹⁶ Asada, Masahiko, "CTBT: legal questions arising from its non-entry-into-force", *Journal of Conflict and Security Law*, vol. 7, n. 1, 2002: p. 109

²⁹⁷ Pronto, Arnold N., "Some Thoughts on the Making of International Law", *European Journal of International Law*, vol. 19, n. 3 (2008): p.607.

²⁹⁸ Boyle, Alan, Chinkin, Christine, *The Making of International Law*, Oxford: Oxford University Press, 2007: p. 161

Working Group A and to the Executive Secretary. The Preparatory Commission is the only organ that can take decisions. It is the Preparatory Commission that has the competence granted by the resolution to handle the development in fulfilling the requirements of the Treaty²⁹⁹, but this is in reality a task that is mostly developed by the PTS on a daily routine basis.

The Commission has been given the tasks of preparing the grounds for the entry into force, as far as technical means are concerned, and, at the same time, to handle the Provisional Technical Secretariat, namely by approving and financing its budget³⁰⁰.

Being an international organisation, the Preparatory Commission, its policy organs and the Provisional Technical Secretary are accountable according to the same rules, with the necessary adaptations resulting from the fact that they are only provisional entities³⁰¹.

²⁹⁹ Anastassov, Anguel. "Can the Comprehensive Nuclear-Test-Ban Treaty Be Implemented before Entry into Force?", *Netherlands International Law Review*, 2008: p. 89 and *Resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization*, adopted by the States Signatories on 19 November 1996, http://www.ctbto.org/fileadmin/user_upload/public_information/2009/prepcom_resolution.pdf, paras. 14b and 15a

³⁰⁰ Amerasinghe, Chittharanjan Felix, *Principles of the Institutional Law of International Organizations*, 2nd ed., Cambridge: Cambridge University Press, 2005: p. 68 and 352.

³⁰¹ Wellens, Karel, *Remedies against International Organisations*, Cambridge: Cambridge University Press, 2007: p.7.

Chapter III

Article XIV – Questions on entry into force

Chapter III - Article XIV – Questions on entry into force

1. Article XIV – Entry into force

The article is longer than usual compared to articles concerning the same subject-matter³⁰². It is composed by five distinct numbers³⁰³ and its wording already indicated that entry into force would not be an easy process³⁰⁴. This difficulty results from the sensitiveness of the object and purpose of the Treaty but is also due to the extremely strict conditions there imposed³⁰⁵.

The Treaty will enter into force 180 days after the 44th State of Annex 2 to the Treaty, that is all States mentioned in that annex of the Treaty, has ratified and deposited its instrument with the UN Secretary General, but never before two years after its opening for signature. This period was overdue on 10 September 1998. This minimum time frame for the entry into force would allow the realization of many activities in particular those referred to in article IV of the Treaty, especially taking into account the imprecision of the article³⁰⁶. It would be impossible, or at least very ineffective, to have the Treaty enter into force before those tasks had been fulfilled³⁰⁷. Moreover, the extra 180 days foreseen for after the deposit of the last 44th ratification of Annex 2 to the Treaty list of States shall be used for settling down the aspects that might still be under consideration. To mention just a few: the approval of the manuals³⁰⁸ and the transformation of the PTS into a full-fledged organization.

³⁰² If compared to treaties like the NPT or the CWC, although it is not the only exceptional one, for instance the United Nations Convention on the Law of the Sea is of almost equal size and it is also very detailed.

³⁰³ <http://www.ctbto.org/the-treaty/treaty-text/>

³⁰⁴ Asada, Masahiko, "CTBT: legal questions arising from its non-entry-into-force", *Journal of Conflict and Security Law*, vol. 7, n. 1, 2002: p. 99.

³⁰⁵ Asada, Masahiko, "CTBT: legal questions arising from its non-entry-into-force", *Journal of Conflict and Security Law*, vol. 7, n. 1, 2002: p. 86.

³⁰⁶ Michie, Andrew Gordon, *The provisional application of treaties with special reference to arms control, disarmament and non-proliferation instruments*, Pretoria: University of South Africa, 2004: p. 164.

³⁰⁷ Anastassov, Anguel, "Can the Comprehensive Nuclear-Test-Ban Treaty Be Implemented before Entry into Force?", *Netherlands International Law Review*, 2008: p. 81.

³⁰⁸ *Developments of International Law in Treaty making*, edited by Rüdiger Wolfrum and Volker Rübens, Heidelberg: Springer, 2005: p. 63-64.

The Treaty is still not in force once there are still eight States mentioned in Annex 2 to the Treaty missing their ratification and deposit of the respective instrument: China, Democratic People's Republic of Korea, Egypt, India, Iran, Israel, Pakistan, and USA. Of this list, Democratic People's Republic of Korea, India, and Pakistan have not even signed the Treaty yet. The obligation of deposit of the instrument of ratification creates an extra step that can be used to delay the entry into force. It is possible to envisage the possibility that a State may ratify the Treaty and then delay its deposit and until that procedure takes place, the entry into force cannot be concluded³⁰⁹.

Moreover, the deposit instrument must also be taken into consideration, not only to ascertain that the formalities have been followed, but also to ensure if any reservation or interpretation that has been presented may not be acceptable by the some other States Parties. Although the Treaty is clear regarding of making reservations to the Treaty itself, the fact it allowed reservations to the Protocol and its annexes may imply extra time. On the other hand, nothing is said about interpretation by States and its validity.

Until entry into force takes place, a special conference of the ratifying States that have deposited its ratification instrument with the UN Secretary General can be convened three years after the signature³¹⁰. This conference will take place every year until the entry into force upon request by the majority of the ratifying States to the Depositary. The Conference will be convened to analyse the possible measures to be taken to facilitate the ratification process and by doing so the entry into force of the Treaty and it has only one requirement, is that those measures have to be consistent with international law.

It has been agreed by States Signatories that the Conference should take place every two years. So far there have been conferences in 1999, 2001, 2003, 2005, 2007, 2009 and 2011, despite of the fact that the Treaty offered the possibility for such a conference on the anniversary of the Treaty every year. In between, and following an initiative by the Netherlands, Australia and Japan, it was also decided that a Ministerial Meeting should take place in alternative years. The legal character of those two events

³⁰⁹ Treaty Section of the Office of Legal Affairs of the United Nations, *Final Clauses of Multilateral Treaties*. New York: United Nations, 2003: p. 2-5, 6-11.

³¹⁰ Parachini, John V., Birmingham, Tom, "The CTBT Special Conference on entry into force", *The NonProliferation Review*, vol. 6, n.3, 1999: p. 108-121.

is substantially different once the Conference is foreseen in the Treaty and the Ministerial Meeting is not.

Moreover, all States Signatories shall be invited as observers. Practice has shown that even the States that are not Signatories have participated in the conference as observers, the same applies to other International Organizations.

For those States that will ratify or accede to it after its entry into force, the Treaty will enter into force thirty days after the deposit of its instrument of ratification or accession with the UN Secretary General.

The CTBT includes several other conditions for its entry into force³¹¹: apart from the signature (article X), it also sets articles on mandatory ratification (article XII)³¹², accession (article XIII) and deposit (article XVI), only then the conditions established in article XIV can be taken into account, being themselves extra requirements for the entry into force of the Treaty³¹³. Article XIV does not refer to the need to accomplish an act, like ratification, once those are obligations of the parties regarding the Treaty, according to other provisions, as we have seen above, but it sets specific conditions in which the entry into force can take place.

We agree with G.G. Fitzmaurice when he argues that ratification is not the moment when the State consents to be bound by the Treaty (that is when it signs the Treaty), but the moment that makes the State effectively bound to the Treaty³¹⁴. Two different steps are at stake: the consent to be bound and to be bound.

The entry into force, unlike ratification, in our view, is a different matter, as it goes beyond the State's own competence even if, in the case of CTBT, it requires the ratification of 44 namely identified States, it does not depend upon on the will of a single State the entry into force (unless it is the last 44th State of the list of Annex 2 to the Treaty, in which case it is a pernicious effect of the Treaty provisions). Besides the

³¹¹ Malanczuk, Peter, *Akehurst's modern introduction to international law*, 7th ed., London-New York: Routledge, 2010: p. 134

³¹² Fitzmaurice, G.G., "Do Treaties Need Ratification?", *British Yearbook of International Law*, vol. 15, 1934: p. 113-137.

³¹³ Bradley, Curtis A., "Unratified Treaties, Domestic Politics, and the U.S. Constitution", *Harvard International Law Journal*, vol. 48, n. 2, 2007: p. 313.

³¹⁴ Fitzmaurice, G.G., "Do Treaties Need Ratification?", *British Yearbook of International Law*, vol. 15, 1934: p. 114-115. The subtle distinction by Fitzmaurice is not followed by all authors, for instance Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007: p.103-104 while others sustain it, Bradley, Curtis A., "Unratified Treaties, Domestic Politics, and the U.S. Constitution", *Harvard International Law Journal*, vol. 48, n. 2, 2007: p. 316.

procedure that makes a State to be bound by a Treaty, it must be taken into account that only when the Treaty is in force should it be considered that a State is bound to a Treaty, thus being able to withdraw from the Treaty until that moment³¹⁵, without having to follow the withdrawal clause included in the Treaty.

So far there have been 12 UNGA resolutions appealing to the entry into force in the shortest delay and exhorting States to proceed with the ratifications process as soon as possible. The Treaty was opened for signature after being approved by a UNGA resolution. The States that have shown difficulties with those resolutions are: Cuba, Lebanon, Mauritius, Syria, Tanzania, Bhutan, India, Libya, Colombia, USA, Palau, and Democratic People's Republic of Korea. The fact is that not all of the resolutions have received exactly the same voting. But it should be kept in mind that the results do not necessarily mirror the will of all the States, as in some occasions States have missed the UNGA voting moment, and therefore it is from the years' trend that we may infer which State have indeed had difficulties with the Treaty. It is of particular significance that the United States has repeatedly voted against the resolution on entry into force³¹⁶.

³¹⁵ Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007: p.119-120.

³¹⁶ Voting results of the UNGA resolutions on the entry into force of CTBT:

Resolution	Yes	No	Abstention	No vote
A/RES/50/245 (Approval of the treaty text)	158	3 – Bhutan, India, Libya	5 – Cuba, Lebanon, Mauritius, Syria, Tanzania	19
A/RES/54/63	158	0	6 – Bhutan, India, Lebanon, Mauritius, Syria, Tanzania	24
A/RES/55/41	161	0	6 – Bhutan, India, Lebanon, Mauritius, Syria, Tanzania	22
A/RES/57/100	164	1 – USA	5 – Colombia, India, Lebanon, Mauritius, Syria	21
A/RES/58/71	173	1 – USA	4 – Colombia, India, Mauritius, Syria	13
A/RES/59/109	177	2 – Palau, USA	4 – Colombia, India, Mauritius, Syria	8
A/RES/60/95	172	1 – USA	4 – Colombia, India, Mauritius, Syria	14
A/RES/61/104	172	2 – USA, Democratic People's Republic of Korea	4 – Colombia, India, Mauritius, Syria	14
A/RES/62/59	176	1 – USA	4 – Colombia, India, Mauritius, Syria	11
A/RES/63/87	175	1-USA	3 – India, Mauritius, Syria	13
A/RES/64/69	175	1 - Democratic People's Republic of Korea	3 – India, Mauritius, Syria	13
A/RES/65/91	179	1 - Democratic People's Republic of Korea	3 – India, Mauritius, Syria	9

Moreover these resolutions reiterate the practice on prohibiting nuclear explosions. By doing so, they contribute to the development of international law, as foreseen in article 13 of the Charter of the United Nations. It remains to be seen how this customary international law could be taken for “hard law”³¹⁷, instead, as usual, for “soft law”. To translate this customary international law – which is not a general assesement by all States – into an instrument of hard law is in reality what the CTBT is all about.

For the States that have ratified the Treaty, its entry into force is of particular need to make its content valid³¹⁸. Its validity – a fundamental characteristic of law – will imply several other features that will reinforce the purpose of the Treaty just, for instance, by making it binding. The question of the validity of the norm is of major importance when dealing with treaties that have been approved by a UNGA resolution, once it is politically questionable to argue against the Treaty afterwards, even if from the legal point of view, nothing is definite until ratification/entry into force is concluded. This procedure of adoption of the Treaty can be considered as a corroborative element of the normative character of those treaties that, like CTBT³¹⁹, had their texts adopted by a UNGA resolution.

Regarding the normative character of CTBT, or any other Treaty for that matter, it should be distinguish two different aspects that should apply independently. On the one hand, the legal obligation of the State as a party to the Treaty and, on the other hand, the legal effectiveness of the Treaty by itself, that is, by imposing a norm that may even affect third parties. These effects are not formally included in the Treaty, but they are the collateral result of the implementation of its provisions.

2. The negotiations of article XIV

A/RES/66/64	175	1 - Democratic People's Republic of Korea	3 – India, Mauritius, Syria	14
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³¹⁷ Boyle, Alan, Chinkin, Christine, *The Making of International Law*, Oxford: Oxford University Press, 2007: p.210-262.

³¹⁸ Koskenniemi, Martti, “Hierarchy in International Law”, *European Journal of International Law*, vol. 8, n. 4, 1997: p. 566 and in particular the quotation of Jan Klabbers.

³¹⁹ *United Nations General Assembly Resolution A/RES/50/245, Comprehensive Nuclear-Test-Ban Treaty*, 10 September 1996.

The negotiations³²⁰ of the article were long, especially if compared to the time spent for the whole Treaty negotiations, and unsurprisingly controversial, but that kind of negotiations normally are. The idea of having a relevant number of States ratifying the Treaty before its entry into force was not new and was suggested during the negotiations. It would eventually be endorsed, but in a very unique wording, as it names 44 States, thus not leaving any room for flexibility on the entry into force criteria and makes the entry into force dependant on the specific will of those 44 States.

States, like Austria, argued that the ratification by all members of the Conference on Disarmament, the forum where the Treaty was being discussed, should be mandatory before its entry force. The solution that was finally consecrated in the Treaty would prove to be an answer to all the questions raised, but it would soon reveal to be very difficult to achieve. As previously stated, the choice of these 44 States followed two requirements, clearly formulated in Annex 2 to the Treaty: the State had to be member of the Conference on Disarmament on 18 June 1996 (like Austria wanted) and it also had to be in the IAEA list of States possessing a nuclear reactor. This was a very diplomatic way of including all the P5 and other States which, from the security point of view, have been considered threats to other States. Nevertheless, the negotiations were open to all States willing to do so, as membership also will be.

It must be recognised that the Nuclear States in 1996 were no longer just the ones identified in the NPT, but no new list of such States was set, due to the refusal by the P5, but also from other States like Japan or South Korea. This was also one of the reasons that India argued not to proceed with the signature and ratification of the Treaty, as it feared that the discrimination of NPT could be applied again, even if there was no specific disposition of the same sort, namely regarding the P5. The fact that NPT fixed the Nuclear States has always been object of strong criticism by many States, in particular India, that argues that by that procedure those 5 States are granted different and more powers and competences than the other States, the same goes for North Korea.

³²⁰ On the negotiations process over article XIV: Ramaker, Jaap, Mackby, Jenifer, Marshall, Peter D., Geil, Robert, *The Final Test. A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna: Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 2003: p. 235-256 and Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*, Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: p. 106-137.

Being nuclear energy for peaceful purposes an undisputed right according to NPT (article IV), it is not excluded that the number of States having a nuclear reactor, as well as the number of States members to the UN Conference on Disarmament may be larger, which, if the Treaty does not enter into force, may lead to question the logic behind the requirement of article XIV because it is limited to a particular moment in time and does not include a substantive reason (unless it would be updated).

The entry into force has often been politically used, even if “dressed up” as a legal question, and not necessarily because of the Treaty text itself. This has been an assessment made both by scholars and by the ICJ jurisprudence³²¹. The non-ratification by some States has implied the non-entry into force of the Treaty and it has raised a concern regarding the normativity of its content, but the non-ratification does not mean that the concerned State, if a signatory one, is no longer attached to the Treaty³²², as article 18 of VCLT provides³²³.

3. The political difficulties for the entry into force

The fact that eight States of Annex 2 of the Treaty haven't still ratified and notified the UN Secretary General of the ratification is not explainable by one simple, single or legal reason³²⁴, but the compromise to end nuclear explosions has been assumed with the large approval of the CTBT text by the UNGA resolution³²⁵ (with the exception of India, Libya and Bhutan and the abstention of Cuba, Syria, Mauritius, Tanzania and Lebanon) that approved the CTBT.

In reality, the reasons behind the delay in ratification are much more of political nature than of legal reasoning, but the effect is the same, that is, the Treaty cannot enter

³²¹ International Court of Justice, *North Sea Continental Shelf Cases*, I.C.J. Reports 1969, para. 73 and Lantis, Jeffrey S., *The Life and Death of International Treaties. Double-edged diplomacy and the politics of ratification in comparative perspective*, Oxford: Oxford University Press, 2009, p. 1.

³²² Bunn, George, Rhineland, John B., “Senate CTBT rejecting not the end”, *Disarmament diplomacy*, n. 41, 1999: p. 3.

³²³ Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 245-253.

³²⁴ *Developments of International Law in Treaty making*, edited by Rüdiger Wolfrum and Volker Rübens, Heidelberg: Springer, 2005: p. 45-46.

³²⁵ Joseph, Jofi, “Renew the drive for CTBT ratification”, *The Washington Quarterly*, vol. 32, n. 2 2009: p. 81.

into force. The option for not ratifying the Treaty sometimes did not have anything to do with the Treaty, but it was, and it is, an issue for domestic consumption³²⁶.

The USA³²⁷ have delayed the ratification arguing that the Treaty has no substantive benefits for the State but ratifying it³²⁸ would not be a problem, while others arguing differently³²⁹, consider that the ratification might put the State in danger³³⁰, once some other States could develop new weaponry because of not being limited concerning nuclear experiences, while the USA would be³³¹. This is a much contested difficulty once, not only did the USA make numerous explosions in the past, but also the data collected can still be used. Moreover, there are other means – subcritical explosions – that may still take place, thus assuring the quality and efficiency of the nuclear arsenal. The ratification of the USA will most probably pave the way for further ratifications, but it should not be taken for granted that it solve the reticence by all States.

The argument of the subcritical explosions must be carefully addressed as it always raises concerns. Moreover, the USA have started the Stockpile Stewardship Program which is intended to promote research simulation and other activities that may contribute to ensure a continued reliable, safe and credible US nuclear deterrent without nuclear testing (the doubt remaining as whether subcritical explosions should be considered as any other nuclear explosion). The Republicans in the Senate³³² have shown that for them the IMS could be too intrusive and not so much a control mechanism, like the on-site inspections would be.

³²⁶ Koskeniemi, Martti, “The Politics of International Law”, *European Journal of International Law*, vol. 1, n. 1, 1990: p. 9.

³²⁷ *Final Review of the Comprehensive Nuclear Test Ban Treaty (Treaty Doc. 105-28)*, Washington: United States Congress- Senate Committee on Foreign Relations, 2000: p.137p.

³²⁸ The situation does not seem to have changed with the last report from the National Research Council of the National Academies,, *The Comprehensive Nuclear Test Ban Treaty. Technical issues for the United States*, Washington: The National Academies Press, 2012: p. 121

³²⁹ Cotta-Ramusino, Paolo, Butcher, Sandra Ionno, “Report of Pugwash consultations on CTBT entry into force, *Pugwash - Conferences on Sciences and World Affairs*, 2010: p. 1, 3, 6.

³³⁰ McGrath, Keegan, *Battle lines being drawn in the CTBT debate: An analysis of the strategic posture commission's arguments against US ratification*, Washington: Monterey Institute for International Studies - James Martin Center for Nonproliferation Studies, 2009: p.3

³³¹ The recent report of the National Research Council of the National Academies, states otherwise, *The Comprehensive Nuclear Test Ban Treaty. Technical issues for the United States*, Washington: The National Academies Press, 2012: p. 127.

³³² *Final Review of the Comprehensive Nuclear Test Ban Treaty (Treaty Doc. 105-28)*, Washington: United States Congress- Senate Committee on Foreign Relations, 2000: p.137p.

The question regarding the ratification of Iran, Israel and Egypt may have a more regional cause. It does not seem probable that any of them will ratify before the others do so. Moreover, there are other specific reasons for each of them to delay the process. For Israel, not being a member of NPT, to participate in the CTBT is a card it can play in the international arena to reflect its commitment towards nuclear disarmament and non-proliferation, on the other hand being in the crib of Middle East States, and like the USA, it fears that it might be overcome by a neighbour regarding nuclear weapons. Iran will not ratify the Treaty before Israel does, basically for the same fears, even if its fuel cycle is in a less developed stage, and, on the other hand, the CTBT ratification is a card it can always play during negotiations on the nuclear field. Finally, Egypt shall not ratify it before Israel becomes a member of NPT. It is because of its security, but also because Egypt has always argued for non-proliferation and disarmament, after all it was one Non-Aligned Movement State from the very beginning supporting international disarmament.

For North Korea, the CTBT at this stage seems a very limiting Treaty. Although it has a full nuclear cycle and it is able to build long-range missiles, it is still not capable to master nuclear warheads in those missiles, so it is expected that it will conduct some more explosions. The possibility of its signature and ratification in the near future are highly improbable. North Korea could, nevertheless, use the signature and ratification of CTBT to gain some leverage in the Six-party talks³³³.

Unlike it has happened with other States, the pressure on North Korea has been lighter just for the fact that neither Japan nor South Korea, two States very engaged with CTBT, want to officially recognise North Korea as a nuclear military State, which they refuse to do, as they fear that too much pressure on Pyongyang may eventually force that recognition which would lead to a dramatic change in the approach of the Korea peninsula.

Pakistan will follow India's footsteps, for security reasons, but it has been more engaged with the CTBT, even participating as an observer in several events and meetings and even voting in favour on the UNGA resolutions on CTBT entry into force. India has kept a strong opposition to the CTBT arguing that, unlike it is mentioned in

³³³ Williams, Heather, "North Korea's Nuclear Test and Prospects for the Comprehensive Test Ban Treaty", *A Collection of Papers from the 2009 Conference Series*, edited by Mark Jansson, Washington: Center for Strategic and International Studies, 2010: p. 98.

the preamble of the Treaty, its text is not a disarmament Treaty, but a non-proliferation only and for that there is already the NPT. Moreover, the Treaty is not as comprehensive as India wanted³³⁴ once it does not include subcritical tests and may be revised regarding peaceful nuclear explosions (an aim which has always been strongly supported by China, its main competitor in Asia, including regarding nuclear). However, Pakistan and India signed a Memorandum of Understanding, the Lahore declaration, imposing a moratorium³³⁵ on nuclear³³⁶ explosions.

This is sometimes considered a “small bilateral CTBT” and has provided some assurances to the international community, but, like any other moratorium, it can be unilaterally be put to an end at any time. Because this is a bilateral moratorium, it offers more certainty. It must be retained that although a moratorium may be in many cases the best alternative to the CTBT, it is still a fragile legal instrument as it only depends on the political will of the State concerned. Other States of Annex 2 to the Treaty also have moratoria in force, like China and the USA, while others argue that they follow the principle of not defeating the object and purpose of the Treaty they signed.

The ratification process in China started more than 10 years ago, but it has been left in a limbo. The fact the USA has also not ratified the Treaty may serve as an explanation, on the other hand there are still some aspects of the Treaty that China would like to know beforehand, namely regarding on-site inspections and the use of the data provided to the PTS³³⁷. Considered China’s geostrategy, it could be understandable it may be difficult for Beijing to follow the ratification procedure while neither India, nor USA, nor North Korea follows the same path. However, CTBT does not deal with the use of nuclear weapons³³⁸, which in any case could be use in a self-defence scenario,

³³⁴ Gill, Amandeep, “Possible Indian reaction to U.S. ratification of the CTBT”, *Bulletin of the Atomic Scientists*, <http://thebulletin.org/web-edition/features/possible-indian-reaction-to-us-ratification-of-the-ctbt>, 2009: p.1

³³⁵ Tabassi, Lisa, “The nuclear test ban: lex lata or de lege ferenda?”, *Journal of Conflict and Security Law*, vol. 14, n.2, 2009, p. 323.

³³⁶ Cotta-Ramusino, Paolo, Butcher, Sandra Ionno, “Report of Pugwash consultations on CTBT entry into force, *Pugwash - Conferences on Sciences and World Affairs*, 2010: p. 10.

³³⁷ Yunhua, Zou, *China and the CTBT negotiations*, Stanford: Center for International Security and Cooperation, 1998:41p.

³³⁸ “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”, International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions*, I.C.J. Reports, 1996: para. 105 (2) F. This compromise to advance with negotiations towards nuclear disarmament has been clearly endorsed by the international community, for instance in the final declaration of the NPT Review Conference in 2000, with a particular note to the fact that the entry into force of CTBT is the first step, of a group of 13 steps that were approved by then.

according to ICJ, but with nuclear explosions or tests, which in reality serve to upgrade the nuclear weapons. Nevertheless, from the official point of view the only reason presented, so far, is just the administrative burden of the People's Congress and it has always reiterated the official position on the need of an early entry into force³³⁹ of the Treaty, following the Declaration of the Chinese Government of 5 October 1993.

By ratifying the Treaty, States may need to enact legislation so that the Treaty produces legal effects³⁴⁰, as it might not be directly applicable. States can, on the other hand, consider that their jurisdiction is, at the same time, ruled by national and international law and a Treaty in force precedes any national law. It may require national legislation to be transposed into the national public legal order³⁴¹, namely regarding different kinds of procedures that the Treaty may imply. States are free to choose not only the internal way by which they are binded by the Treaty, but also the necessary instrument to make the integration in the national public legal order³⁴².

A question may arise regarding the compatibility of the international and the domestic norm, but an answer has been provided in a quite clear way, conferring international law the *primauté*³⁴³ or if not the *primauté*, than at least international law should be all-inclusive³⁴⁴ and therefore there is no hierarchy but just a complementary system.

If this is a general accepted rule regarding “hard law”, the situation differs as far as customary law is concerned, as some States refuse to accept the precedence of customary international law³⁴⁵ over domestic “hard law”. This is one the reasons

³³⁹ Unlike the USA, China has always vote in favour of UNGA resolutions concerning quicker entry into force of the Treaty.

³⁴⁰ Orakhelashvili, Alexander, *Peremptory norms in International Law*, Oxford: Oxford University Press, 2006: p. 17-18.

³⁴¹ Daillier, Patrick, Pellet, Alain, Forteau, Mathias, Müller, Daniel, *Droit International Public*, 8th ed., Paris: Librairie LGDJ, 2009 : p. 251.

³⁴² Daillier, Patrick, Pellet, Alain, Forteau, Mathias, Müller, Daniel, *Droit International Public*, 8th ed., Paris: Librairie LGDJ, 2009 : p. 252-253.

³⁴³ Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008: p. 34 or Cassese, Antonio, *International Law*, 2nd ed., New York: Oxford University Press, 2005: p. 216, in particular the reference to the monistic theory of Hans Kelsen and especially followed by Alfred Verdross.

³⁴⁴ Simma, Bruno, “Universality of International Law from the Perspective of a Practitioner”, *European Journal of International Law*, vol. 20, n.24, 2009: p. 267.

³⁴⁵ According to Olivier Corten and Pierre Klein, this is the case of France, *The Vienna Conventions on the Law of Treaties: A Commentary*, edited by Olivier Corten, Pierre Klein, 2 vols. New York: Oxford University Press, 2011: p. 462.

justifying the need to vest the customary law into codified “hard law” by means of a Treaty.

4. The efforts made to enhance the entry into force of CTBT

There have been 12 UNGA resolutions regarding the entry into force of the Treaty, and 5 UNSC resolutions calling upon States to sign and ratify the Treaty³⁴⁶. These initiatives obviously do not result from the Treaty, but from the States. Nevertheless they constitute international documents which may be considered as an element for making the purpose of CTBT at least a customary legal norm. Those resolutions are basically a reiteration of the object and purpose of the Treaty and an appeal to non-ratifying States to proceed with the ratification processes and to non-signatory States to proceed with signature and ratification.

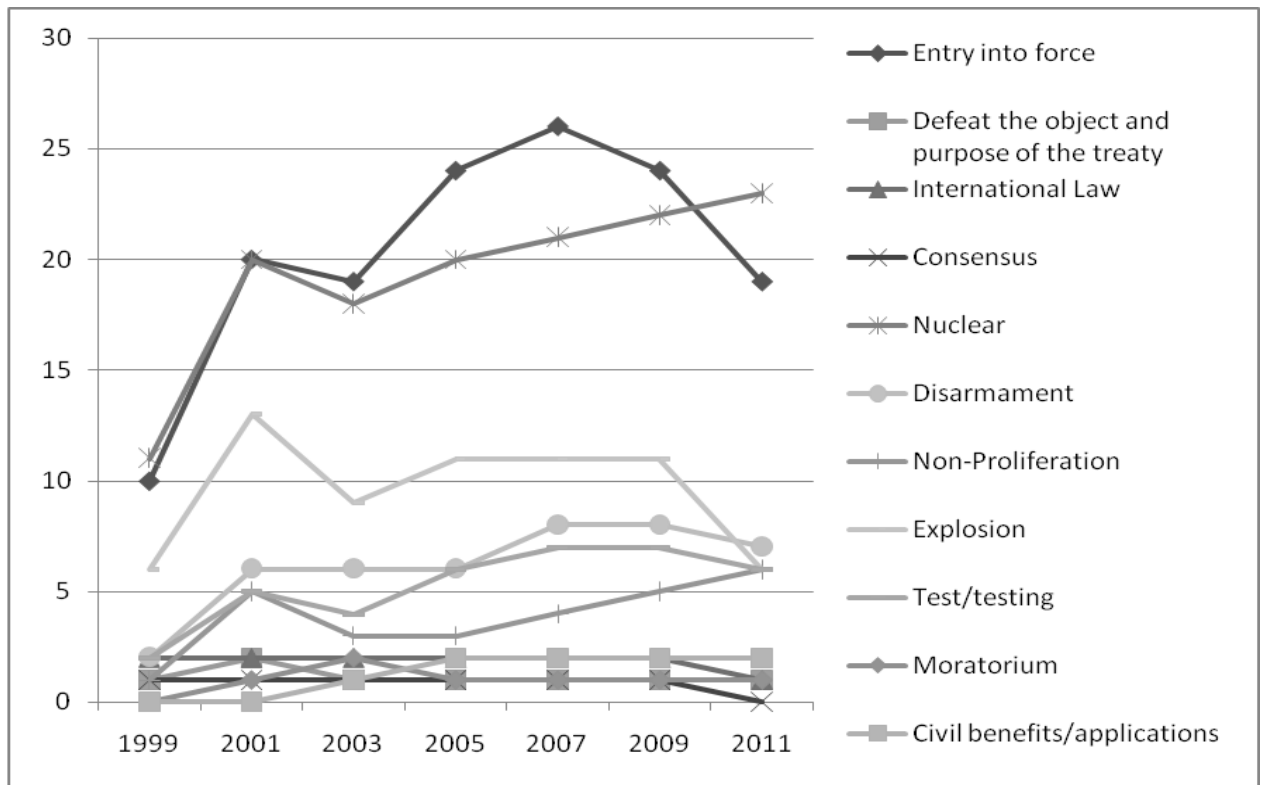
The Treaty, as we have seen, in its article XIV includes a provision that allows States to gather in a conference in order to evaluate the possible proceedings regarding the entry into force of the Treaty and adopt the necessary measures to take it forward. There have been conferences every two years (2001, 2003, 2005, 2007, 2009, 2011), complemented by Ministerial meetings in alternate years, since 1999, date of the first UNGA resolution on the entry into force of CTBT. While the ministerial conference, mostly because it is not set in the Treaty, does not produce any tangible document, it produces some tangible results, mainly keeping the flame of the entry into force burning and issuing a ministerial declaration. On the other hand, the conferences end with a report, a final declaration and a list of measures to press on ratification and eventually on entry into force of CTBT. That list of measures is sometimes presented separately from the declaration. Both the declaration and the list of measures are approved by consensus. The approval procedure of the declaration is relevant, once it reflects a trend in the approach to the CTBT arguments. It is usually approved by consensus by the

³⁴⁶ Security Council resolution 1957 (2010) on the situation concerning Iraq ; Security Council resolution 1929 (2010) on Non-proliferation; Security Council resolution 1887 (2009), on Maintenance of international peace and security: Nuclear non-proliferation and nuclear disarmament; Security Council resolution 1874 (2009), on non-proliferation/Democratic People’s Republic of Korea; Security Council resolution 1172 (1998) on international peace and security.

Preparatory Commission parties (though not in a Preparatory Commission session) before the conference.

Analysing the declarations and the list of measures adopted, some words have been picked up in order to verify the consistency of the international action. As the graphic below presents, three groups of expressions have been singled out: one regarding law and its procedures (entry into force, defeat the object and purpose of the Treaty, international law, consensus); another regarding the object of the CTBT (nuclear, disarmament, non-proliferation, explosion, test/testing) and another one that refers to concepts that have been included in the declaration due to its relevance for the subject that we are dealing with (moratorium, civil benefits/applications). The column on the left indicates the number of times each word/expression is used³⁴⁷.

³⁴⁷ *Report of the Conference on facilitating the entry into force of the Comprehensive Nuclear-Test-Ban Treaty, 23 September 2011, 23 September 2011; Report of the Conference on facilitating the entry into force of the Comprehensive Nuclear-Test-Ban Treaty, 24-25 September 2009, 08 October 2009; Report of the Conference on facilitating the entry into force of the Comprehensive Nuclear-Test-Ban Treaty, 17-18 September 2007, 22 September 2007; Report of the Conference on facilitating the entry into force of the Comprehensive Nuclear-Test-Ban Treaty, 21-23 September 2005, 26 September 2005; Report of the Conference on facilitating the entry into force of the Comprehensive Nuclear-Test-Ban Treaty, 3-5 September, 11 September 2003.; Report of the Conference on facilitating the entry into force of the Comprehensive Nuclear-Test-Ban Treaty, 11-13 September 2001, 15 November 2001; Report of the Conference on facilitating the entry into force of the Comprehensive Nuclear-Test-Ban Treaty, 08 October 1999.*



The decrease of the usage of all of those words in 2011 is due to the fact that the declaration was considerably shortened, but kept the same structure and references (even if in a shorter number). It is important to note that in 2003 the civil benefits were added to the declaration. They constitute more and more an important argument to persuade States to ratify the Treaty³⁴⁸. It is also relevant to note that the word nuclear has gained place compared to test and explosion. As for disarmament and non-proliferation, although they are both referred to in the Treaty, in reality the word disarmament takes the lead (which contradicts India's traditional position on CTBT).

The legal arguments that have been included in the declaration (namely the obligation not to defeat the object and purpose of the Treaty and the reference to international law) have only been reduced to a minimum in 2011, as we have witnessed during the negotiations of the text, but still the need to mention them was fully retained. It should also be noted that in the 1999 and 2001 declarations, apart from those legal aspects that have always been included, there was also a reference to article IV. The mentioning of the obligation not to defeat the object and purpose of the Treaty is

³⁴⁸ McGrath, Keegan, *Battle lines being drawn in the CTBT debate: An analysis of the strategic posture commission's arguments against US ratification*, Washington: Monterey Institute for International Studies - James Martin Center for Nonproliferation Studies, 2009: p.8

nothing more than a repetition of article 18 of VCLT. If doubts could be raised regarding the application of this clause, especially in States that are not party to VCLT, this recurrent procedure may contribute to make it customary international law³⁴⁹ (even if the ICJ has a different opinion)

Once CTBT is not in force, article 26 of VCLT (*Pacta sunt servanda*) is not applicable³⁵⁰. Regarding the possibility of provisional application (article 25 of VCLT)³⁵¹, it will depend on another legal instrument, which then will be executed according to the provision of article 26 for those States that might decide to be parties to that hypothetical instrument on provisional application. So far the Conferences foreseen by article XIV have not adopted or discussed any document of this kind.

It must be recalled here that not only *Pacta sunt servanda* is binding, *jus cogens* norms, according to article 38 of VCLT, as well as the obligation not to defeat the purpose and object of the Treaty, are equally binding.

The inclusion to the reference to international law confines the action of States to a legal basis that otherwise might allow States to dispute over the fundamentals of the principles stated in the declaration. Although the declaration of the conference is a political document, it is very relevant that some international law questions and in particular some legal justifications are inserted in the text of the declarations.

The use of the consensus rule of decision³⁵² is already foreseen in article XIV, n. 2 regarding the measures to be adopted by the conference to promote the entry into force of the Treaty, and it is constantly reiterated. The first declarations also included the reference to the consensus rule of decision for the adoption of the declaration³⁵³.

The option for consensus is very similar to the EU constructive abstention, if not from the strict legal point of view, at least in practical terms. The consensus option

³⁴⁹ Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 247.

³⁵⁰ Daillier, Patrick, Pellet, Alain, Forteau, Mathias, Müller, Daniel, *Droit International Public*, 8th ed., Paris: Librairie LGDJ, 2009 : p. 238 and Asada, Masahiko, "CTBT: legal questions arising from its non-entry-into-force", *Journal of Conflict and Security Law*, vol. 7, n. 1, 2002: p. 92.

³⁵¹ Reuter, Paul, *Introduction au droit des Traités*, 3rd ed., Paris: Presses Universitaires de France, 1995 : p.62.

³⁵² Boyle, Alan, Chinkin, Christine, *The Making of International Law*, Oxford: Oxford University Press, 2007: p. 157-162.

³⁵³ It must be said here that the declaration is negotiated in Vienna where the standard rule of decision is the consensus. Moreover, the treaty establishes consensus as the preferred rule of decision by including it in article II, n. 22 and 23, article VIII and, as seen, in article XIV.

allows that States that do not agree, but do not want to interfere with the outcome, may participate in the deliberative process. It is assumed here that consensus is just the absence of any formal objection³⁵⁴. However, and unlike what happens in EU with constructive abstention, all States are equally affected and obliged to implement the declaration and the measures the same way, and not just those who have approved it. This abstention has been used by some Governments to go along the Treaty, even if against their own Parliaments.

The successive references to entry into force in the declarations can also arguably be used to sustain that the decision is commonly valid to all the States that subscribe it, thus making it an element of general law³⁵⁵, with *erga omnes* effects, as we have seen before.

From a substantive point of view, it is of particular notice the fact that the word nuclear is being more and more used, including in 2011, when the declaration was significantly shortened, and it was the only word that was more used than in previous declarations.

5. Some of the questions raised by article XIV

The difficulties faced by CTBT to enter into force raise several questions to which publicists have provided, at least in some cases, some answers, even if not accepted by all. On the one hand, the conformity of CTBT with VCLT may respond to some of those issues, on the other hand some others remain without a universal answer. Of course it is not forgotten that VCLT is not a universal convention in the sense of including all States, but its content, namely its procedural aspects, is largely understood as customary international law³⁵⁶.

However, taking into account the purpose and object of the Treaty³⁵⁷, a question was raised on how to make sure that all nuclear states would abide by the Treaty, once

³⁵⁴ As article 161 of the United Nations Convention on the Law of the Sea defines it.

³⁵⁵ D'Amato, Anthony, "Treaties as a source of general rules of international law", *Harvard of International Law Journal*, vol. 3, 1962: p. 5.

³⁵⁶ Shaw, Malcolm, *International Law*, 6th ed., Cambridge: Cambridge University Press, 2008: p. 610.

³⁵⁷ Buffard, Isabelle, Zemanek, Karl, "The "Object and Purpose" of a Treaty: an enigma?", *Austrian Review of International and European Law*, (A.R.I.E.L.), vol..3, n.3, 1998: pp. 311-343.

non-Member States might have easier access to nuclear weaponry as they could continue their tests. This argument, used, among others, by USA, goes beyond the purpose of the Treaty – which is to interdict all nuclear explosions – by trying to include the consequences of the act (access to nuclear weaponry) within the framework of the Treaty. The creation of the CTBTO, on the other hand, may serve those purposes³⁵⁸ by accomplishing the required verification.

The object of the CTBT could be argued as also being customary international law³⁵⁹, once the first Treaty regarding some of its aspects dates back to 1963 and others were produced since then regarding some of its major aspects. Again that is also controversial. Perhaps it is even more important the fact that the text of the Treaty was adopted by a UNGA resolution³⁶⁰ with an almost full approval by all States, which may lead to the conclusion that the needed *opinio juris*³⁶¹ of the customary international is already evident. Moreover, unratified treaties may be applied accordingly³⁶², either because the Parties want or because it includes provisions that do not need ratification, namely the ones reproducing *jus cogens* or customary international law, although regarding customary international law there may be some doubts.

To increase the normativity³⁶³ of the CTBT it would have been possible to opt for easier and faster procedure on entry into force, or follow more complicated procedures and compromises. The latter was indeed the case. The normativity of the Treaty is also an element that may preclude national sovereignty and that may generate tensions among domestic partners and impede the ratification, not to mention the nature of verification/enforcement arrangements of the regime established by the CTBT.

³⁵⁸ Simma, Bruno, Paulus, Andreas L., “The “International Community”: Facing the Challenge of Globalization”, *European Journal of International Law*, vol. 9, n. 24, 1998: p. 276-277.

³⁵⁹ Reuter, Paul, *Introduction au droit des Traités*, 3rd ed., Paris: Presses Universitaires de France, 1995: p. 125.

³⁶⁰ Malanczuk, Peter, *Akehurst's modern introduction to international law*, 7th ed., London-New York: Routledge, 2010: p.52; International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinions*, I.C.J. Reports, 1996: para.70; and also Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008: p. 15.

³⁶¹ Cassese, Antonio, *International Law*, 2nd ed., New York: Oxford University Press, 2005: p. 119.

³⁶² Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007: p. 80-91.

³⁶³ Kreps, Sarah Elizabeth, Arend, Anthony Clark, “Why States follow the rules: toward a positional theory of adherence to international legal regimes”, *Duke Journal of Comparative and International Law*, vol. 16, n. 2, 2006: p. 333.

The question of normativity brings up another question which is to know if we can consider the norm of CTBT a peremptory norm (*jus cogens*)³⁶⁴ or just a customary rule of international law, or none. Before it is necessary to decide if indeed the CTBT generates a norm or not, that is, if it is just a declaratory rule³⁶⁵.

We admit there is a graduated normativity³⁶⁶ and that the Treaty cannot be taken as a whole, but instead the different provisions contained in the Treaty should be taken separately, but always considering that CTBT creates norms, with different accents, namely within the situation of not in force.

The basic norm of the Treaty – the interdiction of nuclear explosions as foreseen in the CTBT - should be considered *jus cogens* without the Treaty is in force due to its legal character and antecedents. Moreover, the Treaty (not the Protocol) does not admit any reservation, and therefore the conditions of article 53, n. 2 of VCLT are duly fulfilled.

The norm created by the verification regimes affects both the Signatory and the Ratifying States and, on the other hand, third parties³⁶⁷, once the CTBT creates an objective regime which is internationally controllable – the reality is that the IMS can indeed control non Signatory/Ratifying States, and imposes duties on those States (for instance by “forcing moratoria”, or by restraining trade relations due to the absence of sanctionatory measures)³⁶⁸.

The effects of nuclear explosions may affect third parties, therefore these parties have rights, as well as obligations, that result from a Treaty to which they are not a party. Articles 35 and 36 of VCLT define the conditions in which those rights and obligations occur. It is not question here to revise those articles, but mentioning them is necessary to better frame the discussion on entry into force. Moreover, third parties will be affected as far as *jus cogens* provisions may be found in CTBT. As we have seen in

³⁶⁴ Weil, Prosper, “Towards relative Normativity in International Law?”, *American Journal of International Law*, vol. 77, n. 3, 1983: p. 428.

³⁶⁵ Weil, Prosper, “Towards relative Normativity in International Law?”, *American Journal of International Law*, vol. 77, n. 3, 1983: p. 427-428.

³⁶⁶ Weil, Prosper, “Towards relative Normativity in International Law?”, *American Journal of International Law*, vol. 77, n. 3, 1983: p. 421 and *International Law: Classic and Contemporary Readings*, edited by Charlotte Ku and Paul F. Diehl, 3rd ed., Boulder-Colorado: Lynne Rienner Publishers Inc, 2008: p. 79-94.

³⁶⁷ *The law of the treaties. Beyond the Vienna Convention*, edited by Enzo Cannizzaro, Oxford: Oxford University Press, 2011: p. 241.

³⁶⁸ Hafner, Gerhard, “Pros and Cons Ensuing from Fragmentation of International Law”, *Michigan Journal of International Law*, vol. 25, n. 4, 2004: p. 855.

Chapter 1, CTBT defines a norm with *erga omnes* character³⁶⁹, one of the reasons being the purpose of the Treaty, but also its regime, as to be efficient the verification regime needs to be universally applicable.

The CTBT is one of those treaties that are not only intended to regulate inter-State relations, but it also intends to develop a uniform practice that may include rights of third parties³⁷⁰. It must be retained, however, that States are free to enter into treaties or not³⁷¹, but the agreements reached may generate desired or undesired consequences on third parties, which may have no alternative but to accept those consequences. This practice constitutes another fundamental element for the creation of customary international law.

6. Customary international law

The CTBT consecrated an existing practice which was then approved by a UNGA resolution³⁷². The almost unanimous approval makes it almost custom, leaving aside the very small minority that did not vote in favour of the resolution approving the text of the Treaty. The practice has to be consistent and followed by a sense of legal obligation³⁷³, which the successive UNGA resolutions have sustained.

The practice, it must be recognised, did not concern the explosions – which had continued – but the condemnation of that act. This is what was possible to consider in 1996 as practice and as ground to make CTBT a legal binding instrument prohibiting the explosions and by doing so giving reason to censoring practice. It will never be excessive to remind that the element of practice, along with the *opinio juris*, constitute the fundamental elements for the definition of customary international law³⁷⁴.

³⁶⁹ Pegna, Olivia Lopes, “Counter-claims and obligations *Erga Omnes* before the International Court of Justice”, *European Journal of International Law*, n. 9, 1998: p.731-732.

³⁷⁰ *Making Treaties Work. Human Rights, environment and arms control*, edited by Geir Ulfstein, Cambridge: Cambridge University Press, 2007: p. 4

³⁷¹ Verdross, Alfred von, “Forbidden Treaties in International Law: Comments on Professor Garner’s Report on “The Law of Treaties””, *American Journal of International Law*, vol. 31, n. 4, 1937: p. 571.

³⁷² Reuter, Paul, *Introduction au droit des Traités*, 3rd ed., Paris: Presses Universitaires de France, 1995 : p. 100.

³⁷³ Burroughs, John, “The Advisory Opinion of the International Court of Justice and the Statute of the International Criminal Court”, *Conference on Nuclear Policy and Security on the eve of the 21st century*, St. Petersburg, 1999: p.1.

³⁷⁴ International Court of Justice, *North Sea Continental Shelf Cases*, I.C.J. Reports 1969, paras.74, 77.

This practice implies other criteria that must also be taken into account before considering a certain provision a normative one, those are, for instance, the duration of the practice³⁷⁵.

Custom by itself is not a norm³⁷⁶, to become one it needs to be replenished with the above mentioned elements, and that is what is possible to be said about several aspects of CTBT. Although the CTBT is not customary law, it incorporates some provisions which can be considered to be customary at the international law level and regarding the comprehensive ban of nuclear explosions it intends to create a rule “*in statu nascendi*”³⁷⁷ (or almost).

One way to make custom to become a normative binding rule one is by reinserting it in subsequent treaties³⁷⁸. Those treaties may last in parallel; they do not have necessarily to replace each other. This has been the case with successive treaties on nuclear explosions, even if only dealing with some sorts of explosions. Moreover, the nuclear free zone treaties also corroborate this custom, by inserting provisions interdicting nuclear explosions and also by make it binding for the P5, these treaties can also be seen as examples for the CTBT.

On the other hand, codifying in a Treaty some provisions may also be necessary to be able to adopt counter-measures³⁷⁹ (as the ones referred in article V and VI of CTBT), almost impossible if we take the moratorium cases, this is one of the major differences to the binding character of international norms duly approved in international treaties. The Treaty also defines other norms, namely procedural ones, that may be equally useful to execute the Treaty in an uniform way always respecting the object and purpose of the Treaty text.

³⁷⁵ Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008: p.6-7.

³⁷⁶ Cassese, Antonio, *International Law*, 2nd ed., New York: Oxford University Press, 2005: p. 185.

³⁷⁷ Fitzmaurice, Malgosia, “Third parties and the law of the Treaties”, *Max Planck Yearbook of United Nations Law*, edited by R. Wolfrum J. A. Frowein, Dordrecht: Kluwer Law International, vol. 6, 2002: p. 61.

³⁷⁸ Reuter, Paul, *Introduction au droit des Traités*, 3rd ed., Paris: Presses Universitaires de France, 1995 : p. 99.

³⁷⁹ Williamson Jr., Richard L., “Hard law, soft law, and non-law in multilateral arms control: some compliance hypotheses”, *The Chicago Journal of International Law*, vol. 4, n. 1, 2003: p. 59-77.

7. Provisional entry into force or provisional application of the Treaty

Nothing in the Treaty refers to provisional entry into force³⁸⁰ or to provisional application of the Treaty³⁸¹, but, in reality, the IMS (including the IDC) could be taken as a sign of application of the Treaty before its entry into force³⁸². The IMS is being set up in order to be ready by entry into force of the Treaty – as the article IV, n.1 requires – but it is already functioning. This it was well demonstrated in 2006 and 2009 regarding the nuclear tests by the Democratic People's Republic of Korea or in 2011 after the nuclear accident in Japan at the nuclear power station of Fukushima Dai-ichi. Some questions still remain unsolved, such as the right of access and storage of data or the confidentiality of its usage.

Moreover, the CTBT, like any other Treaty, includes provisions that are supposed to be implemented before the entry into force. Those provisions are legally binding for the States that want to be a Party to the Treaty. As most scholars, and the VCLT, argue, those provisions refer to actions like signature, ratification or deposit³⁸³. Those procedural steps are necessary for each and every party to a Treaty and only with its accomplishment is it possible to achieve entry into force.

Despite the controversy on whether “possible provisional entry into force” or “provisional application” of a Treaty should be considered, according to VCLT, in its article 25, the consecrated concept was provisional application of the Treaty³⁸⁴. Some States have even constitutional problems to accept the figure of provisional entry into force, though may accept the provisional application. This is the case, for instance, of

³⁸⁰ Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007: p.172.

³⁸¹ Report of the of the International Law Commission on the work of its Eighteenth Session, 4 May - 19 July 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), 1966: p. 191-210.

³⁸² Asada, Masahiko, “CTBT: legal questions arising from its non-entry-into-force”, *Journal of Conflict and Security Law*, vol. 7, n. 1, 2002: p. 111-113; Lewis, Jeffrey, “The CTBT: prospects for entry into force”, *Vertic – Occasional Papers*, n. 4, 2010: 2p.

³⁸³ Reuter, Paul, *Introduction au droit des Traités*, 3rd ed., Paris: Presses Universitaires de France, 1995 : p. 91-92. Moreover, as Anthony Aust argues, even before the entry into force, the treaty produces some legal effects, namely regarding procedures about the Treaty, like ratification, deposit, authentication among others, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007: p.162. This is mostly paragraph 4 of article 24 of VCLT.

³⁸⁴ According to Giorgio Gaja, however, the term “provisional application” had not been used during the negotiations at the International Law Commission, “Provisional application of treaties”, *Report of the International Law Commission*, General Assembly, Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10), 2011: p. 326.

Portugal. The option for provisional application was made during the negotiations period, as the option for provisional entry into force raised more eyebrows and could engender extra legal problems that were not desired³⁸⁵.

Article 25³⁸⁶ of VCLT admits that the provisional application may be an ulterior decision to the signature of the Treaty and not necessarily coinciding with the signing moment³⁸⁷. This article defines the moment for the decision to apply a Treaty before its entry into force by considering in its n.1, alinea (b) that the negotiating States have in some other manner agreed to do so. Moreover, the reference of negotiating States makes it possible for non-signatory or non-ratifying States to be parties to the provisional application instrument. To use article XIV conference to discuss provisional application could create a problem by excluding the possibility of participation in the discussions of former negotiating States, like India. As they can participate as observers, this is not a real formal problem, but a political excuse.

It is not automatic that a negotiating party is a signatory or ratifying party: India was a negotiating party, but is not a signatory or ratifying; USA was a negotiating and a signatory party, but is not a ratifying one; Brazil was a negotiating and is a signatory and a ratifying one. These are just some examples of the different status States may have regarding CTBT. The question that may be raised is, if the provisional application is agreed after the signature of the Treaty, which States are supposed to intervene in the negotiations of the legal instruments regarding provisional application of the Treaty? The negotiating States of the Treaty or those which have sign it? Excluding ones or the others may preclude the provisional application. We would admit that the article 25 of VCLT refers to negotiating States of the Treaty, so that no such State is excluded from the possibility of provisional application and the negotiation of the respective instrument.

The CTBT does not refer to any of those possibilities, but it does not exclude them as well³⁸⁸. According to the records of the negotiation period, article XIV should

³⁸⁵ Vignes, Daniel, "Une Notion Ambiguë: L'application à Titre Provisoire des Traités", *Annuaire français de droit international*, vol. 18, 1972: p. 181-199.

³⁸⁶ Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 355-356.

³⁸⁷ Lewis, Jeffrey, "The CTBT: prospects for entry into force", *Vertic – Occasional Papers*, n. 4, 2010: p. 2.

³⁸⁸ Johnson, Rebecca, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*, Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: p. 228.

not be changed before entry into force, neither should any of the conditions it contained be surrendered³⁸⁹. However, in the legal binding text – which is only the Treaty, its annexes, its protocol and its annexes, and not the preparatory work – there is no expression of the sort. The known proposals for entry into force³⁹⁰ only refer to an agreement that could be adopted by UNGA or a protocol but discard the possibility of revisiting the Conferences of article XIV.

To consider CTBT *lex lata* or *lege ferenda*³⁹¹ may seem to be an academic discussion, but in reality it translates a very different approach on the legal consequences of its text. Although it is not in force, and therefore the easiest option would be to classify it as *lege ferenda*, the fact is that, as previously seen, some of the provisions have an immediate application, while others a provisional one, and others none until enter into force of the Treaty. It is then possible to consider CTBT as a mixture of both *lex lata* and *lege ferenda*³⁹². Unratified treaties, which are necessarily not in force, may still be generally accepted rules³⁹³.

Provisional application has one major advantage compared to the normal entry into, that is, it may avoid the same domestic procedures regarding the entry into force of the Treaty, namely the ratification process³⁹⁴.

One of the arguments used for the provisional application is the urgency of the matter³⁹⁵, which is not the case for the CTBT, opened for signature 16 years ago, and which has a prospective aim and not a conjunctural purpose. The delay of its ratification, and the low prospects of its possible entry into force in the near future, should, on the other hand, suggest a deeper reflection on how to make the Treaty move

³⁸⁹ Johnson, Rebecca, “Beyond Article XIV: Strategies to save the CTBT”, *Disarmament Policy*, n. 73, <http://www.acronym.org.uk/dd/dd73/73ctbt.htm>, 2003: 19p.

³⁹⁰ Johnson, Rebecca, “Beyond Article XIV: Strategies to save the CTBT”, *Disarmament Policy*, n. 73, <http://www.acronym.org.uk/dd/dd73/73ctbt.htm>, 2003: p.8 and Anastassov, Anguel, “Can the Comprehensive Nuclear-Test-Ban Treaty Be Implemented before Entry into Force?”, *Netherlands International Law Review*, vol. 55, n.1, 2008: p. 96-97.

³⁹¹ Kolb, Robert, “Principles as sources of international law (with special reference to good faith)”, *Netherlands International Law Review*, vol. 53, n.1, 2006: p. 2.

³⁹² Tabassi, Lisa, “The nuclear test ban: *lex lata* or *de lege ferenda*?”, *Journal of Conflict and Security Law*, vol. 14, n.2, 2009, p. 309-352.

³⁹³ Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008: p. 13 and International Court of Justice, *North Sea Continental Shelf Cases*, I.C.J. Reports 1969, para. 42.

³⁹⁴ Quast, Anneliese, *The binding force and legal nature of provisionally applied treaties*, London: Law Department- Queen Mary- University of London, 2010: p. 51

³⁹⁵ That is the case, for instance of 1986 IAEA Convention on Early Notification of a Nuclear Accident or 1986 IAEA Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. ³⁹⁵ Quast, Anneliese, *The binding force and legal nature of provisionally applied treaties*, London: Law Department- Queen Mary- University of London, 2010: p. 49.

forward. The CTBT did not opt for including any provision like the Council of Europe's standing formula on provisional applications of a Treaty, which approximately reads "in order to avoid any delay in the implementation of the present Treaty, the signatory States agree to apply it provisionally".

8. Interpretation of the provisional application of the Treaty

Article 31, n.3 of VCLT, like the rest of the article, refers to general rules of interpretation. It includes three different elements: a subsequent agreement, a subsequent practice and the relevant rules of international law. The first two of these elements refer to means of interpretation arising after the conclusion of a Treaty³⁹⁶, the latter basically corresponds to the disposition of article 38 of the ICJ-Statute³⁹⁷, although VCLT added "applicable in the relations between parties", meaning that it should be assumed that the parties do not intend to act inconsistently with other previous obligations and that they assume there are relations between them on a particular subject-matter.

It is true that article 32 of VCLT refers to supplementary means of interpretation regarding the means evoked in article 31. Taking into account the provisional application of a Treaty, a special attention should be attributed to article 31, n. 3, alinea b and c. Those supplementary means of interpretation in the case of provisional application of a Treaty must also be understood as means to keep the application itself in line with international obligations.

The preparatory texts are only usable as explanatory elements of the text wording and not as a justification to determine the binding character of the norm or define the scope of the norm. This means there is room for different interpretations in the usage of the same means, which is the preparatory work, without forcing a unique result or interpretation.

³⁹⁶ Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 431.

³⁹⁷ Despite the fact it is not a complete list, Geslin, Albane, *La mise en application provisoire des traités*, Paris: Éditions A. Pedone, 2005: p. 339.

Therefore, the extremely straight position argued by Rebecca Johnson could be questioned, even if the preparatory works of a Treaty are considered to be the most important supplementary means of interpretation³⁹⁸, they are not binding. Once to interpret a text does not necessarily mean to follow previous assumed positions, otherwise they would have been vested in the Treaty. That is even more the case of treaties that create institutions (as CTBT does, although not as a primary objective)³⁹⁹.

If article 31 of VCLT deals with rule of interpretation, article 32 deals with means, therefore they should be read in a different way. While article 31 defines a way to act, article 32 refers to supplementary elements that can be used in that action, but does not attributes them any legal binding category, pre-conclusive character or particular status, they are just elements to help the necessary legal exegesis⁴⁰⁰ of the Treaty text.

Unlike argued by Rebecca Johnson, the preparatory work for a Treaty should be used to enlighten on conceptual notions and not to be used to limit the scope of a legal provision. The present tendency to adequate the rule to the means, which is the opposite of what was decided for the VCLT, should be avoided⁴⁰¹, once it inverts the legal interpretation of VCLT, by conferring a characteristic to means that were not supposed to have it.

9. Provisional application of CTBT – some precedents and proposals

There have been several cases of provisional application of treaties; the most famous one perhaps being GATT, but the United Nations Convention on the Law of Sea, for instance, though not provisionally applied included a Preparatory Commission that, like in the CTBT, was intended to prepare for entry into force. UNCLOS was used by States to adopt legislation according to its provisions and by doing so it generated

³⁹⁸ Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 445; Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007: p. 244-245.

³⁹⁹ Malanczuk, Peter, *Akehurst's modern introduction to international law*, 7th ed., London-New York: Routledge, 2010: p. 366.

⁴⁰⁰ Shaw, Malcolm, *International Law*, 6th ed., Cambridge: Cambridge University Press, 2008: p.932

⁴⁰¹ *The law of the treaties. Beyond the Vienna Convention*, edited by Enzo Cannizzaro, Oxford: Oxford University Press, 2011: p. 151.

rules of customary international law⁴⁰². It is important to note that there are linguistic, as well as, legal differences between treaties and agreement, the reason being that even from the procedural point of view, an agreement is easier to implement than a Treaty⁴⁰³ and may surpass some of the more complicated procedures that treaties require⁴⁰⁴.

The provisional application may be more engaging if it includes an opting out system⁴⁰⁵, as its effectiveness cannot be regarded as binding as the Treaty in force would be and States may change their perspective on the provisional application if, for instance, it may take too long as provisional.

Provisional application, though included in the VCLT, is supposed to be decided by an agreement⁴⁰⁶, which is not a Treaty, and therefore some of the VCLT provisions, like ratification, can be waived. By opting for an agreement and not for a formal Treaty, States have the possibility to stimulate confidence-building (and by doing so improve the possibility of entry into force of the Treaty), the flexibility allowed by a provisional application agreement may ease negotiations regarding some procedural matters (in the case of CTBT, the manuals can be a good example). However, an agreement is a legal binding text between parties and it should be respected.

The creation of CTBTO reflects a tendency found today in international law by which States opt by leaving some of the pursuit of their interests to international institutions⁴⁰⁷, without transfer of sovereignty. The CTBTO was created to implement at least some of the provisions of the Treaty. Without the CTBTO it would be impossible to ensure the regulatory character the CTBT⁴⁰⁸ intends to create. It is important to note that, unlike it happens with EU, we consider that there is no delegation of competences, the CTBTO is attributed with tasks that are controlled by the policy making organs which are constituted by States Parties. We mention this detail here because the

⁴⁰² *The Law of the Sea. Practice of States at the time of entry into force of the United Nations Convention on the Law of the Sea*, New York: United Nations- Office of Legal Affairs – Division for Ocean Affairs and the Law of the Sea, 1994: p.3

⁴⁰³ Goldsmith, Jack, Posner, Eric A., *The Limits of International Law*, New York: Oxford University Press, 2005: p. 81

⁴⁰⁴ As for the definition of Treaty, we follow the VCLT, article 2, n. 1, alinea a.

⁴⁰⁵ Fitzmaurice, Malgosia, “Consent to be bound – anything new under the Sun?”, *Nordic Journal of International Law*, vol. 74,n.3-4, 2005: p. 488-489.

⁴⁰⁶ Hillgenberg, Hartmut, “A Fresh Look at Soft Law”, *European Journal of International Law*, vol. 10, n. 3, 1999: p. 501.

⁴⁰⁷ Simma, Bruno, Paulus, Andreas L., “The “International Community”:Facing the Challenge of Globalization”, *European Journal of International Law*, vol. 9, n.24, 1998: p. 276-277.

⁴⁰⁸ Kiss, Alexandre, “State responsibility and liability for nuclear damage”, *Denver Journal of International Law and Policy*, vol. 35, n. 1, 2006: p. 71.

Provisional Technical Secretariat and the Preparatory Commission have been entrusted with similar tasks.

The fact that the Preparatory Commission resulted from a UNGA resolution may be seen as a precedent for provisional application of CTBT, as the Commission, and the Provisional Technical Secretariat have been given almost the same tasks as the Executive Council and the Secretariat will have upon entry into force of the Treaty. However, regarding the competences of the organs created by the UNGA resolution, there is a bigger limit than that is imposed upon the organs created by the Treaty. They can only act in order to implement the necessary provisions that the CTBT has fixed as mandatory before entry into force. There is one contradiction: on the one hand there are two created organs that somehow correspond to organs foreseen in the Treaty, but they have their competences limited and therefore they cannot apply the Treaty provisionally, but only execute the tasks foreseen by the Treaty for the period before its entry into force.

The creation of a Preparatory Commission with legal personality⁴⁰⁹ – even if only by a resolution and not by a full Treaty – was absolutely needed to be able to move forward with the needs of CTBT. There had been experiences before that lacked a constitutive legally binding instrument, which have not been good examples of effectiveness (for instance the OSCE). The PTS, on behalf of the Preparatory Commission, has already celebrated agreements with States regarding the sharing of data for civilian purposes – namely tsunami warning – with the approval by the Preparatory Commission.

The difficulties with article XIV are somehow the same faced by the UN Convention on the Law of the Sea, once it stipulated impossible conditions for entry into force, as it required that States ratified a Protocol known to be unacceptable by some States. The option was to make a Protocol to the Treaty which in reality changed its content. This, nevertheless, has been a very unusual procedure⁴¹⁰, and so far never

⁴⁰⁹ Even the ICJ refers to this aspect, recognizing its relevance, International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in armed conflict*, Advisory Opinions, I.C.J. Reports, 1996: para.19.

⁴¹⁰ Platzöder, Renate, “Substantive changes in a multilateral treaty before its entry into force: the case of the 1982 United Nations Convention on the Law of the Sea”, *European Journal International Law*, vol. 4, n.1, 1993: p. 392.

suggested for CTBT, as the proposals for provisional application do not refer to any change in the Treaty or Protocol.

The conference of article XIV, and the Ministerial Conference within that context, have only insisted on the need of entry into force and appealed to States still lacking signature, ratification, or deposit to act on those matters as soon as possible. There have been only two concrete proposals for the adoption of a legal instrument regarding the provisional application of CTBT, but none has imposed itself. The down under table intends to present those proposals in comparison:

<p>1.⁴¹¹ To promote the implementation of the Comprehensive Nuclear-Test-Ban Treaty, as opened for signature on September 24, 1996, hereinafter referred to as the Treaty, the States Parties hereby agree to the provisional application of certain provisions of the Treaty.</p> <p>2. Without detriment to the provisions of Article XIV of the Treaty, the States Parties shall apply provisionally all other Articles, Protocols and Provisions of the Treaty.</p> <p>3. The Treaty shall be applied provisionally [on DATE] by all States which have signed and ratified the Treaty, unless they notify the Depositary in writing that they do not consent to such provisional application.</p> <p>4. The Treaty shall be applied provisionally by any State which has signed the Treaty, which consents to its provisional application by so notifying the Depositary in writing. Such provisional application shall become effective from the date of receipt of the notification by the Depositary.</p> <p>5. Regardless of whether a signatory State has agreed to provisionally apply the Treaty, financial contributions for supporting Treaty implementation and verification shall remain as agreed in the Schedule [give details] unless a State notifies the Depositary in writing of its intention to alter its financial contribution.</p> <p>6. Provisional application shall terminate upon the entry into force of the Comprehensive Nuclear-Test-Ban Treaty. In conformity with Article IX of</p>	<p>Preamble⁴¹²</p> <p>The States Members of the Preparatory Commission (hereinafter referred to as “the Member States”,</p> <p>Underlining the objective of the CTBT to contribute effectively to the prevention of the proliferation of nuclear weapons in all its aspects, to the process of nuclear disarmament and therefore to the enhancement of international peace and security,</p> <p>Concerned about the slow pace of ratification process and slim prospects of entering into force of the CTBT in a near future,</p> <p>Called for the early signature and ratification of the CTBT by all States that have not yet done so and for them to refrain from acts which would defeat its object and purpose in the meantime, by, inter alia, preserving the announced moratoria on nuclear testing,</p> <p>Have agreed as follows:</p> <p>Article I. Purpose of the Operational Protocol</p> <p>The purpose of this Operational Protocol is to put the CTBT into effect on a <i>mutatis mutandis</i> basis even though the Treaty as a whole has not yet entered into force.</p>
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⁴¹¹ Johnson, Rebecca, “Beyond Article XIV: Strategies to save the CTBT”, *Disarmament Policy*, n. 73, <http://www.acronym.org.uk/dd/dd73/73ctbt.htm>, 2003: p. 8.

⁴¹² Anastassov, Anguel, “Can the Comprehensive Nuclear-Test-Ban Treaty Be Implemented before Entry into Force?”, *Netherlands International Law Review*, vol. 55, n.1, 2008: p. 96-97.

<p>the Treaty, any State may also withdraw its consent from provisional application by notifying the Depositary in writing, and must include a statement of the extraordinary event or events related to the subject matter of this Treaty which the State regards as jeopardizing its supreme interests.</p>	<p>Article II. The Organization and scope of activities</p> <p>1. The Preparatory Commission shall be the principal organ of the Organization. It shall consider any questions, matters or issues within the scope of the CTBT, including those relating powers and functions of the Executive Council and the Technical Secretariat, in accordance with the CTBT and its provisional application.</p> <p>2. The Preparatory Commission shall not act as a substitute for the Executive Council on issues related to on-site inspections. The latter may be performed as a confidence-building measure at the initiative of and as an act of good will by the Member States concerned.</p> <p>3. The Provisional Technical Secretariat shall assist the Preparatory Commission in the performance of its functions, in accordance with the CTBT.</p> <p>Article III. Adoption of the Operational Protocol and accession</p> <p>This Operational Protocol shall be adopted by consensus by States participating at the Conference on Article XIV (2). Any Member State may accede to this Operational Protocol at any time by sending a formal letter to the Chairperson of the Commission thereafter.</p> <p>Article IV. Entry into force</p> <p>This Operational Protocol shall enter into force immediately after its adoption by the Conference on Article XIV (2).</p> <p>Article V. Duration</p> <p>1. This Operational Protocol shall be applied on a temporary basis for a period of 10 years, or until the CTBT enters into force earlier.</p> <p>2. After the expiration of 10 years States may decide by consensus to extend the duration of this Operational Protocol for another period, or periods.</p> <p>3. The provisional application of the CTBT in no way affects the existing requirements for ratification and entry into force of the Treaty as a whole.</p>
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These are two very different proposals. Rebecca Johnson opts for an agreement endorsed both by the Conference on Disarmament and the UNGA, making the Treaty provisionally applicable, while Angel Anastassov prefers an optional protocol to be

added to the Treaty. Both options enclose elements that may facilitate the (provisional) implementation of CTBT, but neither of them answers all the difficulties, not to mention that they would both still require a large support from the States.

The proposal of Rebecca Johnson refers only to “certain provisions”, while in reality only article XIV is excluded. Number 3 foresees an opt-out mechanism, which makes it easier for States and at the same time does not impede those States that want to move forward to do so. The proposal also includes States that have only sign the Treaty, but still lack its ratification. In this case, the procedure is different, there is an opt-in mechanism requiring the State to inform the depositary that it intends to apply the Treaty provisionally. The provisional application expires with the entry into force, apparently with no intermediate period.

Anastassov suggests a Protocol to be adopted by the Conference of Article XIV and only by the States Members of the Preparatory Commission, which are all the Signatory States, and which have adopted the resolution for the creation of the Preparatory Commission. Although the Protocol is supposed to be adopted by consensus, States may accede to the Protocol whenever they want – nothing is said about the procedure to accede from the beginning, so it could be assumed that the procedure is the same, by a formal letter to the Chairman of the Commission. The preamble of the Protocol refers the object and purpose of the Treaty, like the VCLT does, and presents a justification for its adoption. On-site inspections as such are excluded from the proposal of Protocol, but included as a confidence building measure (this is somehow confusing with the Treaty text that in its article IV clearly separates these two activities).

This may be one of the justifications for the use of the expression “*mutatis mutandis*” referred in number 1 of the proposal. Finally, the protocol includes a date for its entry into force and validity and the Protocol concludes by excluding the provisions of article XIV from the provisional application instrument, which mean that nothing changes regarding the conditions for entry into force. There is a respect for the alleged preparatory works during the negotiations of the Treaty, as Rebecca Johnson has mentioned.

When compared, the two proposals could indeed be complementary. If Johnson’s proposal is lighter, easier to apply and broader in its scope, the legal

architecture of Anastassov's suggestion is clearer, mostly because it includes some extra elements (namely the date of entry into force) that make the protocol more feasible, but it is substantively more restrictive. On the other hand, the reference to 10 years may not be adequate once the Treaty is dragging for 16 years already. From the procedural point of view, the different way for the States to notify their options regarding either the agreement or the protocol reveals a different assessment of the role of the Chairman of the PrepCom, whom is recognised a larger importance in Anastassov proposal compared to Johnson's submission which does not make any reference to the Chairman of the PrepCom.

It does not seem legally clear that Signatory States, like Johnson's sustains, would address themselves to the depository, once until the deposit procedure is concluded there is no link between them, meaning that the link between the depository and the State is only established when the State has completed the national ratification process and deposits its instrument. In reality, the establishment of this relation means that for the State concerned, the Treaty can enter into force.

Regarding the more substantive aspects of the two proposals, it is interesting to verify that both exclude something from the provisional entry into force, but they are not the same, thus clearly translating the problem of entry into force of CTBT is only political, no matter the kinds of issues that may be argued. In reality the two authors exclude one of most difficult clauses of the Treaty: article XIV, and Anastassov also excludes part of article IV – on site inspections.

Both texts do not refer to the use of IMS or IDC in case of provisional application, so it should be assumed that the CTBT provisions would apply. However, some questions regarding the use of national technical means, or the data from auxiliary stations, or the access to data are not answered by the Treaty.

Part II

European Union enhanced cooperation

Chapter IV

Enhanced cooperation: an EU model.

Flexibility and integration

Chapter IV - Enhanced cooperation: an EU model. Flexibility and integration

1. The importance of a concept

Almost four and a half centuries ago, Shakespeare in one of his most celebrated scenes asked, what's in a name? We shall not dare to provide an answer, but we will try to benefit from the fact that the question has been raised long ago to restate it in the context of law hermeneutics. The use of concepts is obviously of prime importance in all academic studies. The definition of a concept is usually never fully complete, especially if dealing with Human rules, and, besides the definition, the interpretation of the concepts also contributes to render the approach of the intended study more accurate. It is common sense that definitions imply interpretations, and this applies to law as well. As we will see, we will try to limit the definition and interpretation of the concepts that are at the basis of this dissertation to the provisions in the TEU and TFEU, and the ECJ positions on those definitions, if any. We shall bear in mind that in several other instances some concepts, like enhanced cooperation, may be subject to different approaches, reasoning or use.

The difference between the EU definition and others definitions, like the ones of UN or APEC, is that it is much more than the junction of an adjective and a noun. Taking the risk of over passing linguistic rigour, we would suggest that enhanced cooperation, within the EU framework, is an entire concept, even if it is formed by a noun along with an epithet. The fact is that this binomial became a single concept in EU law.

Regarding the absolute definition of concepts in law, the literature on the subject is extremely extensive and it is then mandatory that all studies make a choice. We opted by recurring to different approaches that seemed better answering to our perspective of analysis⁴¹³. We will try to take all the concepts within an historical-political-social

⁴¹³ Regarding the importance of concepts and its structuring, and besides the classical law books, it is worth mentioning the article by Giovanni Sartor, "Fundamental Legal Concepts: A Formal and Teleological Characterisation", *EUI Working papers*, n. 11, 2006: 34p. is particularly enlightening. Another relevant reference is Klarman, Szymon, Hoekstra, Rinke, Bron, Marc, *Versions and Applicability*

framework, as it is difficult for us to understand an absolute intangible definition in law, once it deals with norms and rules, but also with contexts and human beings⁴¹⁴.

We consider that above all, the concept must be viable in law in order to be used⁴¹⁵. Moreover, and in accordance to the literature on the subject, there are some criteria that must be respected to avoid misunderstandings and, above all, the lack of legal significance. On the other hand, and independently of any theoretical notion of concepts, it must be taken into account that concepts in law, because of their deep attachment to Human life, must have a very precise use in daily life or else the whole regulatory system would be put into question.

The scope of a concept must also be taken into account to assert its legal meaning, and it is also essential to note that usually there are concepts that have closer definitions to the concept intended to be defined (as we will see further on). The problems previously raised concerning the explanation of a concept are necessarily valid for all concepts. It is often required to come up with several categories in order to theoretically and legally limit the scope consequences of a too broad concept⁴¹⁶.

2. Flexibility within EU – the possibilities offered by the TEU and TFEU

Flexibility as a wide concept should be understood as a constructive tool and not as a threat to the integration process⁴¹⁷. At the same time, the detail of the treaties creating both the European Communities and the European Union might suggest that

of *Concept Definitions in Legal Ontologies*, Amsterdam: Leibniz Center for Law, University of Amsterdam, 2008: 12p.

⁴¹⁴ Rainer, J. Michael, *Introduction to Comparative Law*, Vienna: Manzsche Verlags- und Universitätsbuchhandlung, 2010: p. 9.

⁴¹⁵ Summers, Robert S., *Essays on the Nature of Law and Legal Reasoning*. Berlin: Duncker & Humblot, 1992: p. 99-100. Although not sharing the same law philosophy and even with some contradictions, it is also relevant to see the approach regarding the question of definitions raised in Hart, Herbert Lionel Adolphus, *The Concept of Law*, 2nd, New York: Oxford University Press, 1997: 328p, specially in its Chapter 1, n. 3 “Definitions”.

⁴¹⁶ Breuker, Joost, Hoekstra, Rinke, *Core concepts of law: taking common sense seriously, Proceedings of Formal Ontologies in Information Systems FOIS-2004*, Amsterdam: Leibniz Center for Law 2004: p.5.

⁴¹⁷ “Too often in the past, flexibility has been used as an (efficient) threat to induce reluctant or laggard member states to keep pace with the integration process”, Kurpas, Sebastian, De Clerck-Sachsse, Julia, Torrealanca, José I., Ricard-Nihoul, Gaëtane, “From Threat to Opportunity: Making Flexible Integration Work”, *European Policy Institutes Network, Working Papers*, no. 15, 2006: p.1.

there was no margin for differential approaches and different rhythms of deepening the integration between Member States. Or nothing could be more untrue⁴¹⁸.

From the very beginning there were signs of flexibility in the EU Treaties, either to allow future actions, or to preserve existing realities (these were the case, for instance of the Benelux and the Nordic Council special situations recognised by the Treaties⁴¹⁹). To impose an excessively rigid system would have the undesired effect of narrowing the goal stated in the EEC Treaty, “to establish the foundations of an ever closer union among the European peoples”⁴²⁰, right from the very beginning in 1957. This objective could and can only be possible by, at the same time, widening and deepening the Union⁴²¹. This is another long and fruitful discussion within the EU legal debate that has substantially contributed for the present state of affairs. The idea of a closer Union is referred within the ECJ at different stances and in different formats, but the goal presiding to its reference is the same⁴²².

Despite what the different assessments may be in terms of options, the recognition of this double need (deepening and enlarging) is clear⁴²³. Within the EU context, flexibility always meant different ways to accommodate diverse positions in one single framework, to avoid exclusions that might engender disruptions in the integration process⁴²⁴. Enhanced cooperation will prove to be a way to strengthen the

⁴¹⁸ “The preceding considerations support the emerging political consensus that greater flexibility is an unalterable prerequisite to adequately cope with the enlargement-cum-deepening challenge and the problem of increasing heterogeneity that is associated with the admittance of further countries to the EU. In fact, the need for more flexibility had been recognized for a long time”, Ahrens, Joachim, Hoen, Herman W., Ohr, Renate, *Deepening Integration in an Enlarged EU: A Club-Theoretical Perspective*, EPCS Conference, 2005: p.16.

⁴¹⁹ *Constitutional Change in the EU: From Uniformity to Flexibility?*, edited by Joanne Scott and Gráinne de Búrca, 2nd. ed., Oxford: Hart Publishing, 2001: p. 31.

⁴²⁰ Preamble of the Treaty establishing a European Economic Community (EEC), 1957.. The same idea was restated in the Treaty of the European Union (1992) and it remains in the preamble of the Treaty on the Functioning of the European Union and of the Treaty of the European Union.

⁴²¹ Faber, A., “Theoretical Approaches to EU Deepening and Widening. A Multi-Disciplinary Overview and Some Tentative (Hypo)Theses”, Paper presented at a conference in Brussels, *Theories and sets of expectations (WP II/III)*, 2006: 21p. This author provides an extensive bibliography on this subject.

⁴²² *Case C-503/03, Commission of the European Communities v Kingdom of Spain, Opinion of Advocate General Kokott*, para. 13 and 14; *Cases C-187/01 Criminal proceedings against Hüseyin Gözütok and C-385/01 Criminal proceedings against, Opinion of Advocate General Ruiz-Jarabo Colomer*, para. 41

⁴²³ An example of this position was expressed by the former French Minister for Foreign Affairs, Pierre Moscovici, in June 1998, as quoted in *Flexibility and Enhanced Cooperation in European Security Matters: Assets or Liabilities*, edited by Antonio Missiroli, *Occasional Papers 6*, Paris: Institut for Security Studies - Western European Union, 1999: p. 29

⁴²⁴ Dehouse, Franklin, Coussens, Wouter, Grevi, Giovanni, *Integrating Europe. Multiple speeds – one direction?*, Brussels: European Policy Centre, 2004: p. 31.

Union from within⁴²⁵. By allowing some States to go faster in the integration process it not only opens new horizons, but it also makes possibility a reality. It serves as an example for Member States that opt for not participating in a specific process and, as it promotes integration, it may appeal to those Member States to join later.

In legal literature regarding EU, the notion of flexibility is often confused or at least used indistinctly with the concept of differentiated integration⁴²⁶. By doing so, many authors immediately accept that despite the model of that so-called flexibility, it is an attempt by the EU to induce integration measures, but within this framework it is the EU that develops them and not the Member States. It is prudent to underline from the very beginning that the “differentiated integration”⁴²⁷ is not just another name for flexibility. Although from the linguistic and theoretical point of view different integration is a form of flexibility, when it comes to EU law flexibility, this is mostly identified with article 352 TFEU and the principle of subsidiarity⁴²⁸, but differentiated

⁴²⁵ Verhofstadt, Guy, *A Vision for Europe*, speech to the European Policy Centre, 2000.

⁴²⁶ “According to the terminology used in the context of European integration, flexibility, sometimes used interchangeably with the expression differentiation, constitutes the general term for the possibility of member states to have different rights and obligations with respect to certain common policy areas and refers to the possibility of the temporary or permanent existence of different levels of integration within EU”, Wohlgemuth, Michael, Brandi, Clara, “Strategies of Flexible Integration and Enlargement of the European Union. A Club-Theoretical and Constitutional Economics Perspective”, *Freiburg Discussion papers on Constitutional Economics*, no. 6, Freiburg: Institut für Allgemeine Wirtschaftsforschung - Abteilung für Wirtschaftspolitik - Albert-Ludwigs Universität Freiburg i. Br., 2007: p.2

⁴²⁷ The term was coined by Eberhard Grabitz in 1984 (abgestufte Integration).

⁴²⁸ According to Article 5, n.3 TEU, “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”; and according to article 352 TFEU “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments’ attention to proposals based on this Article”.

Regarding article 352 TFEU, both Declarations 41 and 42 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon on article 352 should also be taken into account in this assessment.

Both articles refer to the principle of conferral, whether directly or not, and they both sustain that the exclusive competences are never at stake. The same goes to the enhanced cooperation. One major difference between the two processes (flexibility-differentiated integration) is the role of national parliaments as it is excluded in the enhanced cooperation mechanism (although at the national level there may be an imposition of the sort).

integration is not. Different integration is a process, while flexibility refers to means for that purpose – this is a major difference between the two concepts.

Unless stated differently, the quotation of the articles of the Treaty of the European Union and the Treaty on the Functioning of the European Union, as well as of the Protocols and Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon will refer to the versions published in the Official Journal of the European Union, C-83 of 30 March 2010.

In reality, both the subsidiarity principle and article 352 TFEU are intended to provide the EU with more or, better, enlarged competences in order to realize the goals of the Treaties⁴²⁹. We shall not extensively comment this here, because the question of competences in EU⁴³⁰ is not the goal of this exercise. However, a note cannot be circumvented. Unlike Member States, with the exception of the competences they have transferred to some other instance (“In der Beschränkung zeigt sich erst der Meister”⁴³¹), the EU is limited in its competences by the principle of conferral⁴³². This limitation to EU competences has been often reiterated by the ECJ⁴³³. It was thus forceful that some sort of mechanism existed to extend EU competences without necessarily having to review the Treaty.

Both article 352 TFEU and the subsidiarity principle⁴³⁴ are not options intended for the Member States, therefore if there were not a similar mechanism allowing Member States to act when the EU cannot do it, it might defer or even endanger the

⁴²⁹ This has been a problem especially for the German Länder. Craig, Paul, *The Lisbon Treaty: Law, politics, and Treaty reform*, Oxford: Oxford University Press, 2010: p. 183. This inquietude was taken by the German Constitutional Court that ruled in its judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, n. 2, al. ee) that the exercise of the competences predicted in article 352 would require the ratification by the German Parliament.

⁴³⁰ The Treaty of Lisbon tries to answer the question raised on this issue by Joschka Fisher, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, Berlin: Humboldt University, [HTTP://DWFED.ORG/PP_CONFED_TO_FED.HTML](http://dwfed.org/pp_confed_to_fed.html), 2000: 4p.

⁴³¹ Johann Wolfgang von Goethe, Sonnet *Nature and Art*, “It is self-limitation that reveals a true master”.

⁴³² Article 5 TEU and article 7 TFEU.

⁴³³ Case C-403/05, European Parliament v Commission of the European Communities and Kingdom of Spain, in particular paragraph 49.

⁴³⁴ We shall not enter here in the argument between Paul Craig and Stephen Weatherill, on the implications of article 352, in particular n. 4, regarding the subsidiarity principle and/or the role of the National Parliaments. A example of this discussion can be found in Paul Craig’s *The Lisbon Treaty: Law, politics, and Treaty reform*, Oxford: Oxford University Press, 2010: p. 184, while at the same time a clear reading of Stephen Weatherill, *Cases & Materials on EU Law*, Oxford: Oxford University Press, 9th ed., 2010: 710p. also confirms the different approach.

integration process. This reality was felt from the beginning and the EU, or the communities before, found different ways of overcoming an eventual deadlock⁴³⁵.

Article 352 TFEU is known as the “flexibility clause”, which means that Member States can attribute new competences to EU institutions, namely the Council, in order to guarantee that the EU has the necessary authority to accomplish its core ends. The Treaty of Lisbon extended the provision of former article 308 (now article 352 TFEU) by putting aside the reference to the internal market, and thus opening the door to a broader spectrum of actions. Article 352 TFEU extends, in fact and *de jure* the scope of EU competences, and even the domain of competences⁴³⁶. The difference between article 352 TFEU and other forms of flexibility is that it refers to the EU flexibility⁴³⁷ and not to the Member States flexibility⁴³⁸.

It is one of these flexibility mechanisms – enhanced cooperation – that we will further develop. Other options for the Member States were the opt-in and opt-out possibilities, as well as the constructive abstention⁴³⁹, although in this case, and unlike enhanced cooperation models, the Member State does not participate in the decision, but is affected by it. The so-called constructive abstention was a procedure foreseen for the CFSP in the Amsterdam Treaty.

The use of this kind of abstention presupposed three rules: in case of abstention, the Member State can make a declaration qualifying its decision, and deciding not to implement the measure at stake, although accepting it⁴⁴⁰; if the number of States making such declarations is more than 1/3 of the weighted votes in the Council, than the measure is not adopted; in order to fulfil the principle of EU solidarity, Member States

⁴³⁵ We do not agree with the new concept created by Hervé Bribosia, “differentiated subsidiarity”, once it is not needed and it engenders even more discursive confusion regarding the theme of flexibility.

⁴³⁶ “In fact one the favourite alternatives of the Council, *In dubio pro* Article 308. *In dubio pro* decisional intergovernmentalism” Schütze, Robert, “Organized Change Towards An “Ever Closer Union”: Article 308 EC and the Limits to the Community's Legislative Competence”, *Yearbook of European Law*, vol. 22, edited by T. Tridimas, P. Eeckhout, Oxford: Oxford University Press, 2003, p. 99. Article 352 TFEU replaced Article 308 TEC.

⁴³⁷ “Article 308 of the EC Treaty (“flexibility clause”)”, Council of the European Union, *Scope of Article 308 of the EC Treaty*, Doc. 11198/07, Jur 261, 2007: p.1

⁴³⁸ Philippart, Eric, Ho, Monika Sie Dhian, “Flexibility and the New Constitutional Treaty of the European Union”, *De Nederlandse stem in de Europese Conventie*, 2003: p. 5

⁴³⁹ Bribosia, Hervé, “Différenciation et avant-gardes au sein de l’Union Européenne”, *Cahiers de Droit Européen*, vol. 36, n. 1-2, 2000, p. 84. and also Ehlermann, Claus Dieter, “Differentiation, Flexibility, Closer Cooperation: The New Provisions of the Amsterdam Treaty”, *European Law Journal*, vol.4, n. 3, 1998: p. 246-270

⁴⁴⁰ One example of these declarations is the one made by Cyprus in February 2008 regarding the adoption of the EU Joint Action establishing Eulex Kosovo.

shall refrain from taking any measures that may clash with the EU decision. Solidarity should be understood in two dimensions: between the Member States and within the Member States⁴⁴¹. If it were not for all these provisions, it could be admitted that construction abstention is very similar to the consensus rule of decision, as we have seen before, once a non-intervention does not impede the adoption of a decision.

Unlike the enhanced cooperation, as we will see further on, the constructive abstention is an extreme discreet procedure, which is often very convenient for the Council and it does not implicate the creation of any legal measures because of its use, only not impeding a measure to be adopted and not establishing any alternative or concurrent legal instrument⁴⁴². On the other hand, the constructive abstention, especially when compared to enhanced cooperation, is much more unpredictable and, furthermore, it is a decision taken in the end of the process, while enhanced cooperation is taken from the very beginning, meaning that its possibility is clear from the start, while with constructive abstention the uncertainty until the decision moment may be a undesired challenge.

The double possibility – either the intervention by EU or the Member States if their action can produce results that the absence of action option would endeavour – confers the EU a dynamism that definitely pushes the integration process. Member States that might have decided not to go ahead may benefit either from the examples set by the actions resulting from the application of these different mechanisms, or by the pressure resulting from its implementation on the initially self-excluded State. That was the case, for instance, for the waiving of the opt-out on social policy by the UK. This Member State eventually decided to accede to the general rule. Enhanced cooperation may have this same effect, as exclusion is hardly an option. It remains to be said that whenever the EU acts as a whole it affects all the Member States, while when an enhanced cooperation group of States take the lead, their action only affect them. This a major difference between the two sorts of differentiated integration.

⁴⁴¹ “Solidarity within the European Union has two main dimensions: solidarity between the Member States, which seeks to reduce disparities between these States, and solidarity within the Member States, which seeks to reduce disparities between persons or groups of people”, *Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation*, edited by José María Beneyto, Madrid: CEU Ediciones, 2009: p. 41

⁴⁴² Philippart, Eric, Ho, Monika Sie Dhian, “Flexibility and the New Constitutional Treaty of the European Union”, *De Nederlandse stem in de Europese Conventie*, 2003: p. 32-33.

3. Variable geometry – a vague approach to old realities

Variable geometry is a concept taken from the aeronautics and which refers to a peculiar way of changing the form in order to stabilize a flight. It has been often used in the context of European law, more within International Relations framework, than in law, as opposed to flexibility or differentiated integration, as we shall see further on. It is a vaguer concept than those ones and does not intend to limit *a priori* any assessment on different forms of integration. It has the advantage to be very broad and metaphoric, thus being of easy understanding and application.

It refers to the variations of shapes and means that can be in differentiated integration. This concept saw light in 1992 with the Maastricht Treaty. Being a very broad concept, it has the advantage that most of the others can fit in⁴⁴³, while not impeding other precisions. This theory considers that any State has two political options on setting its policy, either independently or interdependently. In this case, all forms of collaboration between two or more States may be theoretically accepted⁴⁴⁴ as examples of variable geometry.

It should be stated that variable geometry does not have an absolute connection with a geographical area; it may focus on policies, actions, programs, regions, countries, States, as long as it creates a difference between different partners of the same system. One other aspect that must be taken into account on any variable geometry is the existence, or not, of symmetry assumptions⁴⁴⁵.

In order to implement a variable geometry system, it is necessary that there is no stable objection, once this category of objection will impede one of the parties to join the whole, or the whole itself to proceed. However, this kind of permanent objection should not be confused with any opt-out or constructive abstention, it refers to an objection impeding a specific measure and not allowing it to be implemented even by those who might want it.

⁴⁴³ “L'Europe à géométrie variable est déjà une réalité juridique, politique, et économique”, Pisani-Ferry, Jean, *L'Europe à Géométrie Variable. Une analyse économique*, Document de travail, n. 4, Paris : Centre d'Études Prospectives et d'Information Internationales, 1995, p.3

⁴⁴⁴ Konstantinidis, Nikitas, *On the Political Geometry of International Unions: A Coalition-Theoretic Approach*, Barcelona: Institut Barcelona d'Estudis Internacionals, 2009: 63p.

⁴⁴⁵ Konstantinidis, Nikitas, *On the Political Geometry of International Unions: A Coalition-Theoretic Approach*, Barcelona: Institut Barcelona d'Estudis Internacionals, 2009: p. 27-31

4. Differentiated integration: the concept and historical perspective

Before entering into the analysis of the diverse “differentiated integration”⁴⁴⁶ that may be recognisable in the word of the Treaties, an historical overview of the concept in the EU history seems to be adequate, specially taking into account that it started from the very beginning in 1957, by conferring the Benelux a special status in the Treaty and still keeping valid some of the more integrative elements of that Union. There are two different forms of differentiated integration, a *de facto* integration and a *de jure* integration⁴⁴⁷. This duality of pragmatic and epistemic (or in this sense, normative) perspective should always be present when dealing with a vibrant legal system like European or International law.

The EU has always been a dynamic organisation that has been built by “small steps” (in Jean Monnet’s sense) on gradual and sectoral integration. Since very early in time, the goal of a political Union has been behind the thoughts of many scholars and politicians⁴⁴⁸, either in the sense of Monnet and Schumann federalist view, or in an integration perspective without necessarily aim at any sort of federalism. The debate on this subject has fed thousands of pages since the end of World War II, and it does not seem to be exhausted.

To avoid losing the focus in our study, we will keep ourselves to this small reference. Just to quote some of the major authors on EU federalism, we could name, apart from Jean Monnet and Robert Schumann, Konrad Adenauer, Dennis de Rougemont, Dusan Sidjanski, Altiero Spinelli, Jacques Delors, Andrew Duff, Hannes Swoboda, Guy Verhofstadt, Pasqual Maragall, Joschka Fischer, Mario Monti, Daniel Cohn-Bendit, Mário Soares and many others in all EU States, all of them different between themselves, coming from different political parties and families, some arguing towards a stricter form of federalism than others. Even if federalism is a complex political and legal theory susceptible of several interpretations, the above list only intends to show an inventory of authors, from different Member States, that have argued

⁴⁴⁶ Thym, Daniel, ““United in Diversity” – the Integration of Enhanced Cooperation into the European Constitutional Order”, *The German Law Journal*, vol. 6, n° 11, 2005: p. 1731.

⁴⁴⁷ *Constitutional Change in the EU: From Uniformity to Flexibility?*, edited by Joanne Scott and Gráinne de Búrca, 2nd. ed., Oxford: Hart Publishing, 2001: p. 3.

⁴⁴⁸ Fischer, Joschka, *From Confederacy to Federation. Thoughts on the Finality of European Integration*, Berlin: Humboldt University, [HTTP://DWFED.ORG/PP_CONFED_TO_FED.HTML](http://dwfед.org/pp_confed_to_fed.html), 2000: 4p.

about a more and more integrated Union, and by no means intends to be an exhaustive list.

Several models⁴⁴⁹ and theories⁴⁵⁰ on different integration have been suggested; in many cases the differences are minimal and most of them are just a statement of a situation and not the elaboration of a real system, i.e., it is not always clear how some of the models should (or could) be taken into practice⁴⁵¹.

The idea of a multi-speed Europe set the tone when Willy Brandt spoke of a two-speed Europe (1973), and even more after the Tindemans Report⁴⁵² (1975). The basic idea by then was that, despite the common level of integration, there could be some temporary or exceptional forms of integration, for those States which would be prepared to move forward faster.

Immediately after, in 1979, Ralf Dahrendorf came up with the idea of a Europe à la carte (which had been refused by Tindemans⁴⁵³), where States could freely pick and choose bearing in mind the respective policies. The reason for this proposal was to try

⁴⁴⁹ Bribosia, Hervé, "Différenciation et avant-gardes au sein de l'Union Européenne", *Cahiers de Droit Européen*, vol. 36, n. 1-2, 2000, p. 59-64 ; Thym, Daniel, *The evolution of supranational differentiation. Assessing enhanced cooperation, the area of freedom, security, justice and the common foreign and security policy under the Treaties of Nice and Lisbon*, Walter Hallstein-Institut Papers, n. 03/09, Berlin: Humboldt University, 2009: p. 3-11; *Flexibility and the Future of the European Union. A federal trust report on flexible integration in the European Union*, edited by Stephen Wall, London: The Federal trust for the education and research, 2005: p.7-9; Dehouse, Franklin, Coussens, Wouter, Grevi, Giovanni, *Integrating Europe. Multiple speeds – one direction?*, Brussels: European Policy Centre, 2004: p. 5-9; Lamers, Karl, Schäuble, "Réflexions sur la politique européenne", *Revue des Affaires Européennes*, vol. 6, 1995: p. 9-17 ; Tekin, Funda, Wessels, Wolfgang, "Flexibility within the Lisbon Treaty: Trademark or Empty Promise?", *Eipascope*, Special Bulletin, n.1, 2008: p. 25-31.; Blockmans, Steven, "Flexibility and Differentiation in an Enlarged European Union", *Revista Romana de Drept Comunitar*, n. 3, 2004: p. 122-129.; Beneyto, José Maria, *Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation*, Madrid: CEU Ediciones, 2009: 105p.; Stubb, Alexander, "A categorization of differentiated integration", *Journal of Common Market Studies*, vol. 34, n. 2, 1996: p. 283-295.

⁴⁵⁰ Ahrens, Joachim, Hoen, Herman W., Ohr, Renate, *Deepening Integration in an Enlarged EU: A Club-Theoretical Perspective*, *EPCS Conference*, 2005: p.24 and Wohlgemuth, Michael, Brandi, Clara, "Strategies of Flexible Integration and Enlargement of the European Union. A Club-Theoretical and Constitutional Economics Perspective", *Freiburg Discussion papers on Constitutional Economics*, n. 6, Freiburg: Institut für Allgemeine Wirtschaftsforschung - Abteilung für Wirtschaftspolitik - Albert-Ludwigs Universität Freiburg i. Br., 2007: 46p.

⁴⁵¹ "Les schémas peuvent différer et les arrière-pensées peuvent s'opposer, mais la préoccupation est la même : offrir un concept d'intégration suffisamment flexible pour tenir compte de la diversité des situations et des préférences au sein d'une Communauté", Pisani-Ferry, Jean, *L'Europe à Géométrie Variable. Une analyse économique*, Document de travail, n. 4, Paris : Centre d'Études Prospectives et d'Information Internationales, 1995, p.7.

⁴⁵² Tindemans, Leo, "Rapport au Conseil Européen sur l'Union Européenne", *Bulletin des Communautés Européennes*, Supplément I, 1976: 37p. ("les États qui sont en mesure de progresser ont le devoir d'aller de l'avant", p.19)

⁴⁵³ "Il ne s'agit pas ici d'une Europe à la carte: l'accord de tous sur le but final à atteindre en commun lie chacun, ce n'est que l'exécution qui est échelonnée dans le temps", Tindemans, Leo, "Rapport au Conseil Européen sur l'Union Européenne", *Bulletin des Communautés Européennes*, Supplément I, 1976, p. 19

to implement Tindemans ideas. Almost than 20 years had to pass over the Tindemans report before concrete proposals of partial integrations saw the light of the day.

After the Maastricht Treaty, which first raised the issue, in the mid-90s, some other proposals were presented. One of the more favourable opinions regarding different integration was unsurprisingly expressed by the former British Prime-Minister John Major⁴⁵⁴.

One other proposal that was discussed by then was what is called Europe of concentric circles. This was a model where a hard core group of States would set the pace for the other Member States and for the integration process as a whole. The hard core group of States was supposed to be formed by Germany, France, Belgium, Luxembourg, the Netherlands, and later also by Spain. The first to make this suggestion in 1994 was the by then French Prime-Minister Édouard Balladur⁴⁵⁵. The idea was then developed by Wolfgang Schäuble and Karl Lamers⁴⁵⁶. Within this idea of concentric circles, we could also recognise some other models which in reality follow closely this proposal; for instance the initiative by Michel Rocard in 1994 of the “active nucleus”

Although not suggesting a concrete model, Jacques Delors, by the time he was leaving the Presidency of the European Commission in 1995, spoke of different patterns to be used for integration, which, coming from someone who for 10 years was handling the symbol of supranationalism and communitarisation, reflects an apparent general feeling, independently of political forces, institutions or regional specificities, of the need to find ways to move forward the spirit of integration, even if some concessions on its rhythm had to be made.

Another proposal⁴⁵⁷ is the case of the avant-garde group, or group of pioneers, following upon Schäuble and Lamers proposal of concentric circles, suggested by

⁴⁵⁴“(…) it must be the right sort of Europe. One which does not impose undue conformity, but encourages flexibility” or “Diversity is not a weakness to be suppressed: it is a strength to be harnessed”, Major, John, *Speech at the William and Mary Lecture*, Leiden: University of Leiden, <http://www.johnmajor.co.uk/page1124.html>, 1994: 9p.

⁴⁵⁵ Interview published by *Le Figaro*, 30/08/1994.

⁴⁵⁶ Lamers, Karl, Schäuble, Wolfgang “Réflexions sur la politique européenne”, *Revue des Affaires Européennes*, vol. 6, 1995: p. 9-17

⁴⁵⁷ Tohidipur, Timo, “Expansion of Closer Cooperation as Contra-Indication to the Idea of European Integration: A Critique of Joschka Fischer's Speech and Giuliano Amato's Comment Thereon”, *The German Law Journal*, vol. 2, n° 14, <http://www.germanlawjournal.com/index.php?pageID=11&artID=81>, 2001: 4p.

former German Minister of Foreign Affairs, Joschka Fischer⁴⁵⁸, in 2000, which some authors call the “gravitation core”⁴⁵⁹. From the flow of the speech, it seems that there has not been any doubts on allowing some Member States to proceed quicker than the other, leaving the question on whether a directory was needed or not.

In that same year, French President Jacques Chirac and the German Chancellor Gerhard Schröder raised that model again. An attempt to isolate the British Prime-Minister Tony Blair during the IGC that was then taking place? Unlike the Europe *à la carte*, that is based on policy choices, the model of concentric circles concerns States⁴⁶⁰ that is, it is structured on a geographical, national or regional, criteria. The differentiation results from a group of States that act together regarding policies and not just a fixed pre-determined group of States despite the whole integration process. In the concentric circles model, it is not clear, first on the effects on the *acquis* and, on the other hand on the possibility of other Member States to join. In reality, none of the models was ever presented in a way that it would answer all the legal needs for its implementation as well as with the compatibility with the EU Treaties.

Despite the meagre results of these debates, these have still been the theoretical proposals for a differentiated integration with a view to develop the integration process. This is a long process and it is possible not to count on all Member States at the same time.

In concrete terms, it is required to verify the texts of the successive treaties in order to identify signs of differentiated integration that may already be *de jure* recognitions of such a possibility. It could be argued that differentiated integration could endanger the goals of EU and contribute more to divisions than to integration⁴⁶¹. This is true for some of the models (eg. concentric circles), but it is not the case when an

⁴⁵⁸Fischer, Joschka, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, Berlin: Humboldt University, [HTTP://DWFED.ORG/PP_CONFED_TO_FED.HTML](http://DWFED.ORG/PP_CONFED_TO_FED.HTML), 2000: 4p.

⁴⁵⁹Král, David, “Multi-Speed Europe and the Lisbon Treaty - Threat or Opportunity?”, Paper presented at a conference by EUROPEUM Institute for European Policy, Budapest, 2008: p.2.

⁴⁶⁰“The main distinction between variable geometry and *à la carte* is that the former exemplifies a certain opt-in or opt-out to a conglomeration of Member States which have already pursued deeper integration in a specific policy area (e.g. the Schengen Agreements). The latter, on the other hand, is a form of differentiation in which a Member State opts out or opts down away from a specific policy area (e.g. the UK and the Social Chapter”, Stubb, Alexander, “A categorization of differentiated integration”, *Journal of Common Market Studies*, vol. 34, n. 2, 1996: p. 289

⁴⁶¹“Un défi majeur: organiser la différence au sein d’une Union européenne de plus en plus hétérogène sans casser la dynamique de l’intégration”, La Serre, Françoise de, “Une Europe ou plusieurs?”, *Politique Étrangère*, n. 1, 1999: p.21.

openness is set from the beginning of the model, allowing all Member States to be part of the integration process (as is the case of enhanced cooperation).

After this succinct overview of the different models and theories that have been developed in European law, not to mention the use of enhanced cooperation in other instances, a subject that will be resumed in Chapter VI, it is high time to present some examples of differentiated integration⁴⁶² that can best illustrate what has been said above.

5. Examples of differentiated integration⁴⁶³

Throughout time, the examples have indeed been many, even if not always acknowledged as such. The first one, as mentioned, was the special situation of Benelux that, within the provisions of the EC Treaty in 1957, was allowed to keep some of its more integrative mechanisms⁴⁶⁴.

The possibility of issuing Decisions just for one Member State or the fact that Directives leave their legal transposition to Member States also allows some degree of differentiation. This flexibility on procedures, and sometimes time frame, of the measures to be adopted by Member States clearly reflects some kind of different speed in which the EU legal order is implemented, not to mention that it also allows Member States to accommodate EU rules differently,

Another example of differentiated integration is the transitional periods granted to new Member States. Those intermediary phases are always marked by derogations, longer or shorter, in order to allow the integration to be conducted as a smooth process. These derogations are temporary and from the beginning clearly fixed, although in some cases they may be later extended.

⁴⁶² One of the most extensive list of examples of differentiated integration special cases can be found in Ehlermann, Claus Dieter, "Differentiation, Flexibility, Closer Cooperation: The New Provisions of the Amsterdam Treaty", *European Law Journal*, vol.4, n. 3, 1998: p. 246-270

⁴⁶³ Jan-Emmanuel de Neve develops an interesting image and interpretation of the differentiated integration, "The European Union? How Differentiated Integration is Reshaping the EU", *Journal of European Integration*, Vol. 29, N. 4, 2007: p. 503-521.

⁴⁶⁴ A short synthesis of an historical perspective can be found in the chapter by Annemarie Landsaal, *Flexibility in Constitutions. Forms of closer cooperation in federal and non-federal settings. Post-Nice edition*, edited by Annette Schrawen, Groningen: Europa Law Publishing, 2002: p.47-57.

One of the first options available to EU Member States that did not want to proceed with the rest of the EU was the possibility of opting out, a derogation that has been created for some States following particular intransigent stances. Unlike the enhanced cooperation, the opt-out is an option of no participation in an EU mechanism and not, like the enhanced operation, in the creation of a mechanism that will allow some to go further with integration. In both cases the integration process is not stopped, but it becomes differentiated. The opt-out mechanism has been used before the enhanced cooperation was foreseen in the Treaties and it has also lived together with it⁴⁶⁵.

The United Kingdom and Ireland have an opt-out from Schengen⁴⁶⁶; Denmark and the United Kingdom have an opt-out of the common currency, while Sweden benefits from a *de facto* opt-out concerning the Euro. Denmark has opt-outs for CFSP, European Citizenship and JHA. The United Kingdom, Poland (and eventually the Czech Republic) have opted-out from the Charter of Fundamental Rights. Finally, Ireland and the United Kingdom also have an opt-out from the provision in the Treaty of Lisbon on the change in the decision process in police and criminal cooperation⁴⁶⁷ in criminal matters from unanimity to qualified majority. This opt-out is the continuation of a much more extensive one these two Member States had regarding JHA⁴⁶⁸.

The opt-out option (as well as the opt-in; although in this case the possibility to join at an ulterior moment is kept, while regarding the opt-out it is a definite position) needs to be fixed in a Protocol attached to the Treaties and cannot, like the enhanced cooperation, benefit from a direct legal reasoning from the Treaties. Thus, the opt-out is a fixed mechanism thought for a concrete subject and not, like the enhanced cooperation, a mechanism defined to be used as a resort when needed, without a specific domain of intervention from the start.

⁴⁶⁵Fletcher, Maria, "Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty: Balancing the United Kingdom's "Ins" and "Outs"", *European Constitutional Law Review*, vol. 5, n.1, 2009: p. 71-98

⁴⁶⁶It must be said that in this work, and unless mentioned otherwise, when Schengen is referred to, it is understood that we are taking into account both the Schengen Agreement of 1985, as well as the Convention implementing the Schengen Agreement of 1990, as they have been included in the Treaty of Amsterdam.

⁴⁶⁷ Although we try to use British English all along this text, we have chosen cooperation instead of co-operation because this is the spelling used in the Treaty of Nice and Treaty of Lisbon.

⁴⁶⁸ Peers, Steve, "UK and Irish opt-outs from EU Justice and Home Affairs (JHA) law", *Statewatch analysis – EU Lisbon Treaty*, n. 4, 2009: 27p.

In parallel with these opt-outs, Ireland and the United Kingdom may opt-in regarding JHA but they have to inform the Council that they want to proceed (in terms of procedures there is a difference between Denmark, and the other two States. Denmark cannot opt-in⁴⁶⁹ as it has as an opt-out Protocol).

Another example of differentiated integration is the case of the Economic and Monetary Union, in which not all member states participate in the same degree, as some have decided not to move to the third phase, while others still have not achieved all the requirements to participate in the single currency.

Although it must be said that the Schengen Agreement was negotiated and approved outside the EU⁴⁷⁰, as it happened with the Treaty of Prüm⁴⁷¹, later incorporated into EU law⁴⁷², it was decided to include it in the EU *acquis*. Although some of the Member States were not full Schengen members, that situation prevailed. Nevertheless the Schengen Protocol, attached to the Treaty since Amsterdam, foresees conditions of ulterior participation for Member States⁴⁷³, as if it were an enhanced

⁴⁶⁹ “Denmark cannot opt-in on the decision-making process, but it can decide to accept a completed directive. The obligation will then be under international law, not under European Community law”, *Flexibility in Constitutions. Forms of closer cooperation in federal and non-federal settings. Post-Nice edition*, edited by Annette Schrawen, Groningen: Europa Law Publishing, 2002: p. 70; Bribosia, Hervé, *Les coopérations renforcées : Quel modèle d'intégration différenciée pour l'Union Européenne. Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d'autres coopérations renforcées « prédéterminées » en matière sociale, au sein de l'Espace de liberté, sécurité et justice, et dans l'Union économique et monétaire*, Florence : European University Institute, 2007 : p. 225

⁴⁷⁰ *Constitutional Change in the EU: From Uniformity to Flexibility?*, edited by Joanne Scott and Gráinne de Búrca, 2nd. ed., Oxford: Hart Publishing, 2001: 404p, in particular the chapter by Bruno de Witte, “International agreements between member states of the EU”, p. 31-58

⁴⁷¹ Ziller, Jacques, “El Tratado de Prüm”, *Revista de Derecho Comunitario Europeo*, n. 7 2001: p.21-30 and “Le Traité de Prüm. Une vraie-fausse coopération renforcée dans l'espace de sécurité, de liberté et de justice”, *EUI Working papers*, n. 32, 2006: 28p.

⁴⁷² Dehouse, Franklin, Sifflet, Diane, *Les nouvelles perspectives de la coopération de Schengen: Le Traité De Prüm*, Egmont Papers - Royal Institute for International Relations, Ghent: Academia Press, 2006: 13p.

⁴⁷³ At this stage a note seems to be necessary regarding the understanding of the Schengen Protocol. If it is true that the Protocol attached to the Amsterdam Treaty foresaw a closer cooperation and the Treaty reflected the conditions of such cooperation, the fact is that Protocol n. 19 attached to TFEU on Schengen matters retained the wording “closer cooperation” and refers that its implementation “shall be conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaties”.

However, there is no other mention in the Treaty to closer cooperation. We could admit that as there is a change in the wording of closer cooperation into enhanced cooperation in the rest of the Treaty, the same should apply here. Nevertheless, the question must be raised. Moreover, this is the only way to understand, and eventually accept, the opinion expressed by the Advocate General Paolo Mengozzi in case C-482/08, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*. Curiously, the Court in its judgment does not refer to enhanced cooperation, but Paolo Mengozzi does. Yet, both the Court and the Advocate General quote the same legal basis in their argument.

cooperation⁴⁷⁴. However, in reality the wording used to refer to Schengen cooperation as far as primary law is concerned is not enhanced, but closer cooperation⁴⁷⁵. And that is the language endorsed by the European Court of Justice⁴⁷⁶. The move from closer to enhanced cooperation was not a substantive one, but a terminological one.

Doubts have been raised on the legality of extra-EU cooperation since there is a form of cooperation that allows differentiated forms of participation (or not)⁴⁷⁷.

Besides the opt-out, and opt-in options for the States that wanted to maintain certain independence on some subjects, a mechanism was needed to legally allow an action, that requires unanimity, to be adopted by Member States, even if a particular Member State for specific reasons may not want to be part of that decision (though being equally affected by it). That is what was called the constructive abstention, i.e., a Member State, although not supporting a specific measure would not block the process⁴⁷⁸.

Opt-outs are defined for some States and for some areas; they are not conceived for EU policies as such. Furthermore, the opt-out (and opt-in) options are voluntary exclusions, which is not the same as the derogation imposed, for instance, in the states that have not fulfilled the requirements for the third stage of EMU. The opt-outs permit integration to be used in sectors where the exclusion of some Member States could impede the communitarisation or an EU agreed action.

The problem with this option is that it can only be applicable to known sectors or policies at the time of the Treaty, and not, as the enhanced cooperation, to questions that may arise in the future. While the opt-out is a specific mechanism, the enhanced

⁴⁷⁴ The ECJ refers to the Schengen Protocol to the Amsterdam Treaty as an authorization for an enhanced cooperation, *Case C-137/05, United Kingdom of Great Britain and Northern Ireland, supported by Ireland and the Slovak Republic v Council of the European Union supported by the Kingdom of Spain, the Kingdom of the Netherlands and the Commission of the European Communities*, para. 8.

⁴⁷⁵ *Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union*, Preamble and article 1.

⁴⁷⁶ *Case C-77/05, United Kingdom of Great Britain and Northern Ireland, supported by Ireland and the Republic of Poland and the Slovak Republic v Council of the European Union*, para.8.

⁴⁷⁷ Constantinesco, Vlad, "Les clauses de coopération renforcée. Le protocole sur l'application des principes de subsidiarité et de proportionnalité", *Revue trimestrielle de droit européen*, n°4, 1997, p. 751-765.

⁴⁷⁸ Constructive abstention is, nevertheless a process involving several procedures. It is only valid for CFSP decisions; the Member State that opts to abstain has to produce a declaration classifying its abstention as such upon the voting moment; the number of abstentions cannot be bigger than the number of votes needed for a blocking minority. Urrea Corres, Mariola, "La toma de decisiones en el ámbito de la PESC: la abstención constructiva como alternativa a la unanimidad", *Revista electrónica del Departamento de Derecho de la Universidad de La Rioja - REDUR*, n. 0, 2002: p.154-155.

cooperation is a versatile system that can be applied to a multitude of cases, situations, subjects and policies and it does not requires a Protocol to define its policy scope (the protocol on enhanced cooperation is intended to the regulatory measures of the mechanism only).

Taking into account the amount of terms that have been used in EU to refer to differentiation and heterogeneity, and the fact that differences have been tried to clearly distinguish one from the other, there is indeed a risk of “semantic indigestion”⁴⁷⁹ for an almost excessive use and terminology discussion on this matter.

⁴⁷⁹ Stubb, Alexander, “A categorization of differentiated integration”, *Journal of Common Market Studies*, vol. 34, n. 2, 1996: p. 283-295.

Chapter V

Enhanced cooperation: an EU mechanism

Chapter V - Enhanced cooperation: an EU mechanism

1. General

There has been a significant change in the International order for the last few years, especially after the Copenhagen Summit on Climate Change that highlighted the need to move faster and more effectively in international cooperation. An obvious change in multilateralism could be identified. It was clear that the EU has to be more present, needs to be more active, more committed, and to keep on bringing novelty in order to maintain its relevance in the International order. EU Member States, and, first the communities, and now the Union have always had a prominent role in law making, especially taking into account the influence of its Member States over the years in the world. This influence has been particularly notorious concerning the definition and implementation of different legal orders. After all, the EU Member States do not all share the same law regimes and this diversity has very productively been used by the EU as a whole to develop a new and effective legal order.

Apart from its economical weight, the comprehensive legal framework that EU and its Member States have developed might be one of the most fertile paths to bring EU back to its former foremost position, by being an example of regulation and legal solutions finder. The normative role EU has had is an asset that by no means should be discarded. By choosing innovative legal solutions, EU should and can be an international reference.

Although the concept of Europeanization⁴⁸⁰ seems to be developing in law academies and more and more authors use it mostly because of its laconic definition, it must be very clear that it is not purpose of this study to identify any signs of Europeanization in International law, as the title of the study could suggest. The idea is to analyse concrete European law models and from there verify their practicability and applicability within International law, a direct transposition to International law will not

⁴⁸⁰ Gonçalves, Maria Eduarda, Guibentif, Pierre, *Novos Territórios do Direito. Europeização, Globalização e Transformação da Regulação Jurídica*, S. João do Estoril: Princípia, 2008: 156p., and in particular the chapter by Jacques Ziller, p.23-36.

be argued, but the use of some of the European solutions that have been found for the last 60 years as models of solutions to International law difficulties will be evoked.

If we look into the *acquis*, many examples could be mentioned; we shall concentrate in a specific one, the enhanced cooperation, because it is regulated by the Treaties and may be of horizontal application regarding different policies.

As the first examples of enhanced cooperation have been adopted only in 2011 it remains to be explained why it was done so late (after all the mechanism exists since 1989) and not before and if this kind of cooperation can constitute a future for the alleged inertia of EU in several areas, namely on foreign policy. Being one of the goals of enhanced cooperation the management of the growing heterogeneity of Member States⁴⁸¹, it should never be seen as a mechanism that will make integration more difficult, quite on the contrary, especially for the example it sets.

The strict legal analysis of enhanced cooperation will be based on its definition in the Treaty of Lisbon, including its Protocols and Declarations, and on the doctrine that has been produced so far on the subject. At this stage the specific case law concerning enhanced cooperation is still very sparse, although this analysis will benefit from the jurisprudence regarding other situations which has developed interpretations on the acts and procedures that can be taken by enhanced cooperation, and also in alleged similar situations.

Picking up from the previous chapter, enhanced cooperation is perhaps the most peculiar kind of differentiated integration⁴⁸² and, furthermore, the clearest one provided in TEU and TFEU. This model of differentiated integration is thought to be inclusive and to foster integration, by not denying any State the possibility to participate, even if, and at the same time, not forcing any non participating State to be affected by any

⁴⁸¹ Kurpas, Sebastian, Crum, Ben, de Schoutheete, Philippe, Keller, Jacques, Dehousse, Franklin, Andoura, Sami, Missiroli, Antonio, Hagemann, Sara, Bribosia, Hervé, *The Treaty of Lisbon: Implementing the Institutional Innovations*. Brussels: European Policy Centre - Egmont - CEPS, 2007: p.99.

⁴⁸² “Trata-se de um conceito equivalente ao de flexibilidade, de geometria variável, de integração diferenciada, aproximando-se da ideia de círculos concêntricos, e não excluindo a perspectiva de um directório composto por um grupo limitado de países” (“This is a concept equivalent to flexibility, variable geometry or of differentiated integration, approaching the idea of concentric circles, and not excluding the prospect of a directory comprising a limited group of countries”, our translation), Cunha, Paulo de Pitta e, “As cooperações reforçadas na União Europeia”, *Revista da Ordem dos Advogados*, vol. 61, n. 3, 2001: p. 1219. This is a synthetic paragraph of what enhanced cooperation is and its relation to the different models and systems mentioned before. Nevertheless, like all synthesis, it is necessary to get into its details to avoid misunderstandings.

decision. Some authors call it “integration laboratories”⁴⁸³. The enhanced cooperation as a mechanism does not prejudice any geographical scope of implementation, unlike the opt-out settled in Protocols attached to the Treaties; it does not refer to any State or region specifically, nor is it restraint to any specific policy⁴⁸⁴. (Until the Treaty of Lisbon CSDP, or ESDP by then, was excluded⁴⁸⁵. Despite the fact that the Treaties now refer to structured cooperation for this policy, the fact is that it is not excluded anymore).

Unlike the examples in the previous chapter, it does not establish a clear time line⁴⁸⁶ for the implementation of the action, but by institutionalising one form flexibility⁴⁸⁷ (and it is the only case in the Treaties, once it is of horizontal application) that may be identified in the Treaties, in particular the opt-out and opt-in options, it creates its own legal and regulatory framework of action.

It must be justified on the basis of the EU interest, according to the text of the Treaty, in particular in its article 20, n. 1 TEU, and unlike the opt-out and opt-in mechanisms that only reflect a specific Member State interest⁴⁸⁸, enhanced cooperation is intended to preserve or to create a common target, and it is of general application to all interested Member States. Nevertheless, we consider that we should refrain from

⁴⁸³ Kurpas, Sebastian, De Clerck-Sachsse, Julia, Torreblanca, José I., Ricard-Nihoul, Gaëtane, "From Threat to Opportunity: Making Flexible Integration Work", *European Policy Institutes Network, Working Papers*, n. 15, 2006: 9p.

⁴⁸⁴ “Un mécanisme de coopération renforcée peut aussi être conçu comme une solution – fut-elle partielle – à des problèmes qui, de manière générale et récurrente, pèsent sur le fonctionnement de l’Union. Parmi les partisans de ce nouveau mécanisme, certains cherchaient à :

- surmonter les blocages décisionnels au sein du Conseil ;
- encadrer le développement anarchique de la flexibilité à l’intérieur de l’Union ;
- fournir une alternative à la révision quasi continue du cadre institutionnel ;

et éviter le développement de coopérations hors traités dans les domaines de compétence de l’Union”, Philippart, Eric, “*Un nouveau mécanisme de coopération renforcée pour l’Union Européenne élargie*”, *Études et Recherches - Notre Europe*, n. 22, 2003: p.3. The third bullet is controversial as it may generate some confusion when we talk about institutional revision, it does not refer to any sort of revision of the Treaties.

⁴⁸⁵ “Enhanced cooperation pursuant to this title shall relate to implementation of a joint action or a common position. It shall not relate to matters having military or defence implications.”, Article 27b, TEU, after Nice revision.

Dagand, Sophie. “The Impact of the Lisbon Treaty on CFSP and ESDP”, *ISIS Europe – European Security Review*, n. 37, 2008: p.5

⁴⁸⁶ Bribosia, Hervé, *Les coopérations renforcées : Quel modèle d’intégration différenciée pour l’Union Européenne. Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d’autres coopérations renforcées « prédéterminées » en matière sociale, au sein de l’Espace de liberté, sécurité et justice, et dans l’Union économique et monétaire*, Florence : European University Institute, 2007 : p. 43

⁴⁸⁷ “Institutionalization of flexibility is a new issue in the history of European integration, but flexibility itself is not”, *Flexibility in Constitutions. Forms of closer cooperation in federal and non-federal settings. Post-Nice edition*, edited by Annette Schrawen, Groningen: Europa Law Publishing, 2002: p.49

⁴⁸⁸ Thym, Daniel, ““United in Diversity” – the Integration of Enhanced Cooperation into the European Constitutional Order”, *The German Law Journal*, vol. 6, n° 11, 2005: p. 1731-1748.

referring to enhanced cooperation as a flexibility mechanism – although in practical terms it is one – and to reserve this expressive term for the provision in article 352 TFEU⁴⁸⁹. This option has only a methodological justification and by no means should reflect any political or legal assessment. If we were to consider that flexibility can imply major consequences on the political and finance equilibriums of the EU, on its legal architecture and functioning of the EU institutions, we shall try to demonstrate that enhanced cooperation fits all of these criteria, our only remark, we reiterate, is only a question of the *ordre du discours*⁴⁹⁰. Taking enhanced cooperation as a way of codifying flexibility, by setting up specific rules for its implementation, it is another reason to use its specific name, so that a formal distinction regarding other forms of flexibility is established from the beginning.

Enhanced cooperation was first named as such in the Nice Treaty; although in Amsterdam Treaty the model was already set up⁴⁹¹, but, by then, in the English version, was called closer cooperation⁴⁹². By considering the creation of European law a continuous process, we could say that Maastricht created⁴⁹³; Amsterdam regulated; Nice modified the legal framework⁴⁹⁴; and Lisbon generalised it⁴⁹⁵, making it transversal to both the TEU and TFEU. By establishing a new legal framework for the enhanced cooperation, the Treaty of Lisbon clarifies its horizontal nature in the TEU⁴⁹⁶ and then defines the rules⁴⁹⁷ and procedures to be taken for enhanced cooperation in TFEU.

⁴⁸⁹ “Aunque con frecuencia en vez de la palabra “flexibilidad” se utilice la expression “cooperación reforzada” la idea básica es la misma, establecer nuevas reglas en el Tratado para que varios Estados miembros puedan impulsar la creación de normas europeas solo aplicables a ellos”, Areilza Carvajal, José M. de, Dastis Quecedo, Alfonso, “Flexibilidad y cooperaciones reforzadas: Nuevos métodos para una Europea nueva?”, *Revista de Derecho Comunitario Europeo*, vol.1, 1997: p. 9.

⁴⁹⁰ Foucault, Michel, *L'Ordre du Discours*, Paris: Éditions Gallimard, 1971 : 84p.

⁴⁹¹ Philippart, Eric, Edwards, Geoffrey, “The provisions on closer co-operation in the Treaty of Amsterdam: the politics of flexibility in the European Union”, *Journal of Common Market Studies*, vol. 37, n. 1, 1999: p. 102.

⁴⁹² McAuliffe, Karen, “Enlargement at the European Court of Justice: Law, Language and Translation”, *European Law Journal*, vol. 14, n. 6, 2008, p. 806–818.

⁴⁹³ Thym, Daniel, ““United in Diversity” – the Integration of Enhanced Cooperation into the European Constitutional Order”, *The German Law Journal*, vol. 6, n° 11, 2005: p. 1732.

⁴⁹⁴ Bribosia, Hervé, “Les coopérations renforcées au lendemain du traité de Nice”, *Revue du Droit de l'Union Européenne*, n.1, 2001 : p. 111-171 and “Différenciation et avant-gardes au sein de l'Union Européenne”, *Cahiers de droit européen*, vol. 36, n. 1-2, 2000, p. 57-116.

⁴⁹⁵ One of the more detailed overview of the historical evolution of enhanced cooperation up to the Nice Treaty can be found in Urrea Corres, Mariola, *La Cooperación Reforzada en la Union Europea. Concepto, naturaleza Y régimen jurídico*, Madrid: Colex - Constitución Y Leys, S.A., 2002: 421p. As a general overview of enhanced cooperation in its primary phase, vd. Junge, Kristin, *Flexibility, Enhanced Cooperation and the Treaty of Amsterdam*. London: University of North London, 1999: 74p.

⁴⁹⁶ Art. 20 TEU.

⁴⁹⁷ Arts. 326-334 TFEU.

This separation between the two Treaties not only does it reflect the need of a better legal economy of the text, but it is also a way of making it transversal to the whole Treaties in a more consistent and clear manner. Contrarily to the former Treaties, enhanced cooperation no longer excludes any policy. We could even say that it contributes to building on European integration⁴⁹⁸, and including in its ultimate aim, the political integration⁴⁹⁹, once, since the Treaty of Lisbon, the rules for enhanced cooperation have been made more flexible as well as more extensive, thus allowing it to be implemented⁵⁰⁰, as it has been seen by the adoption of two enhanced cooperation, two years after the Treaty of Lisbon had entered into force, while 23 years passed since the mechanism has been included in the Treaties or 12 years since it has been modified.

Those rules are horizontal and applicable to all subject matters⁵⁰¹. The conditions for its applicability are extensively foreseen in the Treaties. There is a special provision⁵⁰² in the case of Police and Judicial Cooperation in Criminal Matters⁵⁰³, which we will deal with later, allowing a certain automatism on the decision taking process in the Council.

Unlike the opt-out mechanisms, that are forms of co-operation between Member States within the EU structures⁵⁰⁴, the enhanced cooperation procedure establishes a form of cooperation between Member States by making use of EU structures. Thus, the enhanced cooperation is an EU mechanism clearly regulated by the Treaties and it is entitled to use all the institutions, structures, and means available to EU. The Treaty of Lisbon, following on previous steps, makes the enhanced cooperation conditions easier to be understood and implemented and by doing so contributing to avoid cooperation

⁴⁹⁸ Racine, Bruno, Buffotot, Patrice, Canivet, Guy, Pisani-Ferry, Jean, *Perspectives de la coopération renforcée dans l'Union Européenne*, Paris: La Documentation française 2004: p.26 and 28

⁴⁹⁹ Fischer, Joschka, *From Confederacy to Federation. Thoughts on the Finality of European Integration*, Berlin: Humboldt University, [HTTP://DWFED.ORG/PP_CONFED_TO_FED.HTML](http://DWFED.ORG/PP_CONFED_TO_FED.HTML), 2000: p.1

⁵⁰⁰ *Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation of 12 July 2010*, (2010/405/EU)

⁵⁰¹ Arts. 326-334 TFEU.

⁵⁰² Articles 82, 83, 86 and 87 TFEU.

⁵⁰³ Regarding mutual recognition in criminal matters, the studies developed by Massimo Fichera, Massimo, *Mutual Trust in European Criminal Law*, University of Edinburgh – School of Law, Working Paper Series, 2009/10, 2010: 25p., and *Mutual Recognition in Criminal Matters From Its Creation to the New Developments in the Lisbon Treaty*, UACES Paper Seminar, University College London - School of Public Policy, 2008: 27p. are quite inspiring. In a more concise, but still very clear, Craig, Paul, *The Lisbon Treaty: Law, politics, and Treaty reform*, Oxford: Oxford University Press, 2010: p. 442-443 is equally meritorious of reading.

⁵⁰⁴ Gil-Robles Gil-Delgado, José Maria, *Report on reinforced cooperation (A5-0288/2000 (INI))*, Brussels: European Parliament – Committee on Constitutional Affairs, 2000: p.6 and 9.

outside of the Treaties⁵⁰⁵. The enhanced cooperation mechanism is also a way of disciplining Member States that wanted to go further⁵⁰⁶ or to cooperate among themselves without hurting EU main goals, policies or structures⁵⁰⁷, while being also a way to defend some of the EU principles, namely the EU solidarity⁵⁰⁸, which can certainly be better accomplished within a cooperation framework where States help each other to achieve their own goals⁵⁰⁹. Unless stated otherwise, solidarity will be taken here as a general principle and not in the restraint assessment that the TFEU has given it in article 222.

Differently from the opt-out model where a decision is made by the Member State not to participate and by doing so abstain from using the existing EU institutions for a specific purpose⁵¹⁰, the enhanced cooperation assures a full use of EU institutions for its implementation and does not, like the opt-out, leave for the Member States the option on handling or not the cooperation. Despite what it may seem, we reiterate that enhanced cooperation is a mechanism of integration, created for the EU and based on its structures. Enhanced cooperation is a method to be used by the Member States for the EU and within the EU. The opt-out is an option circumstantially created for specific Member States that decided not to participate in the common effort, but which is consecrated in a protocol, while the opt-in gives Member States an autonomous capability to decide without necessary having to accommodate itself to others position.

⁵⁰⁵“Au stade actuel de la réflexion, deux axes sont privilégiés : un assouplissement des conditions de mise en œuvre et une extension de son champ d’application pour y inclure le deuxième pilier. Dans les deux cas, la motivation est identique : éviter que, dans une Europe fortement élargie, la tentation pour certains États-membres de coopérer hors traité ne l’emporte”, La Serre, Françoise de, "Les Coopérations Renforcées: Quel Avenir?" *Politique Étrangère*, n. 2, 2000: p. 460.

⁵⁰⁶ “No member state can be forced to go further than it is able or willing to go, but that those willing to go any farther cannot prevent others from doing so, then the center of gravity emerges within the treaties; otherwise, outside them, Fischer, Joschka, *From Confederacy to Federation. Thoughts on the Finality of European Integration*, Berlin: Humboldt University, [HTTP://DWFED.ORG/PP_CONFED_TO_FED.HTML](http://DWFED.ORG/PP_CONFED_TO_FED.HTML), 2000: p.4.

⁵⁰⁷ Constantinesco, Vlad, “Les clauses de coopération renforcée. Le protocole sur l’application des principes de subsidiarité et de proportionnalité”, *Revue trimestrielle de droit européen*, n°4, 1997, p. 751-765.

⁵⁰⁸ Bribosia, Hervé, “Différenciation et avant-gardes au sein de l’Union Européenne”, *Cahiers de Droit Européen*, vol. 36, n. 1-2, 2000, p. 84.

⁵⁰⁹ Apart from the principle of solidarity, the principle of sincere cooperation as enunciated in article 4, n.2 TEU should also be taken into account. *O Tratado de Lisboa, Cadernos O Direito*, n. 5, Coimbra: Edições Almedina, 2010: p. 294-295.

⁵¹⁰ Nevertheless, the ECJ has been very clear on alerting to possible actions by Member States that may affect the EU on the exercise of its competences, Case 22/70, Commission of the European Communities v Council of the European Communities (European Agreement on Road Transport, ERTA), paragraph 22.

Enhanced cooperation might contribute to avoid possible directories, once it does not impose any exclusion or leading role. Moreover, the rules foreseen in the Treaties establish a regulatory framework that ensures the participation of an enough big number of States, thus making the policy to be followed to be representative of the choice of a quite important group of Member States. The two enhanced cooperation counted on 15⁵¹¹ and 25⁵¹² Member States respectively. With the enlargement it would have been too difficult to continue to accept the blockage by one single Member State. Enhanced cooperation is (now) a clearer provision of the Treaties and it is easier to be applicable⁵¹³, as reality has shown, by the fact that only with the Lisbon wording was it possible to implement it.

Nevertheless, it must be said that even though it has not been implemented before, it has been particularly useful to persuade some Member States to overcome their intransigency, as was the case of the European Arrest Warrant that Italy did not want to approve. It was when an enhanced cooperation was suggested on this domain that Silvio Berlusconi decided to move along. In this particular case, taking into account the subject dealt with, an enhanced cooperation by all of the other States and leaving Italy outside would put that State in a very delicate political situation, not to mention that it would make Italy an “out-law” area which would be then much more difficult to control by its own authorities⁵¹⁴. This “out-law” was only possible because Italy was the only Member State against the enhanced cooperation⁵¹⁵.

The term enhanced was the result of the insistence of the Latin languages on the word “renforcée”, “reforzada”, “reforçada”, “rafforzata”. The United Kingdom considered that the option for the word enhanced might be considered too integrative for its nationals but once it already had a few opt-outs it knew it would be difficult to get some extra concessions, special because of a word that it did not, apparently, have any

⁵¹¹ *Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation of 12 July 2010*, (2010/405/EU). Lithuania has recently (end of June 2012) become the 15th Member State to sign up the enhanced cooperation.

⁵¹² *Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection*

⁵¹³ Philippart, Eric, Ho, Monika Sie Dhian, *The Pros and Cons of “closer cooperation” within the EU. Argumentation and recommendations*, The Hague: WRR – Scientific Council for Government Policy, Working Document W104, 2000: p. 24-25, 36, 42-45.

⁵¹⁴ “Flexibility is like a nuclear weapon: used as threat, not in practice”, Stubb, Alexander, *Negotiating Flexibility in the European Union: Amsterdam, Nice and Beyond*, Hants: Palgrave Macmillan, 2003: p. 163.

⁵¹⁵ Italy has raised some of the same questions regarding the enhanced cooperation on patents, in particular arguing that enhanced cooperation is a last resort and only a last resort.

legal meaning. Up until then, the English versions of the Treaties used the word “closer cooperation”⁵¹⁶. Moreover, from the International Law perspective it was more and more difficult, specially taking into account the future enlargement, to continue to admit that a multilateral Treaty would not be identical in all languages. The other versions of the Treaties already spoke of the equivalent to enhanced cooperation. This kind of imprecision is a mistake that EU cannot make and it affects its credibility.

Some authors question why the United Kingdom, as well as Denmark, since the ICG in 1996, tried to avoid the creation of this mechanism, once they were used to the opt-out mechanism, it could be easier to accept different forms of integration. However, it must be underline that the opt-out possibility already served their interests and the enhanced cooperation could put them in jeopardy, once instead of creating a differentiation for the States that did not want to participate, it created a possibility for some to go further, leaving the ones that did not want to participate behind. Because the opt-out kept those States out of some Treaty provisions, while the enhanced cooperation creates a new framework for action, those States saw in this possibility a threat to this autonomic decision process and regarded enhanced cooperation as a undesirable game of incertitude⁵¹⁷. Opt-out and opt-in were ruled by separate Protocols to the Treaties and its application was clearly defined before the Treaties enter into force. Enhanced cooperation is a theoretical mechanism to be applied according to rules but without any pre-definition of any domain.

2. Pre-conditions for an enhanced cooperation

There is a minimum threshold of participants in an enhanced cooperation⁵¹⁸. It is required that nine States start the procedure⁵¹⁹ (it used to be eight), but there is no other

⁵¹⁶“The provisions of Article 43, which were established by the Amsterdam Treaty, have been replaced and (at least in the English version of the TEU) been renamed “enhanced” rather than “closer” co-operation”. Craig, Paul, Búrca, Gráinne de, *EU Law. Text, Cases and Materials*, 4th ed., New York: Oxford University Press, 2008: p. 29.

⁵¹⁷ Urrea Corres, Mariola, *La Cooperación Reforzada en la Union Europea. Concepto, naturaleza Y régimen jurídico*, Madrid: Colex - Constitución Y Leys, S.A., 2002: p.185

⁵¹⁸ Bribosia, Hervé, *Les coopérations renforcées : Quel modèle d'intégration différenciée pour l'Union Européenne. Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d'autres coopérations renforcées « prédéterminées » en matière sociale, au sein de l'Espace de liberté, sécurité et justice, et dans l'Union économique et monétaire*, Florence : European University Institute, 2007 : p.95

specification, that is, there is no connection with the population they may represent or any other criteria as it is used to define qualified majority in the Council⁵²⁰.

The idea of establishing a rule of 1/3 of the Member States, evoked during the negotiations for the Treaty establishing a Constitution for Europe, was not retained, but the fact is that 9/27 is, indeed, 1/3 of the Member States. In case of new accessions this number of nine may probably not change, thus becoming the smallest threshold ever considered for an enhanced cooperation and it shall not follow the 1/3 rule anymore (as it will happen from 2013 on the accession of Croatia, lowering the ratio to 9/28).

There are concrete reasons to have a group of States requiring the authorisation to initiate an enhanced cooperation⁵²¹ instead of trying to have some sort of cooperation outside the Treaties framework:

- i) It includes a group that is big enough to ensure effectiveness of the enhanced cooperation;
- ii) The costs are born by a big number of partners, thus contributing for its launch;
- iii) Prevents different actions within EU in diverse senses, especially in the cases the Commission has to make the proposal to the Council;
- iv) Minimises the risk of institutional tension;
- v) Due to a larger participation of Member States, its legitimacy is more secure.

It is always difficult to generalise and more often than not it is necessary to find different systems to answer different realities⁵²².

⁵¹⁹“Provided that at least nine Member States participate in it”, Article 20, n. 2 TEU.

⁵²⁰ Once this refers to the process of initializing an enhanced cooperation, as this rule puts all Member states in equal grounds to request an enhanced cooperation, a different situation, as we shall see later, is the authorization decision where the Treaties rules of decision are applied. It is justifiable to quote here and always article 4, n. 2 TEU “The Union shall respect the equality of Member States before the Treaties”.

⁵²¹ Bribosia, Hervé, *Les coopérations renforcées : Quel modèle d'intégration différenciée pour l'Union Européenne. Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d'autres coopérations renforcées « prédéterminées » en matière sociale, au sein de l'Espace de liberté, sécurité et justice, et dans l'Union économique et monétaire*, Florence : European University Institute, 2007 : p. 102.

⁵²² *Constitutional Change in the EU: From Uniformity to Flexibility?*, edited by Joanne Scott and Gráinne de Búrca, 2nd. ed., Oxford: Hart Publishing, 2001: 404p, in particular the chapter by Gráinne de Búrca, “Differentiation within the core? The case of the Internal Market”.

Unlike the opt-out/opt-in schemes, as referred in the clauses of inclusion (opt-in) and in the clauses of exclusion (opt-out), which are fixed regarding the States they were created for, the enhanced cooperation is always open to the participation of other Member States⁵²³ that did not join it from the start⁵²⁴. It is relevant to underline that this openness is permanent⁵²⁵ and no extra conditions can be imposed either by the Commission or the Council than those valid for all the other Members, except the respect of the “enhanced cooperation *acquis*”⁵²⁶. It couldn’t be otherwise, or one of the purposes of the enhanced cooperation – to further integration⁵²⁷ – could not be achieved, as instead of integration, the enhanced cooperation would create more difficulties for Member States to go further. Nonetheless, the new acceding States to enhanced cooperation already in place have to deal with a few extra procedures⁵²⁸, that have to do with controls on their capacity to participate in the enhanced cooperation, namely to follow the *acquis* meanwhile adopted by the Member States parties to the enhanced cooperation.

A remark seems opportune at this stage. The idea of an “enhanced Union”⁵²⁹, sometimes touched upon in literature, should not be pursued; otherwise the goal of increased integration will be disrupted making therefore this instrument an enemy of the Union and not an auxiliary for its achievement. In reality, such an option will be a clear contradiction of the main purposes of the Union and of the enhanced cooperation main task which is to be at the service of the Union and not to compete with it⁵³⁰. This is a risk that legally is not clearly avoided and will require the political determination of Member States to refuse it. The problem we anticipate with this option is the legitimacy deficit it may be argued by the opponents to enhanced cooperation. It is worthy to

⁵²³ “When enhanced cooperation is being established, it shall be open to all Member States (...). It shall also be open to them at any other time”, Article 328 TFEU.

⁵²⁴ “No Member state should be excluded from an area of policy in which it wants and is qualified to participate. To choose not to participate is one thing, to be prevented from doing so is quite another – and likely to lead to the sort of damaging divisions which, above all, we must avoid”, Major, John, *Speech at the William and Mary Lecture*, Leiden: University of Leiden, <http://www.johnmajor.co.uk/page1124.html>, 1994: p. 5

⁵²⁵ *Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation*, edited by José Maria Beneyto, Madrid: CEU Ediciones, 2009: p. 17

⁵²⁶ Article 20, n. 4 TEU.

⁵²⁷ *Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation*, edited by José Maria Beneyto, Madrid: CEU Ediciones, 2009: p. 15.

⁵²⁸ Article 331 TFEU.

⁵²⁹ Tuytschaever, Filip, *Differentiation in European Union Law*, Oxford: Hart Publishing, 1999: p. 238.

⁵³⁰ Blockmans, Steven, “Flexibility and Differentiation in an Enlarged European Union”, *Revista Romana de Drept Comunitar*, n. 3, 2004: p. 122-129.

remind that enhanced cooperation is also a solution to impede that cooperation action take place outside the Treaties, and regardless of the Treaties⁵³¹.

It is admissible, like some authors argue that enhanced cooperation may be more useful (or easier) for “soft” integration, including the creation of regional structures or non-statutory agencies⁵³². It is always easier to make less mandatory rules accepted than those that imply a more fixed legal framework, or with binding character, especially in the case of enhanced cooperation, once only some of the Member States are affected by it.

The enhanced cooperation will generate legal provisions that will constitute the enhanced *acquis*. This *acquis* will only be valid for the Member States of the enhanced cooperation⁵³³ and, unlike it happened with other forms of differentiated integration, namely the Schengen *acquis*, it shall not be imposed on acceding States to the EU⁵³⁴, but it will have to be accepted for ulterior participations⁵³⁵ in the enhanced cooperation. Moreover this particular *acquis* cannot affect the *acquis communautaire*⁵³⁶ and EU primary law. Some authors even consider it redundant or superfluous to make such a statement⁵³⁷, we disagree with this perspective, as clarity in EU law is never too much⁵³⁸.

Although it would be easier to consider enhanced cooperation a *lex specialis* that would impose itself to the *lex generalis* of the Treaties, it must be recalled that the agents producing both laws are not the same, and therefore, it cannot be considered to be a *lex specialis* but just a legal framework existing in parallel with the Treaties and the *acquis*. Moreover, this, indeed, is one of the reasons of enhanced cooperation; it exists because it was impossible to adopt an act valid for all Member States. Furthermore, the

⁵³¹ Ehlermann, Claus Dieter, “Differentiation, Flexibility, Closer Cooperation: The New Provisions of the Amsterdam Treaty”, *European Law Journal*, vol.4, n. 3, 1998: p. 250.

⁵³² Hall, Ben, *How flexible should Europe be?*, London: Centre for European Reform, 2000: p. 9-10.

⁵³³ *Case C-168/08, Iaszo Hadadi (Hadady) v Csilla Marta Mesko, married name Haddadi (Haddady)*, *Opinion of Advocate General Kokott*, para. 88.

⁵³⁴ “Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union”, article 20, n.4 TEU.

⁵³⁵ Article 328, n. 1 TFEU.

⁵³⁶ “Any enhanced cooperation shall comply with the Treaties and Union law”, article 326 TFEU.

⁵³⁷ Gaja, Giorgio, “How flexible is flexibility under the Amsterdam Treaty?”, *Common Market Law Review*, n. 35, 1998, p. 862.

⁵³⁸ Paul Craig is particularly eloquent concerning the need of clarity when he refers to the need of clarity regarding the competences, “The desire for *clarity* reflected the sense that the Treaty provisions on competences were unclear, jumbled and unprincipled”, *A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention*, Baden-Baden: Nomos Verlag, 2003: p. 76.

enhanced cooperation law does not fulfil the same criteria as the *lex generalis* once it does not have any primacy over national law, nor direct effect over all Member States, but only in those that have opted for the enhanced cooperation, and even though, it remains to be seen its compatibility with the Treaties. As there is no hierarchy between the EU law and the enhanced cooperation law, this one cannot be taken as a *lex specialis*, but only as a kind of International law. It must be reminded that *norma normarum* of EU law is an international Treaty (the same is valid for enhanced cooperation), so there is always a possibility to look at European law as a form of international law, even if with its own specificities.

A question unanswered by the Treaties regards the possibility of withdrawal by a Member State from an enhanced cooperation already approved. The provisions of the treaties foresee that Member States can withdraw from a permanent structured cooperation⁵³⁹ and even from the EU itself⁵⁴⁰, but nothing is said on their right to withdraw from an enhanced cooperation, therefore once the right is not expressed it should not be assumed as granted, especially once the treaties do it in other circumstances⁵⁴¹.

If there are only nine Member States, if one leaves, can the enhanced cooperation still persist? We believe if there were more than nine States, the answer would be obviously yes, but if the number goes under nine, then the principle *rebus sic stantibus* should prevail just for the fact that the conditions that originated the enhanced cooperation are not fulfilled anymore. It remains to be seen what would happen with the enhanced cooperation *acquis*. We would argue that this *acquis* remains valid for the Member States that adopted the enhanced cooperation, but no more acts can be adopted in that framework for lack of *quorum*.

Unlike what is predicted by the Vienna Convention on the Law of the Treaties in its article 55⁵⁴² regarding multilateral treaties, the enhanced cooperation is just a

⁵³⁹ Articles 42 to 46 TEU and Protocol (10) on permanent structured cooperation established by Article 42 of the Treaty on European Union, in particular Article 46, n. 5 TEU.

⁵⁴⁰ Article 50, n. 1 TEU.

⁵⁴¹ Cantore, Carlo Maria, "We're one, but we're not the same: Enhanced Cooperation and the tension between unity and asymmetry in the EU", *Perspectives on Federalism*, vol. 3, n. 3, 2011: p.17-18.; "Enhanced cooperation: A Union à taille réduite or à porte tournante?", *Common Market Law Review*, vol. 48, n. 2, p. 317-327.

⁵⁴² Article 55 - *Reduction of the parties to a multilateral Treaty below the number necessary for its entry into force*.

mechanism within the EU Treaties and should not benefit from any *ultra vires* interpretation of article 55 VCLT. After all, the number of nine States is a precondition of the enhanced cooperation and not just an element to allow its implementation, it is an element of the treaty that cannot be surpassed as it does not concern the whole treaty, but just one provision of one mechanism, and if the treaty is in force, it must be used in all its provisions, and it is difficult to accept that some could be waived according to conjunctural conveniences.

However, any Member States is free to withdraw from the process of an enhanced cooperation before it is approved⁵⁴³ and not after the moment a binding decision is adopted. It could constitute a legal deadlock to know, in cases where only 9 Member States decided to pursue an enhanced cooperation, if the enhanced cooperation could still persist with less than the minimum of Member States. There is a clear distinction between the authorisation of enhanced cooperation and its establishment. The only link that Article 328(1) TFEU makes between the authorisation and the enhanced cooperation itself is that the Member States that participate in enhanced cooperation must comply with “any conditions of participation laid down by the authorising decision”. The authorisation decision does not necessarily implies any sense of compulsion, that is achieved by a distinct instrument.

This may be understood either as a lacuna or as political intention to make the enhanced cooperation less flexible, especially in those cases when only the minimum of 9 States would take part in, but this reasoning would also have to be applied to structured cooperation, and that is not the case. Any possible conclusion on this gap will always be counter-argued, as it cannot be other than speculation⁵⁴⁴.

The question of withdrawal, as Nicholas Fernandes stated in the House of Commons, has to be taken at different levels and under distinct principles. The Treaties do not prohibit it, but they also do not allow it. We would sustain that once there is not any right on this matter recognised to Member States, it should not be inferred that it

Unless the Treaty otherwise provides, a multilateral Treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

⁵⁴³ This was the case of Greece regarding the enhanced cooperation, Council Decision of 12 July 2010 authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

⁵⁴⁴ *Opinion 1/09 of the Court (Full Court)*, 8 March 2011.

exists⁵⁴⁵. After the enhanced cooperation has been established its functioning rules are the ones defined either by the Treaties or the Decision itself and not by former rights, competences and attributions that would not exist if it were not for the enhanced cooperation.

One other question is the understanding of the time frame of enhanced cooperation and its legal regime. The doctrine is very contradictory; on the one hand some authors argue that enhanced cooperation is almost perennial; others, like us, prefer to consider it as a temporary mechanism⁵⁴⁶. Furthermore, there are others that have a more subtle position and only call it a non permanent mechanism⁵⁴⁷. The fact is the Treaties do not mention the permanent character of the legal regime created by the enhanced cooperation, but it should be assumed that if all the Member States participate then it is no longer justified.

As far as the acts of enhanced cooperation are concerned, a distinction must be made between the kinds of acts that an enhanced cooperation can adopt, which result from the policies that they are applied to and not from enhanced cooperation itself. As we have seen, however, although not being part of the *acquis communautaire*, the enhanced cooperation is still of legal value for the States that start or accede to an enhanced cooperation and its binding character results from the specific act adopted.

It is not clear from the provisions on the procedures of enhanced cooperation which entity is responsible for verifying if the several requirements foreseen are met. It seems to us that the institution responsible for authorising the proposal – the Commission or the Council –, and not for its approval, should be the stance responsible for that review⁵⁴⁸, as who decides should borne the responsibilities of control.

⁵⁴⁵ *Withdrawal from enhanced cooperation: the Committee's evidence session with Baroness Wilcox*, House of Commons - European Scrutiny Committee, Thirty-ninth Report of Session 2010–12, London: The Stationery Office Limited, 2011: 24p.

⁵⁴⁶ For instance, Constantinesco, Vlad, “Les clauses de coopération renforcée. Le protocole sur l'application des principes de subsidiarité et de proportionnalité”, *Revue trimestrielle de droit européen*, n°4, 1997, p. 751-765.

⁵⁴⁷ Namely, Bribosia, Hervé, “Différenciation et avant-gardes au sein de l'Union Européenne”, *Cahiers de Droit Européen*, vol. 36, n. 1-2, 2000, p. 57-116.

⁵⁴⁸ “Except for the last resort condition, the Treaties do not specify who is responsible for verifying whether those requirements are met. Logically speaking this duty should fall on the institution responsible for the authorization proposal”, Philippart, Eric, Ho, Monika Sie Dhian, “Flexibility and the New Constitutional Treaty of the European Union”, *De Nederlandse stem in de Europese Conventie*, 2003: p.14.

All EU Member States participate in the deliberation process of enhanced cooperation acts after its launching, but only those Member States that participate in the enhanced cooperation mechanism take the decision, the other Member States are excluded from the decision taking phase⁵⁴⁹.

3. Starting an enhanced cooperation

The TEU refers to enhanced cooperation as a possibility, not as a mandatory procedure, for integration, once the EU structures are available for its implementation⁵⁵⁰. It should be understood both as a potestative integration mechanism, once the Treaty confers the freedom to the States to go ahead with this kind of integration, and at the same time the freedom to make use of the provisions foreseen by the Treaty to implement the mechanism⁵⁵¹, and also as a dispositive mechanism⁵⁵², that is, the enhanced cooperation clauses refer to the same procedures as the rest of the Treaties, and they dispose basically the rules to participate in, and to start an enhanced cooperation, as well as the validity of its decisions.

It is a right the States have, but it is not a mandatory obligation, the EU provides a mechanism if the States want to use it, but it does not impose the obligation to use the enhanced cooperation. This is a very relevant aspect, as the voluntary character of enhanced cooperation is clearly set in the Treaties. The same happens with the EU structures, they may be used, but their use is not compulsory⁵⁵³. On the other hand, it is exactly the use of the EU structures that concur for the coherence in EU law and

⁵⁴⁹ Article 330 TFEU.

⁵⁵⁰ As the use of the word May in article 20, n. 1, TEU suggests by not making it mandatory to use the EU institutions. Although still referring to article 43 according to the Nice versions of the Treaties, Mariola Urrea Corres, develops this legal reasoning on the potestative character of enhanced cooperation (*La Cooperación Reforzada en la Union Europea. Concepto, naturaleza Y régimen jurídico*, Madrid: Colex - Constitución Y Leys, S.A., 2002: 421p.)

⁵⁵¹ Areilza, José M. de, "Enhanced Cooperation in the Treaty of Amsterdam: Some Critical Remarks", *Jean Monnet Working Papers*, vol. 98, n° 13, 1998: 14p; Constantinesco, Vlad, "Les clauses de coopération renforcée. Le protocole sur l'application des principes de subsidiarité et de proportionnalité", *Revue trimestrielle de droit européen*, n°4, 1997, p. 751-765; Gaja, Giorgio, "How flexible is flexibility under the Amsterdam Treaty?", *Common Market Law Review*, n. 35, 1998, p. 855-870; Tuytschaever, Filip, *Differentiation in European Union Law*, Oxford: Hart Publishing, 1999: 298p.

⁵⁵² Philippart, Eric, Ho, Monika Sie Dhian, "Flexibility and the New Constitutional Treaty of the European Union", *De Nederlandse stem in de Europese Conventie*, 2003: p.13 and 15.

⁵⁵³ Urrea Corres, Mariola, *La Cooperación Reforzada en la Union Europea. Concepto, naturaleza Y régimen jurídico*, Madrid: Colex - Constitución Y Leys, S.A., 2002: p. 207-208.

between the EU *acquis* and the enhanced cooperation *acquis*⁵⁵⁴. Not to mention that this possibility solves many legal problems regarding procedures and decisions, once the Treaties and the EU *acquis*⁵⁵⁵ are particularly rich in this field.

Since the beginning there were some rules⁵⁵⁶ that have not changed, while some others have been made more flexible⁵⁵⁷. One example of this is what is normally called the “last resort” clause⁵⁵⁸, that is, an enhanced cooperation can only be started once all the other existing procedures in the treaties have been tried without success⁵⁵⁹. The procedural rules foreseen in the Treaties assure a time frame that guarantees the “last resort” clause has enough time to be exercised. In case something comes up after the request by the Member States for an enhanced cooperation, it is still possible to stop the process and because of its lengthy procedure no Member State or Institution can allege that it was a decision taken without enough debate time.

Although being an integration mechanism, it excludes the States that decide not to participate, but its permanent openness sustains the integration process. This has been the way found by legislators to make sure that the adoption of enhanced cooperation would not take place before other more extensive integrative mechanisms have been fully tried. Once the new wording of the Treaties waves the former possibility of veto by the States in most of the cases – all those not implying unanimity –, the last resort clause acquires an even more relevant character for the enhanced procedures, as it is the guarantee to Member States that integration and “an ever closer Union” remain one of the main goals of the EU.

⁵⁵⁴ Kurpas, Sebastian, De Clerck-Sachsse, Julia, Torreblanca, José I., Ricard-Nihoul, Gaëtane, "From Threat to Opportunity: Making Flexible Integration Work", *European Policy Institutes Network, Working Papers*, n. 15, 2006: 9p.

⁵⁵⁵ It is not intention here to redefine the *acquis communautaire*, although it includes both the Primary law, the Secondary law, jurisprudence, etc., we considered that it was of importance to accentuate that even the Treaties are already a very well developed form of law.

⁵⁵⁶ Craig, Paul, *The Lisbon Treaty: Law, politics, and Treaty reform*, Oxford: Oxford University Press, 2010: p. 440-442

⁵⁵⁷ *Think Global - Act European - The Contribution of 14 European Think Tanks to the Spanish, Belgian and Hungarian Trio Presidency of the European Union*, edited by Elvire Fabry, Ricard-Nihoul, Gaëtane, Paris: Notre Europe, 2010: p. 233

⁵⁵⁸ Bribosia, Hervé, *Les coopérations renforcées : Quel modèle d'intégration différenciée pour l'Union Européenne. Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d'autres coopérations renforcées « prédéterminées » en matière sociale, au sein de l'Espace de liberté, sécurité et justice, et dans l'Union économique et monétaire*, Florence : European University Institute, 2007 : p. 58

⁵⁵⁹ “The decision authorizing enhanced cooperation shall be adopted by the Council as a last resort”, Article 20 TEU, n. 2

The Treaty of Lisbon establishes the general framework of enhanced cooperation in TEU, article 20, reserving the regulatory articles for the TFEU (articles 326 to 334). This new legal systematic approach to enhanced cooperation in the provisions of the Treaties reflect the change of perspective of enhanced cooperation, once it defines the mechanism as some current “functioning mechanism of EU”, that has its political boundaries defined in just one article of TEU. Once now there is a horizontal possibility it is easier to have a “universal” mechanism which is not discriminatory in its functioning logic. The end of the division in pillars of the Treaties also contributes for this new approach, and once all the rules adopted cover the whole treaties, unless expressed otherwise, that also includes enhanced cooperation. Despite there are still some specificities for some policies (e.g. automatism – AFSJ; unanimity – CSFP), solutions have been put in place to ease the process, for instance the *passerelle* clause.

In terms of the legal logic of TEU⁵⁶⁰, it should also be noted that enhanced cooperation is presented with all the other “common provisions”, before it deals with specific policies, showing clearly that it is now a mechanism that can be used horizontally. As for the TFEU, enhanced cooperation is included in Part Six⁵⁶¹ (Institutional and Financial provisions) under an autonomous title, but still in the part on institutional provisions. The place chosen for the enhanced cooperation in the TFEU is fully justified for the fact that it is indeed an institutional procedure in the sense it implies institutions, presupposes the possibility of using the relevant provisions of the Treaties, and only defines the rule not the matter to which it can or cannot be applied to.

To start the enhanced cooperation procedures, several other criteria have also to be respected⁵⁶², most of them were already contained in the Treaties before the Lisbon revision:

- i) it is not applicable to EU exclusive competences⁵⁶³;

⁵⁶⁰ Article 20 TEU.

⁵⁶¹ Articles 326 to 334 TFEU.

⁵⁶² Piris, Jean-Claude, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p.90

⁵⁶³ This idea has been confirmed in the jurisprudence of the ECJ, even if not in a judgment, *Case 13/07, Commission of the European Communities v Council of the European Union, Opinion of Advocate General Kokott*, para.55. It will eventually also be argued as a reason to contest an enhanced cooperation decision

- ii) it must protect the principles and goals of the Treaties⁵⁶⁴, moreover enhanced cooperation have to comply with the Treaties and EU Law⁵⁶⁵;
- iii) it cannot undermine the internal market, or economic, social and territorial cohesion⁵⁶⁶;
- iv) Nor can it be a barrier to or discrimination in trade between Member States⁵⁶⁷;
- v) Member States may make use of EU institutions and exercise the competences⁵⁶⁸ by applying the relevant provisions of the Treaties⁵⁶⁹.

This last criteria as we have seen above, is only a possibility for Member States, not a mandatory requirement, like the others criteria mentioned, to the launching of an enhanced cooperation. Overall and it will never be excessive to reiterate that one of the major goals of the enhanced cooperation is to develop the objectives of the Union⁵⁷⁰, as this is what makes enhanced cooperation a common project, and fully justifies that this form of cooperation is developed within Treaties' boundaries.

“To establish enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences”, Article 20, n. 1 TEU. The TFEU, in its article 3, lists the exclusive competences of the Union. The wording of article 2, n. 2 TFEU also allows some flexibility on who is responsible for exercising a shared competence. This is an example of flexibility that has not been mentioned so far. The ECJ has confirmed, if not enlarged, the EU exclusive competence, Case 22/70, *Commission of the European Communities v Council of the European Communities* (European Agreement on Road Transport, ERTA), paragraphs 17-18.

⁵⁶⁴ “Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process”, Article 20, n.1 TEU.

⁵⁶⁵ Article 326 TFEU. There is a very clear reference to primary and secondary law of EU.

⁵⁶⁶ These restrictive conditions were not present since the beginning. Craig, Paul, Búrca, Gráinne de, *EU Law. Text, Cases and Materials*, 4th ed., New York: Oxford University Press, 2008: p. 30. However, once internal market is included in the area of shared competences, which we assume can also be included in the realm of enhanced cooperation, because it not exclusive to the EU, the reference made in this case regarding the internal market can be understood as a pre-limit to the enhanced cooperation. (*Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation*, edited by José Maria Beneyto, Madrid: CEU Ediciones, 2009: p.27-28). If we were to admit this, it would be necessary to enlarge this understanding to the areas of economic, social and territorial cohesion.

⁵⁶⁷ “Any enhanced cooperation shall comply with the Treaties and Union law. Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them”, Article 326 TFEU.

⁵⁶⁸ Craig, Paul, Búrca, Gráinne de, *EU Law. Text, Cases and Materials*, 4th ed., New York: Oxford University Press, 2008: p. 101, quoting A.G. Toth.

⁵⁶⁹ Article 20, n. 1 TEU.

⁵⁷⁰ “Enhanced cooperation shall aim to further the objectives of the Union”, Article 20, n. 1 TEU.

If it is not applicable to EU exclusive competences, it remains to be defined to which competences it refers to⁵⁷¹. Taking into account article 4 TFEU, a list of shared competences is clearly identified; therefore it is possible to admit that enhanced cooperation can take place in any of these areas, while the actions referred in article 6 TFEU may also be included in a hypothetical list of competences to which enhanced cooperation might be applicable. The players in these cases are the Member States, in the name of the group of members of the enhanced cooperation, even if the use of EU institutions is provided⁵⁷².

The Treaty of Lisbon, by defining the competences more clearly, avoids some of the problems that have been identified by some authors regarding the competences that can be applied to enhanced cooperation⁵⁷³. But it does not solve all of the inaccuracies in the Treaties⁵⁷⁴. We assume here, along with the British House of Lords, that competence is the term used to define the responsibility for decision making in a particular field⁵⁷⁵. Despite it may be considered a very narrow assessment of a complicated subject, as competences are, it is nevertheless sufficiently clear and wide in the context of this reference.

⁵⁷¹ Piris, Jean-Claude, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p. 74-76.

⁵⁷² Article 20, TEU.

⁵⁷³ “Por outra parte, respecto de aquellos ámbitos competenciales ajenos à la Unión en los que los Estados miembros deseen cooperar de una manera especialmente intensa, advertimos que, en la medida en que él régimen jurídico de la cláusula de cooperación reforzada previsto en los Tratados exige el respeto al principio de atribución expresa de competencias, queda excluída cualquier utilización de la cláusula de cooperación reforzada en el marco de competencias no comunitárias lo que convierte en un mecanismo *exclusivo* de la Unión”, Urrea Corres, Mariola, *La Cooperación Reforzada en la Union Europea. Concepto, naturaleza Y régimen jurídico*, Madrid: Colex - Constitución Y Leys, S.A., 2002: p.130. We do not fully agree with this assessment.

When Mariola Urrea Cores states “queda excluída cualquier utilización de la cláusula de cooperación reforzada en el marco de competencias no comunitárias” we can only infer that the enhanced cooperation is only valid within the Treaties Framework, and the exclusion of the non communitarian competences refers to competences outside that framework and not to all the non exclusive competences. The situation is much clearer with the Lisbon Treaty and the clear provisions on competences, moreover the distinction EU/EC is gone, so it is clear that we are dealing with EU competences.

Regarding the EU competences, it is particularly informative Schoutete, Philippe de, Andoura, Sami, “The Legal Personality of the European Union”, *Studia Diplomatica*, vol. LX, n. 1, 2007: p. 233-244 as well as Mayer, Franz C., “Competences - Reloaded? The Vertical Division of Powers in the EU after the New European Constitution,” *Jean Monnet Working Papers*, New York: New York University School of Law and Woodrow Wilson School of Public and International Affairs at Princeton University, 2004: 38p.

⁵⁷⁴ “it does not specify the distribution of competences in the EU, thus leaving open the relevant question regarding the separation of powers between the EU and member states. This vague definition of competences is still broadly considered to be the best solution in order to preserve the essence of the European construction (internal market and compensatory policies)”, *Think Global - Act European - The Contribution of 14 European Think Tanks to the Spanish, Belgian and Hungarian Trio Presidency of the European Union*, edited by Elvire Fabry, Ricard-Nihoul, Gaëtane, Paris: Notre Europe, 2010: p. 225.

⁵⁷⁵ House of Lords - European Union Committee, *The Treaty of Lisbon: An Impact Assessment*, Vol. I, Report, London: The Stationery Office Limited, 2008: p. 234.

First we consider that to have competences, it is required to have legal personality to exercise them. If we take into account the Treaties in their pre-Lisbon wording, there is not such a provision regarding EU. We admit the implied international legal personality of EU⁵⁷⁶, as an international organization, but in reality the EU until the Treaty of Lisbon is only granted some external powers, as the rest of the competences remain either with the Member States or with EC. It is relevant to quote here article 43 of TEU, according to Nice version, “remains within the limits of the powers of the Union or of the Community and does not concern the areas which fall within the exclusive competence of the Community”. The Treaty does not speak about EU competences, but only vaguely about Union powers, reserving the concrete term competence, which is dealt all along in the Treaties, to the Community.

Despite the fact that article 5 TEU admits the use of the subsidiary principle for non-exclusive competences of the EU, it states that, in that case, it is the EU that develops the action in name of all Member States, thus establishing a clear separation line between the two mechanisms, i.e., enhanced cooperation and subsidiarity⁵⁷⁷. Even if enhanced cooperation could also be called subsidiarity, in the sense that it allows some of the actors to take the lead in a particular subject, we sustain that clarity is needed, and once the Treaty refers to subsidiarity referring to EU’s role, we shall respect this distinction⁵⁷⁸. Although from a linguistic point of view and taking into account what has been stated about enhanced cooperation, we could use the term subsidiarity, we argue that EU Primary law has given this concept a very precise legal definition that should be preserved when dealing with European affairs, therefore we consider that this term should be avoided to refer to enhanced cooperation to discard any misunderstanding⁵⁷⁹.

⁵⁷⁶ ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, I.C. J. Reports 1949, p. 174-220, and following upon the reasoning by Ian Brownlie, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008: 784p.

⁵⁷⁷ Urrea Corres, Mariola, *La Cooperación Reforzada en la Unión Europea. Concepto, naturaleza Y régimen jurídico*, Madrid: Colex - Constitución Y Leys, S.A., 2002: p. 175-180.

⁵⁷⁸ Even if disagreeing with Hervé Bribosia (“Différenciation et avant-gardes au sein de l’Union Européenne”, *Cahiers de Droit Européen*, vol. 36, n. 1-2, 2000, p. 57-114).

⁵⁷⁹ The position of Hervé Bribosia, despite its merits of raising the same question, is not endorsed by us, as we consider that it mixes the competences in the subsidiarity, which refer to the EU competences. *Les coopérations renforcées : Quel modèle d’intégration différenciée pour l’Union Européenne. Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d’autres coopérations renforcées « prédéterminées » en matière sociale, au sein de l’Espace de liberté, sécurité et justice, et dans l’Union économique et monétaire*, Florence : European University Institute, 2007 : p. 551-555. In the same sense we defend, the

The limits imposed by the categories and areas of Union competence⁵⁸⁰ do not, however, exclude any policy, while it may be argued that the discrimination is not exhaustive, the conferral principle enlightens on those that are not referred (and which remain Member States competence). In reality, the Treaty of Lisbon introduces some changes regarding CFSP and CSDP as far as enhanced cooperation is concerned. One major change is the fact that enhanced cooperation is no longer excluded from CSDP⁵⁸¹. It must be retained that CSDP is part of CFSP⁵⁸².

Recognising the principle *lex specialis derogat legi generali*, the fact is that the specific kind of cooperation that has been set for CSDP (permanent structured cooperation⁵⁸³) although it is a special rule, it does not replace enhanced cooperation nor does it intend to just detail the general rules of enhanced cooperation⁵⁸⁴. It is another form of cooperation, another example of differentiated integration and unlike enhanced cooperation it is reserved for just one policy. This is not the only specific kind of enhanced cooperation, although this term is not literally applied to those two forms we refer to: the Schengen area and the Eurogroup⁵⁸⁵. Both already existed before the Lisbon revision of the Treaties and although from the substantive legal point of view they are similar to enhanced cooperation provisions, the use of the term to refer to those two situations could be avoided, as they did not result from the enhanced cooperation procedure.

ECJ has also argued in a way that separates the reasoning on enhanced cooperation and proportionality principle by explaining that compatibility (in the case concerned) had to be established regarding both situations. *Case C-137/05, United Kingdom of Great Britain and Northern Ireland, supported by Ireland and the Slovak Republic v Council of the European Union supported by the Kingdom of Spain, the Kingdom of the Netherlands and the Commission of the European Communities*, para. 40.

⁵⁸⁰ Articles 2 to 6 TFEU.

⁵⁸¹ “It widens the scope of possible enhanced cooperation to cover the whole CSFP field, including defence”, Piris, Jean-Claude, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p.89.

⁵⁸² “The common security and defence policy shall be an integral part of the common foreign and security policy”, article 42 TEU.

⁵⁸³ Article 42, n. 6 TEU

⁵⁸⁴ “66. A genuine contradiction between two provisions of equal rank could indeed cast doubt on their validity, if it could not be resolved by interpretation or by principles of the conflict of rules (e.g. *lex posterior* or *lex specialis*). In such a case it could not be ascertained which rule had to be applied. Such a contradiction would infringe the principle of legal certainty. That fundamental principle of Community law requires rules to be clear and precise, so that the persons concerned are able to ascertain unequivocally what their rights and obligations are and take steps accordingly”, *Case C-558/07, S.P.C.M. and Others*, Opinion of Advocate General Kokott.

⁵⁸⁵ Piris, Jean-Claude, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p. 90-91.

The kind of cooperation envisaged for CSDP is an extra kind of cooperation, even if it is specific; therefore, there is no hierarchy in law between the two kinds of cooperation and therefore it should not be considered that the permanent structure cooperation replaces the enhanced cooperation. In reality the two legal provisions, even if one is horizontal to the whole Treaty, and the other is a special one for a specific policy, they do not interfere with each other from a theoretical point of view. Having said this, it is easy to conclude that this *lex specialis*, in this particular case, does not abrogate or prevails over the *legi generalis*, they are both applicable once they refer to different realities⁵⁸⁶.

Taking into account there is a specific kind of cooperation in this area, it is perhaps too difficult for the Council to adopt an enhanced cooperation on CSDP, even if from the legal point of view nothing impedes it. It would also be difficult to politically argue in favor of an enhanced cooperation instead of the permanent structured cooperation. Furthermore, and to take the possibility to the limit, the CSDP, being a part of CFSP, is by force of law ruled by CFSP legal framework, unless stated otherwise in the Treaties, which means that in the hypothetical case there was a permanent structured cooperation that might go against CFSP policy, namely an enhanced cooperation, it would not be null and void once CSDP would be seen as a *lex specialis*, while CFSP as the *legi generalis*. Nevertheless, it does not seem credible that politically the Council would adopt two contradicting decisions just by using the two mechanisms available. In the case of CSDP we will only probably see permanent structured cooperation.

This assumption of respect by the principles of the Treaties is also meant to impede diversity to be established in the Union and thus distorting one of its main aims, which is the increasing integration.

Despite the fact that referring to the respect by the principles of the Treaties in the Treaties themselves may seem redundant, this was the best formula found to make sure that enhanced cooperation would take place within the EU and not aside, like it had happened, for instance, with the Treaty of Prüm⁵⁸⁷. Only respecting the principles of the

⁵⁸⁶ “42. (...) a special law has to be interpreted narrowly and may derogate from the general law only if and to the extent that it effectively and explicitly lays down provisions in the area it is designed to regulate. In all other respects, the general law continues to apply”, Case C-254/03, Eduardo Vieira SA v Commission of the European Communities, Opinion of Advocate General Tizzano.

⁵⁸⁷ Cunha, Paulo de Pitta e, “As cooperações reforçadas na União Europeia”, *Revista da Ordem dos Advogados*, vol.61, n. 3, 2001: p. 1221.

Treaties can the Member States apply the normal EU legal order, i.e., the normal rules and procedures provided in the Treaties, its rules of decision and policies, as well as the *acquis*, and initiate the mechanism by making use, as foreseen, of the EU institutions.

It is difficult to synthesise the principles referred to in the Treaties as not only are they part of the preambles, but also others are dispersed in several articles of the Treaties. However, a distinction can be made between the general principles (the democratic principles, the respect for Human Rights, the significance of the UN Charter, among others) and the more operational or executive principles (like the subsidiarity, proportionality or conferral, thought mostly to make the Union work, or others like the principle of effective judicial protection⁵⁸⁸). All of these principles must be taken into account when deciding upon enhanced cooperation.

Although mentioned in different stances of the Treaties, the internal market, economic, social and territorial cohesion are goals that have been continuously reaffirmed by the Treaties and in their revisions as well. Despite the assessment any of these concepts may have, whether with more or less extensive interpretation, the fact is that they constitute objectives of the EU according to the Treaties and therefore they must be fully taken into account in all EU activities, as is the case of enhanced cooperation.

The Treaty of Lisbon, by creating one single entity (the Union, and thus overriding the communities), makes it easier to make full recourse for an enhanced cooperation to the framework of the Treaties as they all refer to the same entity. By framework it should be understood not only the institutional structure of EU, but also all of its *acquis*⁵⁸⁹. This use cannot affect the Member States that do not participate in the enhanced cooperation.

⁵⁸⁸“29. (...) the principle of effective judicial protection. That principle is a general principle of EU law stemming from the constitutional traditions common to the Member States”, Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland.

⁵⁸⁹ “Member States which wish to establish enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties”, Article 20, n. 1 TEU, and “Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union.”, Article 20, n. 4 TEU.

This important principle, that enhanced cooperation is an EU activity⁵⁹⁰, makes it an even more integration mechanism, and the fact that participating Member States in the enhanced cooperation are able to make full use of the single institutional framework of EU is an important step.

Finally, another fundamental principle that is applicable to enhanced cooperation – as to the whole of the Treaties – is that it cannot be a barrier to or to generate any discrimination in trade between Member States. This is a basic principle of EU and any initiative for an enhanced cooperation will have to take it into account, especially in cases of harmonisation of laws⁵⁹¹.

Enhanced cooperation cannot be used to harmonise laws between Member States which may result in barriers or discrimination in trade. This is a particularly relevant aspect to take into account once commercial policy is an exclusive competence – so excluded from enhanced cooperation. It must be clarified here that policies are not excepted from enhanced cooperation, but competences, even if it means that the result in the end is the same – as well as the competence regarding the competition rules for the functioning of the internal market. But the internal market is more than trade (that is why overall it is a shared competence), and trade and commerce are the same. The provisions of the Treaties, we assume, do not refer to enhanced cooperation in these areas, namely regarding trade policy, but to the spill-over effects on these domain of the acts adopted in other fields.

As seen, enhanced cooperation is a mechanism clearly defined in the Treaty but still with a few exceptions, regarding its implementation or application. Just to quote a few examples we would mention the specificities of CFSP and CSDP, as well as the new provisions regarding judicial cooperation in criminal matters⁵⁹² and police

⁵⁹⁰ “Enhanced cooperation is classified in the Lisbon Treaty as an EU activity”, Sieberson, Stephen C., *Dividing lines between the European Union and its Member States. The impact of the Treaty of Lisbon*, The Hague: T.M.C. Asser Press, 2008; p. 248.

⁵⁹¹ If we take into account the 27 legal systems of the EU, we could try to divide them in a few groups: Mediterranean (Portugal, Spain, France, Italy, Greece); Nordic (Denmark, Sweden, Finland), Anglo-Saxon (United Kingdom, Malta, Cyprus and Ireland); Central Europe and Balkans (Germany, Austria, Belgium, Netherlands, Luxembourg, Czech Republic, Hungary, Romania, Slovenia, Slovakia, Poland, Bulgaria); Baltic (Latvia, Estonia, Lithuania). Apart from the theoretical groups, that may be justified by the number of similarities among them, it is also needed to take into account the specificities of each and every one legal system of the 27 Member States, which mean that harmonisation is a long path to follow and enhanced cooperation may be a tool, as long it is not used to make this group division static.

⁵⁹² Article 82, n. 3, article 83, n. 3, and article 86, n. 1 TFEU

cooperation⁵⁹³. It must be said that in the case of enhanced cooperation affecting the Area of Freedom, Security and Justice, and which constitute new articles of the Treaties⁵⁹⁴, and unlike the general rules for enhanced cooperation, the matter can either be referred to the European Council (in a first moment) or an enhanced cooperation can be addressed to the Council, the European Parliament and the Commission, according to their own competences on the subject, and the enhanced cooperation is then deemed granted.

This principle of almost automatism is new in the Treaties. In the pre-Lisbon version of the Treaties, it was possible to address the European Council to block an enhanced cooperation in all domains; this is no longer possible in any domain.

4. Phases of the enhanced cooperation process

There are four phases in all enhanced cooperation processes. Not all actors that intervene in all of the phases are necessarily the same in all situations. It is only possible to infer which institution has competence to intervene according to the areas the request for the enhanced cooperation intends to address. Even though, in terms of procedure, these four phases are: the request, the authorisation proposal; the consultation; and eventually the deliberation⁵⁹⁵. These phases do not refer to the extra procedures that acceding States to enhanced cooperation have to follow⁵⁹⁶.

There are two sets of procedures, one regarding enhanced cooperation concerning CFSP matters, and another one for the rest of the situations. The general rule states that any group of nine States may request authorisation for an enhanced cooperation⁵⁹⁷, which will be then transformed in an authorisation proposal to be

⁵⁹³ Article 87, n. 3, article 83, n. 3 TFEU

⁵⁹⁴ *Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation*, edited by José Maria Beneyto, Madrid: CEU Ediciones, 2009: p. 100

⁵⁹⁵ Eric Philippart and Monika Sie Dhian Ho speak of 3 procedural phases. We consider that the request, which is not included by those authors in the procedural phases, is an equally important step, moreover it is an initiative of several Member States and it reflects some preceding negotiations among those Member States that are equally important for the setting up of the enhanced cooperation ("Flexibility and the New Constitutional Treaty of the European Union", *De Nederlandse stem in de Europese Conventie*, 2003: 51p.).

⁵⁹⁶ Article 331 TFEU.

⁵⁹⁷ Each Member State has to produce its own request and it is the sum of, at least, nine request that constitute the minimum threshold predicted in the Treaties.

submitted to the Council. This proposal is made by the Commission to the Council. The request reflects the fact that enhanced cooperation is a right that can be, or not, granted to a group of States, according to Treaties' rules. By no means is enhanced cooperation mandatory, not at its launching phase, nor later.

The Commission, after receiving the request by the interested Member States, as long the request does not deal with exclusive competences of the Union nor with common foreign and security policy, is entitled to issue the authorisation proposal to the Council that eventually will adopt it, after obtaining consent from the European Parliament. The Council adopts the proposal following the qualified majority rule⁵⁹⁸. We shall note that article 329, n.1 does not state the rule of decision; therefore we conclude it by default, especially taking into account that n. 2 is clear on the exception. Nevertheless, this is not politically obvious, and may rise some doubts, especially in areas like banking union or fiscal union. In these particular cases the problem of the competences may also be raised. Once fiscality is still an unanimity policy, it may be difficult, at least for the States that supported this unanimity from the very beginning, to accept that an enhanced cooperation on these matters may be adopted by qualified majority. It may be a legal debate, but most surely it will answer political concerns and opinions.

The Commission is not forced to present an authorisation proposal, but if it opts for not doing so, it has to justify its choice to the Council⁵⁹⁹. The Commission cannot, at this stage, decide upon the conditions of each Member State to participate in the enhanced cooperation, as nothing in the Treaty foresees it⁶⁰⁰, but it can do it for further participations (it is always easier to catch the train at the station than on the move), but may refuse the requests because of policy reasons. The Treaty of Lisbon dropped the veto possibility by Member States and introduced qualified majority voting for most of the cases, except CFSP and CSDP⁶⁰¹.

⁵⁹⁸ "The Council shall act by a qualified majority except where the Treaties provide otherwise", Article 16, n. 3, TEU.

⁵⁹⁹ Article 329, n.1 TFEU.

⁶⁰⁰ Daniel Thym considers that the lack of criteria for participation in enhanced cooperation is not a lacuna, but instead it is a consequence of the openness and mostly political character of enhanced cooperation. "The political character of supranational differentiation", *European Law Review*, vol. 31, n. 6, 2006: p. 790

⁶⁰¹ Article 329, n.1, n.2 TFEU combined with article 330 TFEU.

In the case of a request dealing with common foreign and security policy, the Member States must address their request to the Council that will forward it to the High Representative of the Union for Foreign Affairs and Security Policy who will give an opinion on its consistency with EU common foreign and security policy (and of CSDP as an integral part of CFSP⁶⁰²), and to the Commission, that will give its opinion on the consistency with the EU policies⁶⁰³. The Council shall keep the European Parliament informed. The decision is taken in the case of CFSP by the Council acting unanimously.

The TFEU is not clear on who is responsible for the authorisation proposal in this situation, but taking into account the different roles expressed in the Treaty, we shall assume that in reality there is no authorisation proposal, and that the Council will act based on three different elements: the request by the Member States; the opinion by the High Representative of the Union for Foreign Affairs and Security Policy; and the opinion of the Commission. These two opinions are only opinions, with no binding effect.

The request addressed by the Member States to the Commission must specify the scope and objectives of the enhanced cooperation. Remarkably, this is only mentioned in Article 329, n.1 TFEU. The TFEU leaves then a certain margin of interpretation on the real dimension of this obligation as far as enhanced cooperation on common foreign and security policy is concerned. In Article 329, n.2 TFEU there is no boundaries of the same kind to the request, being up to the Member States the sole responsibility for the definition of the framework of the enhanced cooperation and, once there is no authorization proposal, it could be admitted that only the decision granting the authorization for the enhanced cooperation will define its scope and objectives. However, for a practical and legal logic, it seems more adequate to consider that these elements should already be mentioned in the request presented by the Member States to the Council, at least as a reference for its further work.

There is a bilateral mechanism instituted in the Treaties⁶⁰⁴ that, on the one hand, guarantees the Member States that do not participate in the enhanced cooperation their competences, rights and obligations, and, on the other hand, impedes those Member

⁶⁰² “The common security and defence policy shall be an integral part of the common foreign and security policy”, Article 42 TEU.

⁶⁰³ Article 329, n.2 TFEU. The double use made in this paragraph of the word consistency is intentional, not only because the TFEU does it, but also to clearly identify the competences of each of the actors.

⁶⁰⁴ Article 327 TFEU.

States to hinder the enhanced cooperation of the Member States that may want to start it⁶⁰⁵. This new formulation goes much beyond the former constructive abstention⁶⁰⁶, which has been waived from this mechanism. Despite it may seem a very twisted way of interpreting, it should not be excluded that a Member State may decide to participate in the enhanced cooperation just to block its implementation⁶⁰⁷, once there is no veto. However, machiavelism and politics go often hand in hand.

Blocking an enhanced cooperation is only possible for Member States regarding CFSP (and CSDP) matters as the decision is taken by unanimity⁶⁰⁸. The treatment of an abstention situation is not foreseen so it is admitted that it is not possible, otherwise unanimity would be put into question⁶⁰⁹ with no alternative, as constructive abstention has been dropped.

The Treaties anticipate the possibility of a *passerelle* for enhanced cooperation acts, although not for matters having military or defence implications⁶¹⁰ (we understand that, theoretically, there may be enhanced cooperation in military or defence areas, despite the existence of permanent structured cooperation, which is distinctly ruled by articles 42 and 46 TEU, as well by Protocol n. 10, as there is no exclusion of any policy). As for the area of Area of Freedom, Security and Justice, there is no *passerelle* foreseen, but it must be clear here that in this situation, the general rule for AFSJ in the Treaties is the qualified majority, we tend to assume that if the enhanced cooperation is thought to overcome the unanimity blockage, it would not make sense to impose that same rule of decision to the States that have opted to go faster in its integration process. And therefore we conclude that enhanced cooperation in AFSJ is ruled by qualified majority. This also one of the results of the suppression of the pillar system in the

⁶⁰⁵ “El planteamiento es, por tanto, un planteamiento de voluntades y no de capacidades” (“the approach is, though, an approach of wills and not of capacities”, our translation), Pons Raols, Xavier, “Las cooperaciones reforzadas en el Tratado de Niza”, *Revista de Derecho Comunitario Europeo*, n.9, 2001: p. 166-167.

⁶⁰⁶ As we have seen in the precedent chapter, the Treaties according to Lisbon wording did not keep the constructive abstention, but instead consider it as no obstacle to unanimity, there is no longer a need to qualify it.

⁶⁰⁷ This is an idea, or better, an alert, that has been developed by Mariola Urrea Corres, *La Cooperación Reforzada en la Unión Europea. Concepto, naturaleza Y régimen jurídico*, Madrid: Colex - Constitución Y Leys, S.A., 2002: 421p. even before the Treaty of Lisbon.

⁶⁰⁸ Article 329, n. 2 TFEU

⁶⁰⁹ In reality, articles 31, n.1 TEU, 235, n.1, 235, n.1, 238, n. 4 ad 354 TFEU waived the constructive abstention by generalizing to all abstentions the impossibility to block any act adoption process.

⁶¹⁰ Article 333 TFEU. The Declaration on Article 329 of the Treaty on the Functioning of the European Union should also be taken into account, once it allows the requesting Member States to formulate this possibility right from the beginning that they will make use of the *passerelle*.

Treaties, as the full integration of AFSJ in the Treaties makes the common procedural rules of decision applicable to AFSJ as well.

There is a duty of information “where appropriate” by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament and the Council. The expression “where appropriate” should be considered an extra control instituted by the Treaties regarding enhanced cooperation⁶¹¹. We consider that “where appropriate” also means “when appropriate”, as it is inconceivable to institutionalise permanent information, otherwise it would block the decision process. Nevertheless, “where appropriate” remains an extreme and deliberately vague expression that may result in very diverse assessments, even contradictory, among the different actors involved (European Parliament, Commission, Council, 27 Member States, High Representative for CFSP).

According to the Treaties⁶¹², it is up to the Council and the Commission to ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union. Finally, but no less important, is the fact that the Treaties impose an obligation of cooperation on the Council and the Commission regarding the enhanced cooperation⁶¹³. It should be reminded that there is also a provision⁶¹⁴ in the TFEU referring to the role of cooperation among Member States as far as enhanced cooperation is concerned. This blended duty of cooperation of all of the actors involved is also a means to underline the principle of EU solidarity⁶¹⁵.

⁶¹¹ This duty of information had been removed by the Treaty of Nice, but the Treaty of Lisbon brought it back. Pons Raols, Xavier, “Las cooperaciones reforzadas en el Tratado de Niza”, *Revista de Derecho Comunitario Europeo*, n.9, 2001: p. 170.

⁶¹² Article 334 TFEU.

⁶¹³ *O Tratado de Lisboa*, Cadernos *O Direito*, n. 5, Coimbra: Edições Almedina, 2010: p. 292

⁶¹⁴ Article 327 TFEU.

⁶¹⁵ It must be recalled that the solidarity principle is identified in different stances of the Treaties, both regarding policies and acts of EU. The same principle is also included in the preambles of the Treaties, as we have seen, it is key to enhanced cooperation. Articles 2,3 and 12 TEU and articles 67, 80, 122 and 154 of TFEU, along with Protocol n. 28 on economic social and territorial cohesion are of particular significance.

In reality the Treaty of Lisbon almost only standardised the requirements for the enhanced cooperation, as the Treaty of Nice had already extended it to more domains⁶¹⁶. The Treaty of Lisbon, nevertheless, goes deeper into its definition, uses and procedures.

5. Acts of the enhanced cooperation

The Treaty of Lisbon creates a triptych typology act: legislative, delegated⁶¹⁷ and implementing acts⁶¹⁸. The binding acts predicted in article 288 TFEU can be used in all of these forms⁶¹⁹. Intended to be a full fledged EU mechanism the wording on enhanced cooperation of the Treaties does not exclude⁶²⁰ the possibility of adopting any kind of act, as it does in the articles of CFSP⁶²¹, which lead us to conclude that all kinds of acts foreseen in the Treaties could then be adopted within an enhanced cooperation, but being valid only for the participants⁶²² in the mechanism and following the same procedures and criteria (adjusted to the number of participants)⁶²³ predicted in the Treaties, namely in articles 4⁶²⁴, 16 and 17 TEU and 288 TFEU and

⁶¹⁶ Lamping, Matthias, “Enhanced Cooperation - A Proper Approach to Market Integration in the Field of Unitary Patent Protection?”, *International Review of Intellectual Property and Competition Law*, No. 8, 2011: p.8.

⁶¹⁷ Although this is a new kind of act, in reality it was already in place. An example may be the reasoning of the ECJ in *Case 25/70, Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster et Berodt & Co.*

⁶¹⁸ Hofman, Herwig, “Legislation, delegation and implementation under the Treaty of Lisbon: typology meets reality”, *European Law Journal*, vol. 15, n. 4, 2009: p.482-505; Driessen, Brian, “Delegated legislation after the Treaty of Lisbon: an analysis of article 290 TFEU”, *European Law Review*, vol. 35, n. 6, 2010: p.837-848; Conway, Gerard, “Conflicts of competence norms in EU law and the legal reasoning of the ECJ”, *German Law Review*, vol.11, n. 9, 2010: p. 966-1005; Craig, Paul, Búrca, Gráinne de, *EU Law. Text, Cases and Materials*, 4th ed., New York: Oxford University Press, 2008: 1148p; Piris, Jean-Claude, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: 426p.

⁶¹⁹ “The ECJ has not so far developed abstract criteria for the differentiation between legislative matters”, Hofman, Herwig, “Legislation, delegation and implementation under the Treaty of Lisbon: typology meets reality”, *European Law Journal*, vol. 15, n. 4, 2009: p.490

⁶²⁰ Like it happens in article 24 TEU.

⁶²¹ Article 24, n. 1 TEU.

⁶²² Pons Raols, Xavier, “Las cooperaciones reforzadas en el Tratado de Niza”, *Revista de Derecho Comunitario Europeo*, n.9, 2001: p. 172.

⁶²³ Gaja, Giorgio, “How flexible is flexibility under the Amsterdam Treaty?”, *Common Market Law Review*, n. 35, 1998, p. 863

⁶²⁴ The wording of article 4TFEU, imposing the Member States the obligation to fulfill the Treaties obligations, should be read together the provision in article 291 TFEU, where it is clearly stated that Member States “shall adopt all measures of national law necessary to implement legally binding Union acts”, that is, according to article 288TFEU, regulations, directives and decisions addressed to a particular State, which means legislative acts. The same position is expressed by Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p.93

the Member States involved in an enhanced cooperation are also obliged to follow the exceptions that the Treaties may foresee on the adoption of certain acts, whether in the case of certain policies (like CFSP) or because of the competences definition (the case of delegated acts).

Intended to be a full fledged EU mechanism, enhanced cooperation is not limited to any sort of acts. Member States, as long as they follow the Treaties rules, they can adopt all type of acts, its adoption will depend on the policy they are addressed to and the actors concerned. It is important here to distinguish between a legislative act, which, by its own intrinsic nature, is binding, legal acts with binding effect, namely the decisions (taking into account that the Lisbon IGC opted for dropping the suggestion of the Constitutional Treaty on clearly distinguishing legislative and non-legislative acts, it is perhaps useful to clarify which category of acts are we dealing with), and acts without binding and direct effect⁶²⁵. This means, that not only can the Member States involved in the enhanced cooperation adopt political acts, but also legislative acts, even if with a restraint application, only for EU Member States that participate in the enhanced cooperation.

The question regarding the adoption of a legislative act by the Council in an enhanced cooperation format raises the question of the European Parliament role as co-decisor. The provisions on enhanced cooperation do not refer to this, so it should be assumed that as long as there is a legislative act involved, the European Parliament has to be involved.

Enhanced cooperation as a mechanism of action is not excluded from the possibility to recur to any legal acts mentioned in article 288 TFEU, it is the policy in which those are applied or the matter addressed by the act itself that limits the choice of the kind of acts. The Treaty of Lisbon has the merit to make the variety of acts available for the EU institutions more limited, by terminating with the specific acts that existed for the former third pillar (JHA) and by imposing only one legal act to CFSP, the decision⁶²⁶. The enhanced cooperation mechanism, which is a mechanism, not a rule of

⁶²⁵ Piris, Jean-Claude, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p.93-94.

⁶²⁶ *The Lisbon Treaty. EU constitutionalism without a Constitutional Treaty?*, edited by Stefan Griller and Jacques Ziller, New York-Vienna: Springer, 2008: p.88-90.

decision or a competence, has to be compatible with the rest of the Treaties⁶²⁷. Co-decision is the ordinary legislative procedure in the Treaties, and the same applies to enhanced cooperation. There are, however, different rules predicted for some policies as well as for some non legislative procedures.

The choice of the kind of act must have at his root a clear definition of the legal basis. This choice has always constituted a problem for EU to act, once a wrong option might make the act ineffective and inapplicable⁶²⁸. Not only does the legal basis establish the competence to act and the institution or agent responsible to do so, but it also defines its scope. It may even serve as guidance for the implementation of the act intended to be taken, by taking into consideration the judgments by the ECJ⁶²⁹ on cases dealing with similar legal basis⁶³⁰.

It is not the name of the act that defines its hierarchy. It is possible to find regulations attributing another institution (normally the Commission) or the Member States the task to implement measures (implementing acts – article 291 TFEU)⁶³¹. These measures are often adopted either by a regulation (that must be in line with the basic regulation that precedes it) or a decision. The Treaty of Lisbon also speaks of a new kind of acts (delegated acts – article 290 TFEU).

⁶²⁷ Referring to the very useful list provided by Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p.379-382 on the articles of the Treaties enabling the Council to take decisions having legal effects, we would consider that none of them is *a priori* excluded from the enhanced cooperation.

⁶²⁸ Marise Cremona is very expressive on this subject, *Law and Practice of EU external relations. Salient features of a changing landscape*, edited by Alan Dashwood and Marc Maresceau, Cambridge: Cambridge University Press, 2008: p. 37-42

⁶²⁹ *Interface between EU Law and National Law*, edited by Daniela Obradovic and Nikolaos Lavranos, Groningen: Europa Law Publishing, 2007: p.13

⁶³⁰ Cremona, Marise, “Coherence through law: What difference will the Treaty of Lisbon make?”, *Hamburg Review of Social Sciences*, vol. 3, n. 1, 2008: p. 26

⁶³¹ “The legislative, executive and judicial powers are divided in a different way than on the national legal systems and the dividing lines between, for instance, the legislature and the executive are not very clear-cut”, Senden, Linda A.J., “Soft law and its implications for institutional balance in the EC”, *Utrecht Law Review*, Volume 1, Issue 2, December 2005, p.85. However, “from a legal point of view, the principle of institutional balance is one manifestation of the rule that the institutions have to act within the limits of their competences”, Jacqu  , Jean-Paul, “The principle of institutional balance”, *Common Market Law Review*, vol. 41, 2004: p. 383. It deserves to be analysed in depth the fact that, at least apparently, the Treaties, more than 50 years later, recover the Meroni Doctrine (Case 9/56, *Societ   Industriale Metallurgica di Napoli (S.I.M.E.T.)*, Meroni & Co. *Industrie Metallurgiche*, Erba, Meroni & Co. *Industrie Metallurgiche*, Milan, Fer.Ro (Ferriere Rossi) and *Acciaierie San Michele v High Authority of the European Coal and Steel Community*).

The delegated acts⁶³² include a time frame for its duration⁶³³ and therefore a “sunset clause” must be present in the legislative act that delegates the powers. These acts are supposed to be exercised by the Commission, and therefore they are out of the scope of enhanced cooperation, once, as we have seen, the actors of an enhanced cooperation are the Member States. It is not the enhanced cooperation that is excluded from the possibility of adopting delegated acts, but once they are just reserved for the Commission⁶³⁴, which is not part of the legislative process in the enhanced cooperation framework, the adoption of delegated acts is therefore impracticable.

It must be stated however, that although enhanced cooperation acts become *acquis* of the enhanced cooperation, they cannot be taken for more than that. It is not an easy task, but still this must be the legal reasoning⁶³⁵.

As for the procedures regarding the adoption of the acts, the provisions on enhanced cooperation do not include any such reference; therefore it is deduced their adoption follows the normal rules in the Treaties⁶³⁶.

Without sharing the view of an “enhanced cooperation council”⁶³⁷, which might jeopardise EU goals just for the fact of institutionalising a discriminatory instance within EU, the truth is that, in reality, with this concept it is easier to grasp the real involvement of different actors in enhanced cooperation, i.e., there is in reality a small group formed by the participating Member States in the enhanced cooperation that follow the same (adapted) rules of procedure as the Council does, but this group is not a legal institution, and is only restraint to the enhanced cooperation and does not have legal personality⁶³⁸. Moreover, each enhanced cooperation has its own members, so

⁶³² Piris, Jean-Claude, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p. 92-94

⁶³³ Article 290, n. 2 TFEU.

⁶³⁴ Article 290, n. 1 TFEU.

⁶³⁵ Craig, Paul, *The Lisbon Treaty: Law, politics, and Treaty reform*, Oxford: Oxford University Press, 2010: p. 449

⁶³⁶ Article 293 to 299 TFEU, as well as specific procedures that are referred to in other articles, like the unanimity for CFSP (article 31, n. 1 TEU) or CSDP (article 46, n.6 TEU) decisions.

⁶³⁷ Bribosia, Hervé, *Les coopérations renforcées : Quel modèle d'intégration différenciée pour l'Union Européenne. Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d'autres coopérations renforcées « prédéterminées » en matière sociale, au sein de l'Espace de liberté, sécurité et justice, et dans l'Union économique et monétaire*, Florence : European University Institute, 2007 : p.63

⁶³⁸ Hervé Bribosia raises the question without giving a definite answer, *Les coopérations renforcées : Quel modèle d'intégration différenciée pour l'Union Européenne. Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d'autres coopérations renforcées « prédéterminées » en matière sociale, au sein*

the format of that hypothetical council will change from one enhanced cooperation to another one.

All of the legislative acts adopted within the enhanced cooperation framework may be subject, as any other legislative act of EU, to judicial review⁶³⁹ by the ECJ⁶⁴⁰. And the same is valid for the decision by the Council on launching an enhanced cooperation⁶⁴¹, as it is also a legislative act, after all Member States are allowed to adopt legislation by this procedure⁶⁴².

6. Financing enhanced cooperation

The principle of “costs lie where they fall”, which was common to ESDP missions, for instance in the case of the operation ALTHEA in Bosnia-Herzegovina, has been recuperated for the enhanced cooperation⁶⁴³. The costs of enhanced cooperation shall be assumed by the Member States participating in the enhanced cooperation⁶⁴⁴, with the exception of administrative costs which shall be the EU institutions responsibility. It seems clear that expenditure resulting from enhanced cooperation cannot be attributed to the EU budget. There is a technical reason for that. Once budgetary lines are mostly defined according to policies, it would be impossible to define an amount for a policy which may not be known by the time of budget discussions, or even if it will happen. Moreover the versatility of enhanced cooperation

de l'Espace de liberté, sécurité et justice, et dans l'Union économique et monétaire, Florence : European University Institute, 2007 : p.133

⁶³⁹ According to articles 263 to 269 TFEU.

⁶⁴⁰ Weatherill, Stephen, *Cases & Materials on EU Law*, Oxford: Oxford University Press, 9th ed., 2010: p. 205-256, specially the several cases used to illustrate the subject, and also Craig, Paul, Búrca, Gráinne de, *EU Law. Text, Cases and Materials*, 4th ed., New York: Oxford University Press, 2008: p.502-575.

⁶⁴¹ In reality, two existing cases on this matter prove this assessment: *Case C-295/11, Action brought by the Italian Republic against Council of the European Union*; *Case C-274/11, Action brought by the Kingdom of Spain against Council of the European Union*.

⁶⁴² Bribosia, Hervé, *Les coopérations renforcées : Quel modèle d'intégration différenciée pour l'Union Européenne. Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d'autres coopérations renforcées « prédéterminées » en matière sociale, au sein de l'Espace de liberté, sécurité et justice, et dans l'Union économique et monétaire*, Florence : European University Institute, 2007 : p. 118-126

⁶⁴³ Article 332 TFEU.

⁶⁴⁴ Philippart, Eric, "Optimising the mechanism for "Enhanced Cooperation" within the EU: Recommendations for the Constitutional Treaty", *Centre for European Policy Studies Briefs*, 2003: 33p.; Andrade, Norberto Nuno Gomes de, "Enhanced Cooperation: the ultimate challenge of managing diversity on Europe. New perspectives on the European integration process", *Intereconomics*, vol. 40, n. 4, 2005: p. 214.

may require several budget lines at the same time, depending on the activities and policies that may be tried to be reached.

Nevertheless, there is a possibility of changing that rule by a unanimous decision by the Council after consulting with the European Parliament. Unlike it happens with the ESDP missions⁶⁴⁵, it is not referred that it shall be managed in accordance with the procedures and rules applicable to the general budget of the European Union, which is quite clear from the fact that the European Parliament is only consulted, nothing is said on the binding effects of that consultation, which means that it is not probably the case⁶⁴⁶. However, even with the end of the division of obligatory and non-obligatory expenses, which were subject to different procedures, it remains to be seen what will be the role of the European Parliament in the new context of enhanced cooperation expenses, if any besides the consultation.

The Treaties refer to the costs of implementing an enhanced cooperation and not only to the launching and existence of the enhanced cooperation *per se*, as this surely does not involve costs that cannot be borne by the EU general budget, besides they are already foreseen in the Treaties when administrative costs are referred.

It is important to underline here that the provisions regarding enhanced cooperation, both in TFEU or TEU, when referring to the financing of enhanced cooperation do not refer specifically to the financing to the acts adopted in that context. It is admissible, nevertheless, that the rule of “costs lie where they fall” shall be kept, as it would be strange to impose in the Treaty a provision of a financial obligation to Member States that may not participate in the implementation of the act. When we mention implementation of the act we refer to the procedures intended to execute the said act, and not the exactly the legal implementation of the act. All Member States that have decided to constitute the enhanced cooperation are equally financially responsible. Nothing is said on the allocation of expenses among them, but one of two criteria should most probably be considered. One possibility would be to consider that “costs lie where they fall”, and therefore each participant knows the financial consequences of

⁶⁴⁵ Council Joint Action 2004/569/CFSP, of 12 July 2004, on the mandate of the European Union Special Representative in Bosnia and Herzegovina and repealing Council Joint Action 2002/211/CFSP, in particular article 6, n.2

⁶⁴⁶ On the budget procedures, in particular the role of the Parliament, vd. Paul Craig’s chapter in *The Lisbon Treaty. EU constitutionalism without a Constitutional Treaty?*, edited by Stefan Griller and Jacques Ziller, New York-Vienna: Springer, 2008: p. 129-131

participating in a given act; the other possibility would be to use the allocation scheme of the EU budget, adjusted to the effective members of the enhanced cooperation.

7. The adopted enhanced cooperation cases

To illustrate what has been discussed above, an analysis of the enhanced cooperation adopted so far will follow in order to recognise the composing elements and, if the case may be, some possible ulterior problems resulting from the enhanced cooperation adopted.

7.1. Enhanced cooperation in the area of the law applicable to divorce and legal separation⁶⁴⁷

The decision that has been taken on 12th July 2010 concludes a process that started in 2006, having the request been presented in 2008. It is interesting to note that one Member State (Greece) withdrew its request, bringing the initial number of 10 States (Austria, Bulgaria, France, Greece, Hungary, Italy, Luxemburg, Romania, Slovakia and Spain) to the minimum 9 Member States required by the Treaties, but other Member States (Germany, Belgium, Malta, Latvia, Portugal and Lithuania) have joined in a later state and others can still do it. All these situations are foreseen in to the Treaties. In a nutshell, this decision intends to allow European citizens (of the Member States concerned) to be able to choose which State's jurisdiction should apply to their divorce.

As a regulation could not be approved, an enhanced cooperation was launched in order to allow the adoption of legislative measures regarding conflict-of-law rules in order to determine which substantive law applies to an international divorce that has connections with more than one legal order, whether for the nationality of the citizens involved or the place of residence or the legal order that might have been defined upon the marriage. This is a question that will have to be addressed at some stage. This

⁶⁴⁷ Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

decision is a mark in EU law history, as it is the first time that the enhanced mechanism is applied in full according to the rules and provisions of the Treaties, although at its origine enhanced cooperation was not foreseen for private international law issues, but to facilitate the internal market and to be used for economic affairs⁶⁴⁸.

The presentation of the proposal of a decision by the Commission to the Council⁶⁴⁹ for approval shows it had been accepted by the former. The other formality – the consent by the European Parliament – was also given⁶⁵⁰. In its proposal, the Commission recognises that all the conditions foreseen in the Treaties are met⁶⁵¹. It should also be noted that Denmark, Poland and Sweden abstain on voting the enhanced cooperation decision, by doing so they allow it to continue without further procedures⁶⁵². They could abstain because only a majority voting was required.

This enhanced cooperation includes more than the minimum number of nine States required by the Treaty to be launched⁶⁵³. It also refers to the “last resort” requirement⁶⁵⁴. In reality it clearly reiterates it, by referring that the request had been presented two years before with no results⁶⁵⁵ (not to mention that at the origin there was a regulation proposal from 2006). Both the Commission, who made the proposal, and the Council, that approved the decision agreed that, at least in this case, two years was enough to try to reach a decision valid for all Member States. The decision on the whole seems to be directed to the approval of the preceding Commission proposal for a Regulation amending Regulation No. 2201/2003 as regards jurisdictional rules and introducing rules concerning applicable law in matrimonial matters (the broken off “Rome III” Regulation), which could not be approved by the Council.

⁶⁴⁸ Boele-Woelki, Katharina, "To Be, or Not to Be: The Enhanced Cooperation in International Divorce Law within the European Union", *Victoria University of Wellington Law Review*, vol. 43, 2008: p. 792.

⁶⁴⁹ “Having regard to the proposal from the European Commission”, preamble of the Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

⁶⁵⁰ “ Having regard to the consent of the European Parliament”, preamble of the Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

⁶⁵¹ Peers, Steve, “Divorce, European Style: The First Authorization of Enhanced Cooperation”, *European Constitutional Law Review*, vol. 6, n. 3, 2010: p. 348.

⁶⁵² Peers, Steve, “Divorce, European Style: The First Authorization of Enhanced Cooperation”, *European Constitutional Law Review*, vol. 6, n. 3, 2010: p. 347.

⁶⁵³ 2nd paragraph and n.5 of the Preamble of the Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

⁶⁵⁴ N. 4 , n.7 and n.9 of the Preamble of the Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

⁶⁵⁵ N. 9 of the Preamble of the Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

It also refers to the procedural articles on enhanced cooperation, namely the provisions of articles 326 and 329⁶⁵⁶. It is particularly evident the concern by the Council on scrupulously respecting the wording of the Treaties, by following all the articles regarding enhanced cooperation, even if just to repeat them without any comment or presentation of sustaining arguments, after all this is the first enhanced cooperation and any legal failure might jeopardise the use of the mechanism forever.

Article 81 TFEU refers to judicial cooperation in civil matters, the decision is taken in the area of the law applicable to divorce and legal separation, clearly civil matters. Despite the specific simplified procedure for enhanced cooperation in AFSJ, it was not used once the process started before the Treaty of Lisbon entered into force. A question that must be considered is what the competences of the States and of the EU in civil matters are, especially after the creation of AFSJ. Other situations resulting from divorce, namely family law, are probably excluded from the scope of the enhanced cooperation⁶⁵⁷.

According to the decision of the Council, the enhanced cooperation that has been decided does not undermine the internal market or economic, social and territorial cohesion⁶⁵⁸ and it even goes further by laying down the possibility of the enhanced cooperation participate in the development of the internal market⁶⁵⁹.

The enhanced cooperation will respect the rights and obligations of Member States that do not participate in and it does not affect any pre-existing *acquis*⁶⁶⁰. It remains to be seen how this enhanced cooperation will handle the situations of litigious divorce and not amicable ones, as there may not even be an agreement on which legal order to use.

⁶⁵⁶ N. 7 of the Preamble of the Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

⁶⁵⁷ It “does not comprise conflict-of-law rules for the property consequences of divorce⁸. Also, the subject is not the substantive law on divorce, i.e. grounds for divorce or the procedure to apply for divorce”, *Proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation*, COM(2010) 104 final, 24 March 2010, n.15.

⁶⁵⁸ N. 11 of the Preamble of the Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

⁶⁵⁹ N.1 of the Preamble of the Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU). Maybe because this reference Katharina Boele-Woelki almost restricts the goals of the European Union to the internal market, “To Be, or Not to Be: The Enhanced Cooperation in International Divorce Law within the European Union”, *Victoria University of Wellington Law Review*, vol. 43, 2008: p. 779-792.

⁶⁶⁰ N.12 and 13 of the Preamble of the Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

Finally, the openness granted by the Treaties to ulterior memberships is also accommodated in the Decision⁶⁶¹.

The single article of the Decision does more than just repeating the wording of article 20, n. 1 TEU, once it imposes that “establish enhanced cooperation between themselves in the area of the law applicable to divorce and legal separation by applying the relevant provisions of the Treaties”, which the TEU has considered as a possibility only⁶⁶², but it does not refer to the use of the institutions. The use in the TEU of the word “may” refers to both things otherwise instead of the word “and”, the legislators would have use a full stop⁶⁶³.

The Decision, following upon the Treaties, does not establish any conditions for participation in the enhanced cooperation, neither at its launching, nor for later participation, so it should be assumed that the Commission, when making its evaluation of a further request, will have little to control, except the transposition of the *acquis* of the enhanced cooperation, but surely a Member State would not request to participate without doing it, as it is a binding rule from the Treaties.

The assessment of “relevant provisions of the Treaties” is extremely vague, probably to allow a high level of flexibility to the Member States. We would recall that this is an expression in the general article on enhanced cooperation in TEU, but it could easily have been better defined by referring, for instance to the scope foreseen in article 81 TFEU. Reproducing the Treaties is not enough, however it is easier. The idea of having a decision on enhanced cooperation is also to fix some boundaries for its implementation. The Treaties do not take into account any particular case, they have to be general, while the enhanced cooperation is indeed vested with a very determined object and therefore it could indeed be on the benefit of the Member States involved and of the Union to specify better which are provisions intended to be used and in what terms that use will be pursued.

⁶⁶¹ N.15 of the Preamble of the Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU).

⁶⁶² Vd. footnote 63 above.

⁶⁶³ Article 20, n. 1, TEU “Member States which wish to establish enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union. Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union

The document approved by the council authorising enhanced cooperation in the area of the law applicable to divorce and legal separation says nothing on what kind of acts the Member States can adopt regarding the enhanced cooperation, and it was not expected that it would.

This enhance cooperation may be seen as an integrative form of impeding harmonisation, for the simple fact that if there is mutual recognition, there is no need to harmonise once no conflict exists⁶⁶⁴. Indeed there is no harmonisation of laws, but there is an harmonisation of criteria of which law to apply. By imposing mutual recognition it strengthens the integration process, which is a condition for enhanced cooperation according to article 20, n. 2 TEU⁶⁶⁵.

7.2. Enhanced cooperation in the area of the creation of unitary patent protection⁶⁶⁶

The idea of a common patent protection was first raised in 1975, but did not lead to any concrete action. The fact that the TFEU, in its article 118, includes a clause creating the European intellectual property rights facilitates the process for a unitary patent system, even if the article has so far been scarcely used as a legal basis for matters regarding patent.

The enhanced cooperation creating a unitary patent goes behind what the European Patent Office has been doing since 1973. While the European Patent Office grants European patents, the fact is that they have then to be registered in all national laws, the granting of the patent is not in question, but without this registry, it is not possible to argue in its defense⁶⁶⁷. The enhanced cooperation intends to make the EU registry equally valid in all Member States (at least in those that participate in the enhanced cooperation).

⁶⁶⁴ Maduro, Luis Miguel Poiares Pessoa, "So close and yet so far: the paradoxes of mutual recognition", *Journal of European Public Policy*, vol. 14, n.5, 2007: p. 816.

⁶⁶⁵ Fiorini, Aude, "Harmonizing the law applicable to divorce and legal separation – enhanced cooperation as the way forward?", *International and Comparative Law Quarterly*, vol. 59, n. 4, 2010: p. 1149.

⁶⁶⁶ Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection of 10 March 2011, (2011/167/EU)

⁶⁶⁷ Cantore, Carlo Maria, "We're one, but we're not the same: Enhanced Cooperation and the tension between unity and asymmetry in the EU", *Perspectives on Federalism*, vol. 3, n. 3, 2011: p.12.

Besides the act of registration of a patent, the creation of unitary patent protection where the translations of the patents⁶⁶⁸ could be assured and that a special court would be created to control the disputes that may arise regarding the subject of patents were also matters that were taken into account. Nevertheless, neither one, nor the other has been included in the decision authorising the enhanced cooperation. The decision says that it is supposed to allow an enhanced cooperation for the creation of unitary patent protection. However, both the Commission and the European Parliament reflected in their positions that at least a regulation regarding the translations would be adopted. The decision does not determine the number and the kind of acts that shall be adopted by the Member States participating in the decision, nor could it.

As for the hypothetical patent Court, in one opinion, the ECJ considered that the creation of a unified patent litigation system is not compatible with the Treaties and therefore it was not possible⁶⁶⁹. This opinion was issued before the adoption of the regulation. Regarding the question of translations, it is not excluded, but the Member States that decided to move forward had already accepted the initial proposal by the Commission regarding the language question, much before the last *avis*⁶⁷⁰ so it is not expectable that the problem may arise again between the 25 Member States that decided to go further.

In its structure, the decision on enhanced cooperation in the area of the creation of unitary patent protection is not very different from the decision on enhanced cooperation in the area of the law applicable to divorce and legal separation. The former has one paragraph more in the preamble (sixteen instead of fifteen, in reality a new number seven).

This decision refers to all the needed articles of enhanced cooperation, so that no legal emptiness can be found later on, which was the same with the decision the area of the law applicable to divorce and legal separation.

The reference in number 1 and 12 make it clear what kind of competence – a shared competence – is at stake in this enhanced cooperation. Regarding paragraph 12, it should be noted that not only the competence to act is sustained, but also the policy

⁶⁶⁸ Fernández Rozas, José Carlos, “Hacia la patente única por el cauce de la cooperación reforzada”, *La Ley*, Año XXXII, n. 7558, 2011: p.2

⁶⁶⁹ *Opinion 1/09 of the Court (Full Court)*, 8 March 2011

⁶⁷⁰ *Proposal for a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection*, COM (2010) 790 final, 14.12.2010

the act is intended to, thus making a double legal guarantee for the enhanced cooperation.

Although paragraph 13 states that this enhanced cooperation does not distort competition between Member States, as it has too according to the Treaty⁶⁷¹, the fact is that it might do so, but it was an option from the Member States to exclude themselves to participate in the mechanism, even if it is open to all Member States⁶⁷², moreover some harmonisation is better than none⁶⁷³. The question arises, which should prevail? The exclusion of the mechanism, or the preconditions to the approval of the mechanism, after all the existing *acquis* is binding to all States. It remains to be seen how in practice this will really work.

Unlike the previous enhanced cooperation, this decision includes a provision on the conditions of participation, being the ones mentioned in the Decision only those referred in the Treaties and therefore already binding. It is of particular importance the reference to the last resort character⁶⁷⁴.

The proposal by the Commission⁶⁷⁵ refers once to approximation of laws and once to harmonisation, which, as it says, is the correct expression according to article 4 TFEU. The use of the term approximation may suggest some legal confusion, which should be avoided once approximation and harmonisation are not exactly the same.

Although the enhanced cooperation on the unitary patent has been adopted, it is still considered by some authors not to respect the treaties for creating a division among Member States without a clear formulation of its goals and without demonstrating that

⁶⁷¹ “Any enhanced cooperation shall comply with the Treaties and Union law. Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them”, Article 326 TFEU.

⁶⁷² Lamping, Matthias, “Enhanced Cooperation - A Proper Approach to Market Integration in the Field of Unitary Patent Protection?”, *International Review of Intellectual Property and Competition Law*, No. 8, 2011: p. 27

⁶⁷³ Lamping, Matthias, “Enhanced Cooperation - A Proper Approach to Market Integration in the Field of Unitary Patent Protection?”, *International Review of Intellectual Property and Competition Law*, No. 8, 2011: p. 21.

⁶⁷⁴ Lamping, Matthias, “Enhanced Cooperation - A Proper Approach to Market Integration in the Field of Unitary Patent Protection?”, *International Review of Intellectual Property and Competition Law*, No. 8, 2011: p.15

⁶⁷⁵ *Proposal for a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection*, COM (2010) 790 final, 14.12.2010

the system now created will be more helpful for the accomplishment of the Treaties goals, namely an “ever closer Union”⁶⁷⁶.

There have already been two processes moved by Italy and Spain to contest the enhanced cooperation on a unitary patent. Both cases consider that article 20 TEU establishing enhanced cooperation regarding a shared competence and not a EU exclusive competence has been violated⁶⁷⁷, as they both agree that it deals with an exclusive competence and for that reason the correct legal basis should be article 118 TFEU. Moreover both parties argue that the decision disrupts the internal market and the principle of non-discrimination, and therefore it violates article 326 TFEU which guarantees that enhanced cooperation must respect EU treaties and EU law⁶⁷⁸. Finally, Spain also argues that the decision does not respect the rights of the non-participating states, and that goes against article 327 TFEU⁶⁷⁹. The question raised by Spain and Italy seem to confuse the legal basis of the enhanced cooperation act and the policy it is intended to cover.

The refusal by the ECJ to accept the creation of a Patent Court also complicates the effectiveness of the enhanced cooperation. The problem is due to the fact that the EU patent law fights with two different jurisdictions, once the EU law and therefore the ECJ which has the competence to pronounce decisions in the subject⁶⁸⁰.

On the other hand, the market has generally considered that ECJ decisions regarding trademarks – and it is admissible the same will happen with patents – to be unsatisfactory. There seems to be no doubts that only the ECJ has jurisdiction over the interpretation of EU law (but not the single one over its implementation). The patent court would have the competence to admit non EU Member States parties and express itself over EU law, this contradicts the dispositions of the Treaties, in particular article 19, n. 3 TUE. Moreover, the patent court is an organisation outside EU legal order and its jurisdiction⁶⁸¹. The patent court could eventually exercise its jurisdiction over the

⁶⁷⁶ Lamping, Matthias, “Enhanced Cooperation - A Proper Approach to Market Integration in the Field of Unitary Patent Protection?”, *International Review of Intellectual Property and Competition Law*, No. 8, 2011: p. 35.

⁶⁷⁷ *Action brought by the Kingdom of Spain against Council of the European Union*, para 3.1.; *Case C-295/11, Action brought by the Italian Republic against Council of the European Union. Case C-274/11.*

⁶⁷⁸ *Action brought by the Kingdom of Spain against Council of the European Union*, para 3.2.; *Case C-295/11, Action brought by the Italian Republic against Council of the European Union. Case C-274/11.*

⁶⁷⁹ *Action brought by the Kingdom of Spain against Council of the European Union*, para 3.3.

⁶⁸⁰ *Opinion 1/09 of the Court (Full Court)*, 8 March 2011: 18p.

⁶⁸¹ *Opinion 1/09 of the Court (Full Court)*, 8 March 2011: para. 64 and 71.

regulation on unitary patent, but that inevitably it will also interpret EU law. Or, if that decision would be a breach or infringement of EU law, its jurisdiction, because it is fixed outside the EU system, could not be liable against any court. As the ECJ clearly points out, this court is a very different one from, for instance, the Benelux court, fully within the EU system⁶⁸².

It is relevant to note that despite the arguments forwarded by Member States the enhanced cooperation regarding the unitary patent is not in itself a problem, nor the way it has been adopted, the problems that have arisen are of substance of the matter and involve reasons that do not have with enhanced cooperation itself., even if conveniently Spain and Italy argued that it could not set as unitary patent titles is an exclusive competence according to article 118, n. 1 TFEU. Accepting this reasoning it would mean that patent should only be considered as competition rules are concerned, and that is not the case, therefore, enhanced cooperation as far as patent is concern should be evaluated against article 4, n. 2 al.a) as a shared competence. Regarding the argument that it was not used as a last resort, if it is true there is no definition of reasonable period⁶⁸³, nevertheless at a certain moment a decision must be taken⁶⁸⁴, and in the the case of the EU unitary patent system, a long period had passed since the beginning of the discussions and different decision had already been taken by the Member States on this domain.

⁶⁸² *Opinion 1/09 of the Court (Full Court)*, 8 March 2011: para. 82.

⁶⁸³ “The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union”, TFEU, article 20, n. 2

⁶⁸⁴ Peers, Steve, “Divorce, European Style: The First Authorization of Enhanced Cooperation”, *European Constitutional Law Review*, vol. 6, n. 3, 2010: p. 348.

Chapter VI

Possible applications of Enhanced Cooperation according to EU law: a versatile mechanism

Chapter VI - Possible applications of Enhanced Cooperation according to EU law: a versatile mechanism

1. The use of enhanced cooperation

Enhanced cooperation, as foreseen in the Treaties, has in reality only been applied twice: in the area of the law applicable to divorce and legal separation⁶⁸⁵ and in the area of the creation of unitary patent protection⁶⁸⁶, even if scholarship identifies similar forms of cooperation still before enhanced cooperation has been formally created⁶⁸⁷, such as Schengen⁶⁸⁸ or, even after its creation but that did not opt for its cooperation model as foreseen in the Treaties, like the Euro Group⁶⁸⁹. The fact is that a special form of cooperation, independently of the format or nomenclature chosen, has been on the verge to be used within the EU area, with a view to an ever closer Union.

Although enhanced cooperation is a very clear mechanism with a specific legal basis and with procedures that have been well defined, the fact is that the EU is not always very accurate in using the concept⁶⁹⁰ in all of its documents. It should be assumed that the use of the expression enhanced cooperation necessarily reflects the meaning and scope adopted in the Treaties, but it recurrently is just the common use of the two words combined, without any specific legal or binding meaning or nature. It is sometimes confusing to assess the kind of cooperation EU is addressing in its policies, it could be reasonable to avoid using concepts that have their own definition according to the Treaties in different or imprecise contexts. By doing so, the enhanced cooperation formula as foreseen in the Treaties would acquire a higher status on the legal discourse.

⁶⁸⁵ *Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation of 12 July 2010, (2010/405/EU)*, OJEU L189, 22.07.2010: p. 12-13.

⁶⁸⁶ *Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection of 10 March 2011, (2011/167/EU)*, OJEU L 76, 22.03.2011: p.53-55.

⁶⁸⁷ *Constitutional Change in the EU: From Uniformity to Flexibility?*, edited by Joanne Scott and Gráinne de Búrca, 2nd. ed., Oxford: Hart Publishing, 2001: 404p.

⁶⁸⁸ Meltzer, Daniel J., "Member State Liability in Europe and the United States", Harvard Law School - Research Paper No. 127, *International Journal of Constitutional Law*, vol. 4, 2006: p. 51.

⁶⁸⁹ Búrca, Gráinne de, "If at First You Don't Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change", *Fordham International Law Journal*, vol. 33, n. 5, 2011: p. 1479, and in particular footnote n. 28.

⁶⁹⁰ Take for instance the joint declaration for enhanced cooperation on energy between the European Union and the Government of India on 10 February 2012.

It must be restated that enhanced cooperation is not a policy but just a mechanism or a legal instrument that allows an action to take place in a different framework to the general one. This distinction is fundamental. The non-use of enhanced cooperation may have found its false justification on the fact that no new policy was intended to be created. This is a mistake; suffice it to say that enhanced cooperation is applicable to all policies (except defence, for which there is a special form, the permanent structured cooperation⁶⁹¹), but it is not in itself a policy, but just a mechanism with rules and a set of procedures for its implementation.

Almost all policy areas are suitable for enhanced cooperation. Some examples will be identified, but many others could be added in the areas of immigration, economic, social and territorial cohesion, development cooperation and humanitarian aid, internal market, social policy research, technological development, space, air-traffic market, energy, among others⁶⁹². The goal here is just to present some examples that may attest the diversity permitted by enhanced cooperation, there is no intention of being exhaustive, especially because it is a hypothetical exercise and therefore further examples could be generously added⁶⁹³.

2. The possible use regarding energy

Jacques Delors has suggested the use of enhanced cooperation in the field of energy⁶⁹⁴. It should be a step to an energy community. It must, however, be recognised that there already exists an Energy Community which follows on EU steps, even if with some differences⁶⁹⁵. The possibility of enhanced cooperation as a means to achieve that bigger goal was presented as a legal alternative to the lack of integration and harmonisation in this domain. This option would allow States that want to move

⁶⁹¹ Biscop, Sven, *Permanent structured cooperation: Building effective European armed forces*, 12th EUSA Biennial Conference, Boston, 3-5 March 2011, p. 5, 7-9, 13, 17-18.

⁶⁹² Andrade, Norberto Nuno Gomes de, "Enhanced Cooperation: the ultimate challenge of managing diversity on Europe. New perspectives on the European integration process", *Intereconomics*, vol. 40, n. 4, 2005: p. 212.

⁶⁹³ Racine, Bruno, Buffotot, Patrice, Canivet, Guy, Pisani-Ferry, Jean, *Perspectives de la coopération renforcée dans l'Union Européenne*, Paris: La Documentation française 2004: p. 243-246.

⁶⁹⁴ Andoura, Sami, Hancher, Leigh, Woude, Marc Van Der, *Towards a European Energy Community: A Policy Proposal*, Paris: Notre Europe, 2010: 131p.

⁶⁹⁵ *Fifty Years of European Integration: Foundations and Perspectives*, edited by Andrea Ott and Ellen Vos, The Hague: T.M.C. Asser Press, 2009: p. 120.

forward in the energy domain to do it without putting into question the EU, the Member States or EU law for that matter.

The substantive and legally binding arguments put forward to justify the enhanced cooperation in the energy field are those mentioned in article 194 TFEU⁶⁹⁶, the novelty is the suggestion to recur to enhanced cooperation in order to make it effective, or to implement it. As energy is referred in article 4 TFEU as well, due to the fact that it is a shared competence⁶⁹⁷, it is not therefore excluded from the possibility of enhanced cooperation application, quite on the contrary⁶⁹⁸.

From the historical point of view, the community envisaged by Jacques Delors is a follow-up of Euratom and ECSC, but by being so, it also fulfils the mandatory criteria of enhanced cooperation and aligns the initiative with the main purposes of the Treaties as far as European integration and solidarity are concerned.

To ensure a common response to a common problem caused by the lack of capability to develop a real energy policy or to affirm its credibility and legitimacy⁶⁹⁹, a legal instrument is needed to ensure a possible implementation of a common energy policy, even if not common to all EU Member States, at least for those that would like to move ahead. Within the existing treaties, the best alternative is recognised to be the option offered by article 20 TEU on enhanced cooperation⁷⁰⁰.

Unlike official EU texts that tend to use indiscriminately enhanced cooperation, the proposal for an energy community, as presented by *Notre Europe* and Jacques Delors, clearly distinguishes enhanced cooperation from strengthened cooperation in a clear effort to separate a formal legal mechanism as foreseen in the treaties, from a

⁶⁹⁶ “1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;
(b) ensure security of energy supply in the Union;
(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
(d) promote the interconnection of energy networks.”

⁶⁹⁷ Craig, Paul, *The Lisbon Treaty: Law, politics, and Treaty reform*, Oxford: Oxford University Press, 2010: p.167-173, but also 173-176.

⁶⁹⁸ *Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation*, edited by José Maria Beneyto, Madrid: CEU Ediciones, 2009: p. 23-36.

⁶⁹⁹ Andoura, Sami, Hancher, Leigh, Woude, Marc Van Der, *Towards a European Energy Community: A Policy Proposal*, Paris: Notre Europe, 2010: p. v, vii.

⁷⁰⁰ Andoura, Sami, Hancher, Leigh, Woude, Marc Van Der, *Towards a European Energy Community: A Policy Proposal*, Paris: Notre Europe, 2010: p. 100.

model of cooperation which may be stronger but it is not a full fledged legal instrument⁷⁰¹.

This particular distinction is very significant once it translates the perfect notion that, for EU law, enhanced cooperation is an autonomous and clearly legal mechanism, with its scope and application ruled in and by the Treaties with a goal to answer the gradually larger diversity within EU, namely after the successive enlargements, and to promote integration

3. The environment – a particular area for implementation of flexibility

The number of legislation procedures pending in the environmental field is very high and the enhanced cooperation could be a way out of that impasse, especially because, so far, the solution that has been adopted has been the granting of exemptions of transition periods, often extended⁷⁰², which means that differentiation has been adopted but in the negative form, while enhanced cooperation could be a positive form of differentiation, i.e., instead of not doing, States could do more⁷⁰³ if they want.

If it is true that States that are not exempted are in reality already doing more than those ones, an enhanced cooperation mechanism could most probably incentivise all States to go further and faster and States would not need to necessarily participate in all enhanced cooperation regarding the different possible features. It is unthinkable, even if desirable, a single enhanced cooperation on all environmental issues.

In the case of environmental policy the potential fields of application of enhanced cooperation are mostly product and process standards, as well as regulatory principles⁷⁰⁴. However, it should be borne in mind that although this field constitutes a possibility, it has to take into account the rules regarding the internal market like any

⁷⁰¹ Andoura, Sami, Hancher, Leigh, Woude, Marc Van Der, *Towards a European Energy Community: A Policy Proposal*, Paris: Notre Europe, 2010: p. 111.

⁷⁰² Bär, Stefani, Gehring, Thomas, Homeyer, Ingmar von, Kraemer, R. Andreas, Mazurek, Anne-Gabrielle, Klasing, Anneke, Tarasofsky, Richard G., "Closer Cooperation, a new instrument for Environmental Policy?", *European Integration on line papers (EIoP)*, vol. 14, n. 13, 2000: p.3.

⁷⁰³ Stettner, Rupert, "Flexibilidad en el Derecho Europeo. Complemento autónomo del Tratado y cooperación reforzada", *Revista de Derecho Comunitario Europeo*, n. 3, 2005: p. 224.

⁷⁰⁴ Bär, Stefani, Gehring, Thomas, Homeyer, Ingmar von, Kraemer, R. Andreas, Mazurek, Anne-Gabrielle, Klasing, Anneke, Tarasofsky, Richard G., "Closer Cooperation, a new instrument for Environmental Policy?", *European Integration on line papers (EIoP)*, vol. 14, n. 13, 2000: p.20.

other enhanced cooperation. It also must be underline that the environment, in particular its protection, is a clear priority of EU⁷⁰⁵, as it is referred in the Preamble and in articles 3, 21 TEU.

Furthermore, the environment is recognised as a shared competence in article 4 TEU⁷⁰⁶, thus a possible area for enhanced cooperation. These are two basic necessary elements, though not sufficient, for the adoption of enhanced cooperation.

Environment protection is an horizontal clause to all EU policies (article 11 TFEU), and what is at stake with the energy tax it is in reality the environment protection, even if it can be argued that somehow it could be included in the wording of article 194 TFEU on energy. The horizontal application of the environment preoccupation is also referred to in article 37 of the Charter of Fundamental Rights. There is though no doubt that the environment concern is an EU major goal. Because of its horizontal effect, we tend to consider that it also has direct applicability⁷⁰⁷.

4. The energy tax

An energy tax has been presented for years as a possible test case for enhanced cooperation, although the tax is intended to products, the fact is that it is in line with the logic of the regulatory process of the internal market and the legal regulatory process. The proposal dates back to 2000, but it keeps its relevance and opportunity. The energy tax is just one example of possible enhanced cooperation within the environmental framework. This is a particularly interesting initiative, taking into account that taxation has always been one of the areas where Member States have refused to give in their sovereignty, but the proposal dates back to the Nice Treaty times.

⁷⁰⁵ In reality, the ECJ has considered it mandatory, *Case 302/86, Commission of the European Communities supported by United Kingdom of Great Britain and Northern Ireland v Kingdom of Denmark*, European Court Reports 1988, 20.09.1988: p. 4627-4633, para.9; Reinisch, August, *Essential Questions in EU Law*. Cambridge: Cambridge University Press, 2009: p. 201

⁷⁰⁶ Piris, Jean-Claude, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p. 75.

⁷⁰⁷ As it happened in *Case C-43/75, Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, European Court Reports 1976, 08.04.1976: p. 456-482, although regarding a different article, but with horizontal effect. *The past and future of EU law. The classics of EU law revisited on the 50th anniversary of the Rome Treaty*, edited by Luis Miguel Poiares Pessoa Maduro and Loïc Azoulai, Oxford and Portland: Hart Publishing, 2010: p. 256, 271.

The combination of articles 114 and 191 TFEU should help to clarify up to what level can that kind of cooperation, and in particular the EU action as a whole or part of it, take place. It is first needed to establish the competence framework, as well as the area of application. Although article 191 TFEU speaks about harmonization, the fact is that article 114 TFEU excludes the fiscal provisions, and therefore the introduction of an energy tax veiled with an environment argumentation would have to be carefully weighted.

However, it should be made clear there is a huge difference between harmonisation of national legislation and the creation of an EU law from the start⁷⁰⁸. In the case of the energy tax there would be no harmonisation – which is understood as the initiative to make compatible different legal orders – but only a common decision for a unique legal instrument, which taken to the limit could even be envisaged as a EU own resource. Article 114 TFEU only prohibits initiatives towards harmonisation, but not EU common initiatives to common policies especially when they are not intended to harmonise different regimes but to create a new single one.

The fact that article 191 TFEU now includes the combat to climate change⁷⁰⁹ may suggest that the idea raised beforehand on an energy tax could now be easily applied, but still respecting the intention to keep the question on an energy tax connected to environment and not to the energy field, taken as an economic sector. The tax is one, but not the only possible use of enhanced cooperation within the environmental arena⁷¹⁰, from the protection of species to regulations on dams' constructions, from energy efficiency to forestry; all are areas where enhanced cooperation could be envisaged.

Contrary to what this option for differentiated integration procedures may suggest, that a two speed Europe might unwittingly be developed, it must be clearly reiterated that it is not at all evident that Member States participating in one enhanced cooperation form would inevitably participate in all of them⁷¹¹. This means that EU

⁷⁰⁸ Craig, Paul, Búrca, Gráinne de, *EU Law. Text, Cases and Materials*, 4th ed., New York: Oxford University Press, 2008: p. 665.

⁷⁰⁹ Craig, Paul, *The Lisbon Treaty: Law, politics, and Treaty reform*, Oxford: Oxford University Press, 2010: p.326.

⁷¹⁰ Ahrens, Joachim, Ohr, Renate, Zeddies, Götz, "Enhanced Cooperation in an Enlarged European Union", *Georg-August-Universität Göttingen - Discussion Paper*, vol. 53, 2006: p. 10-14.

⁷¹¹ Wohlgemuth, Michael, Brandi, Clara, "Strategies of Flexible Integration and Enlargement of the European Union. A Club-Theoretical and Constitutional Economics Perspective", *Freiburg Discussion*

integration speed would not be negatively affected, but instead just pushed forward from different sides⁷¹².

5. Enhanced cooperation and technical rules

With a view to a strategy that would replace the Lisbon Strategy, the Swedish Government in 2009 presented a specific proposal as far as technical rules are concerned with the aim to promote increased notification according to the Technical Barriers to Trade agreement, to facilitate early information on new regulations in this domain, to identify new sectors for EU harmonisation⁷¹³ by using a new regulatory technique, to encourage the effort to increase the identity between European and international standards⁷¹⁴. The ultimate goal is to increase openness and productivity in Europe⁷¹⁵, and to promote better ruling for the internal market.

The question of barriers to trade⁷¹⁶ has been dealt with from the EC early days by the ECJ (by then Court of Justice of the European Communities)⁷¹⁷. The prohibition of making use of charges equivalent to customs duties or equivalent measures to restriction to imports by imposing quantities restraints or technical barriers⁷¹⁸ has been a constant in the EU history and States have made several attempts to circumvent this proscription. The enhanced cooperation could be a possibility to harmonize legislation between Member States, thus facilitating a further adoption of technical rules at EU level. The use of enhanced cooperation would start a process with a view to a larger

papers on Constitutional Economics, n. 6, Freiburg: Institut für Allgemeine Wirtschaftsforschung - Abteilung für Wirtschaftspolitik - Albert-Ludwigs Universität Freiburg i. Br., 2007: p. 11-12.

⁷¹² Cantore, Carlo Maria, "We're one, but we're not the same: Enhanced Cooperation and the tension between unity and asymmetry in the EU", *Perspectives on Federalism*, vol. 3, n. 3, 2011: p. 14.

⁷¹³ Craig, Paul, *The Lisbon Treaty: Law, politics, and Treaty reform*, Oxford: Oxford University Press, 2010: p. 178, especially on the role of the ECJ in the appreciation of the harmonisation compatibility with article 2, n.5 TFEU.

⁷¹⁴ Andersson, Fredrik, Arvíus, Christer, Haase, Peggy, Renman, Anne, *Measures for Enhanced Co-Operation in the Area of Technical Rules*, Stockholm: National Board of Trade, 2009: p.2.

⁷¹⁵ Andersson, Fredrik, Arvíus, Christer, Haase, Peggy, Renman, Anne, *Measures for Enhanced Co-Operation in the Area of Technical Rules*, Stockholm: National Board of Trade, 2009: p.5.

⁷¹⁶ Campos, João Mota de, *Direito Comunitário*. Vol. III. *O ordenamento económico da União Europeia - a União Económica e Monetária*, Lisbon: Fundação Calouste Gulbenkian, 1997: 1092p.

⁷¹⁷ Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, European Court Reports 1979, 20.02.1979: p.650- 665; Silva, Miguel Moura e, *Direito da União Europeia. Jurisprudência Essencial*, Lisbon: Associação Académica da Faculdade de Direito de Lisboa, 2007: p.698-702.

⁷¹⁸ Craig, Paul, Búrca, Gráinne de, *EU Law. Text, Cases and Materials*, 4th ed., New York: Oxford University Press, 2008: p. 211.

inclusion without depriving Member States of their competences to decide to proceed or not in that specific area.

This proposal fulfils the criteria of article 20 TEU, once it does not deal with exclusive competences of the EU, but instead with shared competences, once it does not include competition rules. It refers to the internal market, as it is mentioned in article 4 TFEU. The aim is not to define any competition rule or to interfere as far as that policy is concerned, but instead to contribute to strengthen harmonisation within the internal market. Moreover, the enhanced cooperation decisions may well be later adopted as general *acquis* by all Member States with the advantage of benefitting from a trial phase by some Member States.

As far as enhanced cooperation is concerned, the approach of this proposal is somehow unusual. Although it does not seek to suggest a specific enhanced cooperation on the domain concern, as it is foreseen in the Treaties, the fact is that it eventually concludes that the EU approach to that specific subject-matter is in reality a higher level of cooperation⁷¹⁹.

The proposal by the Swedish Government refers to a domain where enhanced cooperation is virtually possible, without prejudging any specific area for its implementation, only quoting the aim of contributing for the development of the internal market.

Moreover, it must be said, there is jurisprudence from the ECJ that limits the freedom of Member States as far as technical barriers to trade are concerned⁷²⁰ and the Treaties, although not mentioning technical barriers to trade as such, already include some limitations of the sort, in particular articles 34 to 36 and 114 TFEU. These limitations both defined by jurisprudence and included in the Treaties are intended to defend the realisation of the internal market⁷²¹. The option for enhanced cooperation as

⁷¹⁹ Andersson, Fredrik, Arvíus, Christer, Haase, Peggy, Renman, Anne, *Measures for Enhanced Co-Operation in the Area of Technical Rules*, Stockholm: National Board of Trade, 2009: p.11.

⁷²⁰ For instance *Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, European Court Reports 1979, 20.02.1979: p.650- 665. *The past and future of EU law. The classics of EU law revisited on the 50th anniversary of the Rome Treaty*, edited by Luis Miguel Poiares Pessoa Maduro and Loïc Azoulay, Oxford and Portland: Hart Publishing, 2010: p. 438-440.

⁷²¹ *The past and future of EU law. The classics of EU law revisited on the 50th anniversary of the Rome Treaty*, edited by Luis Miguel Poiares Pessoa Maduro and Loïc Azoulay, Oxford and Portland: Hart Publishing, 2010: p. 444.

far as technical rules are concerned is already delimited by the Treaties, the *acquis* and the jurisprudence, so that it should not generate any sort of suspicion.

The choice of technical rules can arguably be used to limit or to expand the market, but the goal of the EU and the enhanced cooperation is indeed to make it freer while adopting rules for the benefit of the consumer and the economy⁷²². It is when a technical rule becomes a trade barrier that the enhanced cooperation cannot be adopted once it disrupts, or may disrupt, the internal market.

6. Vocational education and training; recognition of diplomas – much more than common policies, the reaching of EU goals

Although enhanced cooperation has been used in this domain, in reality it basically refers to a form of stronger cooperation, not necessarily deriving from the enhanced cooperation mechanism foreseen in the Treaties. The first goal is to reach a single framework for the transparency of qualifications and competences. It is a question of recognition of qualifications and not an attempt to harmonise the law on the qualifications, that is, although a foreign qualification may be recognised by another Member States, it does not mean that all Member State laws on qualifications must be similar, but the goal is to achieve a framework of understanding that may allow the EU citizens to use their own qualifications in another Member States, without having to repeat their training or education.

This aspect is already confirmed by jurisprudence⁷²³ based in existing legislation, but the enhanced cooperation may help to define criteria and procedures that will eventually contribute for the freedom of movement and freedom of establishment of citizens namely by identifying the best ways to ease the process of diplomas recognition⁷²⁴.

⁷²² Eeckhout, Piet, *EU external relations law*, 2nd, Oxford: Oxford University Press, 2011: p.457.

⁷²³ *Joined Cases C-422/09, C-425/09 and C-426/09, Vassiliki Stylianou Vandorou, Vassilios Alexandrou Giankoulis, Ioannis Georgiou Askoxilakis v Ipourgos Ethnikis Pedias kai Thriskevmaton*, 02.12.2010, namely para. 66. This judgment has references to previous similar cases, which are equally relevant within this context.

⁷²⁴ *Joined Cases C-422/09, C-425/09 and C-426/09, Vassiliki Stylianou Vandorou, Vassilios Alexandrou Giankoulis, Ioannis Georgiou Askoxilakis v Ipourgos Ethnikis Pedias kai Thriskevmaton*, 02.12.2010, namely para. 72.

The credit system adopted after Bologna - a system outside the EU framework - helps in this by creating a mathematic criterion without requiring a content or substantive definition; to apply this system to vocational training is of equal importance⁷²⁵. However, it must be underlined that Bologna rules were not intended for vocational training, but for academic studies, but they can easily be taken as an example to be applied for vocational training qualifications.

Vocational training is addressed in the Treaties along with education, youth and sport. Regarding the definition of competences, the EU is given the possibility of adopting supporting actions (article 6, al. e) TFEU) in this domain according to the definition of such kind of action previously consecrated in the Treaties (article 2, n. 4 TFEU)⁷²⁶.

The specific legal basis for EU intervention as far as education and vocational training are concerned is articles 165 and 166 TFEU, which refer the use of the ordinary legislative procedure for the adoption of the recommendation, thus making it a legal act⁷²⁷, even if not binding⁷²⁸.

Meanwhile, the Council has decided vocational training should be a domain for the application of the open method of coordination. Although a more intergovernmental method, it still shares with enhanced cooperation the flexibility and differentiation character. Despite the option by the Council, it seems clear that the preference for an enhanced cooperation model could be more effective, as it is ruled by the Treaties in a much defined way while the open method of coordination is not even part of the Treaties. Furthermore, enhanced cooperation is much closer to the community method – which we consider to be at the basis of the EU as a whole – than the open method of coordination. The use of the open method of coordination may eventually be an obstacle to the integration due to its intergovernmental characteristics. Although useful to overpass deadlocks in the decision process, it shades away from the EU main goals. It is

⁷²⁵ Jones, Simon, *Enhanced cooperation in vocational education and training. Stocktaking report of the Copenhagen Coordination Group*, European Commission, DG Education and Culture, 2003: p. 14 and *Recommendation of the European Parliament and of the Council of 18 June 2009 on the establishment of a European Credit System for Vocational Education and Training (ECVET)*, OJEU, C-155, 08.07.2009: p.11-18.

⁷²⁶ *The Lisbon Treaty. EU constitutionalism without a Constitutional Treaty?*, edited by Stefan Griller and Jacques Ziller, New York-Vienna: Springer, 2008: p. 44-45.

⁷²⁷ Piris, Jean-Claude, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p. 94.

⁷²⁸ Craig, Paul, *The Lisbon Treaty: Law, politics, and Treaty reform*, Oxford: Oxford University Press, 2010: p.86: article 284 TFEU.

a differentiation method that intends to maintain the national interests above the EU interests.

The instrument applied to vocational training and to the other areas concerned by articles 165 and 166 TFEU, although our concern here is with vocational training and education in particular, is often seen as a new form of governance or soft law instruments⁷²⁹. It is important to note that concerning vocational training other instruments like action programmes or declarations⁷³⁰ are also adopted, making the number of soft law more relevant and its effect even broader.

The acts adopted are intended, as the Treaty refers, to incentive measures⁷³¹ and not to harmonise. The adoption of an act by exercising a non-exclusive competence of the EU, and the fulfilment of the conditions for an enhanced cooperation, namely the *ultima ratio* character, the full respect for the internal market and the achievement of EU goals, it is admissible to consider enhanced cooperation as a possibility as far as vocational training and education are concerned.

The question remaining is the binding nature of those instruments, and therefore their efficacy, as they do not assume the character of binding instruments as foreseen in article 288 TFEU. The binding nature could be ascertained by national legislations when applying the principles and recommendations approved at EU level. In this case harmonisation would not be considered, as the decision on the legal instrument would remain in the Member States, without any mandatory or binding rule by EU but only general guidance.

7. Area of Freedom, Security and Justice – different forms and procedures of enhanced cooperation

Apart from already existing forms of cooperation that can be assimilated to enhance cooperation as far as the Area of Freedom, Security and Justice is concerned,

⁷²⁹ Senden, Linda A.J., “Soft law and its implications for institutional balance in the EC”, *Utrecht Law Review*, vol. 1, n. 2, 2005, p.83.

⁷³⁰ *The Bruges Communiqué on enhanced European cooperation in Vocational Education and Training for the period 2011-2020*, Belgian Presidency, 2010: 20p.

⁷³¹ Craig, Paul, *The Lisbon Treaty: Law, politics, and Treaty reform*, Oxford: Oxford University Press, 2010: p. 174-175.

like Schengen and Prüm, the Treaties include other possibilities, but making, in those particular cases, enhanced cooperation an easier procedure. This is a very special case, as the Treaties impose from the start lighter procedures regarding enhanced cooperation in this field. We argue that this is in line with the advances in the communitarisation of this domain that has been facilitated by the end of the pillar structure of the Treaties.

Those are the cases of judicial cooperation in criminal matters (articles 82, n.3, 83, n.3 and 86, n.1 TFEU) and police cooperation (article 87, n.3 TFEU). The possibility of enhanced cooperation is established in the treaties, but nothing is said on which specific matters⁷³² should it be used, only the general areas of possible intervention are referred to in the Treaties⁷³³. The enhanced cooperation foreseen in these articles does not change any obligation of the criteria established for enhanced cooperation, nor does it make them less important, it just reduces the number and the difficulties of some procedures. Another interesting aspect is that enhanced cooperation is introduced in these areas as an accelerator⁷³⁴, and not as a deviation from the integration process.

The Area of Freedom, Security and Justice is taken as a chapter of shared competences⁷³⁵ between Member States and the EU, and therefore clearly an area where enhanced cooperation can be exercised.

It must be recalled that within the Area of Freedom, Security and Justice there is already institutionalized differentiation due to the Protocols of United Kingdom, Ireland and Denmark. In those cases, differentiation has been granted from the start and recognized as the only chance to keep those Member States on board with the rest of EU, even if under different criteria.

8. Fiscal and Monetary policies – how to overcome unanimity

⁷³² *Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation*, edited by José Maria Beneyto, Madrid: CEU Ediciones, 2009: p. 103-105.

⁷³³ *O Tratado de Lisboa*, Cadernos *O Direito*, n. 5, Coimbra: Edições Almedina, 2010: p. 28-29.

⁷³⁴ Piris, Jean-Claude, *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press, 2010: p. 184-185; Griller, Stefan, Ziller, Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Vienna-New York: Springer-Verlag, 2008: p. 231.

⁷³⁵ Griller, Stefan, Ziller, Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Vienna-New York: Springer-Verlag, 2008: p. 13

8.1. Monetary policy

The financial crisis started in 2008 and its ups and downs since then have forced EU to find ways to tackle the challenges posed to its financial and economic policies. Clearly, when the crisis started – and long afterwards – the EU has proven not to be prepared to face it efficiently. The Treaties' provisions were not enough to address the problems⁷³⁶, although within the Treaties there could be found mechanisms to address the crisis⁷³⁷. The option for secondary legislation has been one alternative.

An innovative reference to enhanced cooperation has been recovered in the negotiations and eventually in the text of the new Treaty on Stability, Coordination and Governance in the Economic and Monetary Union⁷³⁸. In this case the enhanced cooperation has been referred to (Preamble and article 10) as a means to realize some of the aims of the Treaty as long as they do not jeopardize the internal market, as if this were the only requirement foreseen in the Treaties. A Treaty that is not a revision of the Treaties allows itself to refer to 'Treaties' norms (a fact that contributed a lot for the refusal by the United Kingdom to sign it) for its implementation. Scholarship is divided on considering this acceptable or not⁷³⁹.

However, the reference made in article 10 should be taken more as of political nature than of legal efficacy. It is interesting to note that in its article 10, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, reinforced the measures specific to the Euro States with measures that may be applied by enhanced cooperation. This is a way of allowing a smaller group within the Euro States⁷⁴⁰ to move forward on specific matters if there is a need to do so⁷⁴¹. Enhanced cooperation is understood as a means for the adoption of secondary legislation.

⁷³⁶ One of the other legal instruments that must always be taken into account in this discussion is the Stability and Growth Pact.

⁷³⁷ López-Pina, Antonio, "Enhanced cooperation as a European form of Government", *A constitution for the European Union: first comments on the 2003-draft of the European Convention*, Baden-Baden: Nomos Verlag, 2003: p. 122.

⁷³⁸ http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf: 25p.

⁷³⁹ *Fifty Years of European Integration: Foundations and Perspectives*, edited by Andrea Ott and Ellen Vos, The Hague: T.M.C. Asser Press, 2009: p. 128-129.

⁷⁴⁰ Racine, Bruno, Buffotot, Patrice, Canivet, Guy, Pisani-Ferry, Jean, *Perspectives de la coopération renforcée dans l'Union Européenne*, Paris: La Documentation française 2004: p. 59-92.

⁷⁴¹ Craig, Paul, *Reinforcing the eurozone*, London: House of Commons Select Committee, Session 2010-12, 7 February 2012, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/uc1817-i/mem02.htm>, 2012: 13p.

Within the Treaty, not only enhanced cooperation is referred but also an “ever-closer coordination of economic policies within the euro area”, which is basically the repetition of the TFEU and TEU idea of an ever closer Union, although restricted to a much defined area. Similarly, this preoccupation with an ever closer is clearly at the roots of the enhanced cooperation as well⁷⁴².

We sustain that it is a legally valid option, as the parties of this Treaty are the same as of the Treaties (except one, that did not oppose to it), and although it is a distinct instrument from the Treaties, it has been adopted within the EU framework (the Treaty was approved during an European Council meeting, even if from the formal point of view it cannot be called a Treaty). As for the recourse to the EU institutions, they are not given new tasks, but only an extension of those they already have and therefore they should be admissible as well. Moreover, to attribute new powers or competences to EU institutions by this Treaty would not be possible, as those are kept under the conferral principle stated in the Treaties. With the new Treaty, there is no breach of the law, as the respect for EU law is kept entirely. Moreover the ECJ has recognized that Member States may grant EU institutions competences regarding an action they decide to take jointly outside the treaties⁷⁴³. This an old problem, that the ECJ has addressed in more than one occasion⁷⁴⁴.

Another controversial aspect of the new Treaty is the role of the Court of Justice once it must be clarified whether the new Treaty gives an extra jurisdiction to the Court which is not referred to in the Treaties. The ECJ itself has concluded in the past that this a possible legally valid situation, as long as the extra jurisdiction does not affect the core nature of the treaties⁷⁴⁵. It remains to be seen, however, how this will develop,

⁷⁴² In reality this idea of a closer cooperation is often quoted, and different contexts, by the ECJ, *Cases C-187/01 Criminal proceedings against Hüseyin Gözütok and C-385/01 Criminal proceedings against, Opinion of Advocate General Ruiz-Jarabo Colomer*, European Court Reports 2002, Part I, 19.09.2002: para. 41.

⁷⁴³ *Joined Cases C-181/91 and C-248/91, European Parliament v Council of the European Communities*, European Court Reports 1993, Part I, 30.06.1993: p. 3713- 3721, in particular para. 18 to 25.

⁷⁴⁴ *Case C-316/91, European Parliament v Council of the European Union*, European Court Reports 1994, Part I, 02.03.1994: p. 653 – 665, para. 41.

⁷⁴⁵ *Opinion 1/00: Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, 2002: 34p.

despite the arrangement fixed along with minutes of the signing of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union⁷⁴⁶.

Having said this, we shall note, however, that the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union is not an EU Treaty, as it does not address the same the other EU treaties do, and the parties are not the same, so it can't replace any other existing Treaty, but it is only a new legal instrument for the parties which are simultaneously member of the Euro area and/or of the EU.

Some authors⁷⁴⁷ argue that the Treaty goes beyond what EU can do, for instance, regarding Member States budgets, but the "Six Pack" had already launched the first rock. Moreover, article 16 of the new Treaty refers that it should be incorporated into the EU legal framework and not into the Treaties (the same had happened in the past with the Prüm Convention).

In reality, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union might not have been needed if the Member States had decided to move forward just with an enhanced cooperation on the subject-matter of this Treaty⁷⁴⁸, but as it was a mechanism seldom used, its legal effectiveness was seen with suspicion and eventually that possibility did not proceed, nevertheless it was later included in the new Treaty. The aim of having all of the Member States as parties to the Treaty was from the beginning impossible due to the United Kingdom refusal, on the other hand the inclusive character of the enhanced cooperation could have left the door open for an ulterior decision, as the new Treaty also does (article 15).

⁷⁴⁶ *Treaty on Stability, Coordination and Governance: impact on the eurozone and the rule of law*, House of Commons - European Scrutiny Committee - Sixty-Second Report, of Session 2010–12, London: House of Commons, vol. I, *Report, together with formal minutes, oral and written evidence*, 2012: p. Ev 83.

⁷⁴⁷ Vasconcelos, Margarida, *Brussels has used its usual legal tricks – the final draft of the so-called Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, http://www.europeanfoundation.org/my_weblog/2012/02/margarida-vasconcelos-brussels-has-used-its-usual-legal-tricks-the-final-draft-of-the-so-called-treaty-on-stability-coo.html, 2012: p. 2

⁷⁴⁸ Racine, Bruno, Buffotot, Patrice, Canivet, Guy, Pisani-Ferry, Jean, *Perspectives de la coopération renforcée dans l'Union Européenne*, Paris: La Documentation française 2004: p. 244; *Fifty Years of European Integration: Foundations and Perspectives*, edited by Andrea Ott and Ellen Vos, The Hague: T.M.C. Asser Press, 2009: p. 134.

The goal of the Treaty is to reinforce the economy, the finances and the politics in the EU. It reproduces and extends the EU Strategy 2020 goals and the Euro Plus Pact although the “Six Pack”⁷⁴⁹ had already been adopted beforehand.

Nevertheless, from the formal point of view, the measures applicable to Euro area States, as foreseen in article 6, differentiate themselves by the possibility introduced in article 10 of enhanced cooperation. It could not be otherwise, once the non-Euro states, which have a blocking minority number of votes, might impede Euro states to adopt their own rules. Undoubtedly, this may be absurd, but politically and legally it had to be avoided. This is why the Treaty is intended to the entire EU and there is a clear differentiation regarding the Euro Member States. The adoption of secondary legislation according to the Treaties’ rules allow enhanced cooperation to be used in specific circumstances, as referred in article 333 TFEU. Due to the fact that enhanced cooperation cannot affect the internal market, it sets the limits of intervention as far as rules and regulation affecting the market might be adopted⁷⁵⁰.

8.2. Taxation

Approximation of legislation within fiscal policy is a shared competence and therefore a possible area for enhanced cooperation⁷⁵¹.

As taxation is concerned, one very specific case is the financial transaction tax. Despite the fact that some States already have such a tax in their domestic legal orders, the fact is that the effectiveness of that tax could be of much greater importance if it

⁷⁴⁹ Regulations: Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure. Directive Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.

⁷⁵⁰ *Fifty Years of European Integration: Foundations and Perspectives*, edited by Andrea Ott and Ellen Vos, The Hague: T.M.C. Asser Press, 2009: p. 120-121.

⁷⁵¹ Källberg, Alex, *A Common Consolidated Corporate Tax Base through Enhanced Cooperation?*, Lund: Lund University, 2011: p. 28.

were considered at EU level. Many States refuse and refused to do so, or the tax decision must be a unanimous one. Eleven States (Austria, Belgium, Estonia, Finland, France, Germany, Greece, Italy, Portugal, Spain and Slovakia) have said that they would agree with such a tax, and 9 is the minimum required number for an enhanced cooperation. The financial transaction tax is very warmly supported by the Commission⁷⁵² (probably because it can eventually mean extra own resources for the EU budget) and after its adoption in the Council, the process will follow with the adoption of the needed legal instruments. The process for this enhanced cooperation was starting by the end of November 2012, it is expected to be concluded during the first semester of 2013.

The enhanced cooperation regarding this tax may cause its inefficacy as it is extremely possible that companies will use different sort of “finance engineering” to escape the tax, namely by playing with the residence definition⁷⁵³, or worst, it could be applied by two Member States simultaneously, thus making the tax of 0,2% and not 0,1% as proposed by the Commission⁷⁵⁴ (some States will even have higher taxes, Portugal should fix it at 0,3%).

Some Member States, like UK, argue that a stamp tax, which already exists in Britain, may be a better option. Other States, like Ireland, consider that they cannot afford to impose a tax that may drive investors out of its market.

Another area where enhanced cooperation has been suggested as far as taxation is concerned has to do with a common consolidated corporate tax⁷⁵⁵; the question is to know if harmonization will be included and if so how⁷⁵⁶. Some authors basically argue on the advantages of harmonization⁷⁵⁷, but it is not crystal clear that harmonization on

⁷⁵² *Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC*, COM(2011) 594 final, 28.9.2011 : 31p.

⁷⁵³ *Towards a Financial Transaction Tax?*, House of Lords - European Union Committee, 29th Report of Session 2010–12, London: House of Lords, 2012: 58p.

⁷⁵⁴ *Towards a Financial Transaction Tax?*, House of Lords - European Union Committee, 29th Report of Session 2010–12, London: House of Lords, 2012: p. 20.

⁷⁵⁵ *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, COM(2011) 121 final/2, 03.10.2011:84p.

⁷⁵⁶ Hurk, H.T.P.M. van den, “The Common Consolidated Corporate Tax Base: A Desirable Alternative to a Flat EU Corporate Income Tax?”, *Bulletin for International Taxation*, vol. 65, n. 4/5, 2011: p. 263-264.

⁷⁵⁷ Bettendorf, Leon, Horst, Albert van der, Mooij, Ruud A. de, Vrijburg, Hendrik, “Corporate Tax Consolidation and Enhanced Cooperation in the European Union”, *CPB Netherlands Bureau for Economic Policy Analysis Discussion Paper*, n. 132, 2009: 40p.

taxation is possible from the legal point of view, not to mention the opposition by Member States to follow that path.

However, the proposal includes other elements that may be autonomously treated and then be used within an enhanced cooperation mechanism. The idea of a single formula for corporate tax clearly may serve competition and the internal market, but is not necessarily the best option for the Member States. The problem of the apportionment factors (namely consumption, production, services, and goods among others) may change the framework of the enhanced cooperation and may replace the question of harmonization⁷⁵⁸.

⁷⁵⁸ Bordinon, Massimo, Brusco, Sandro, “On Enhanced Cooperation”, *Journal of Public Economics*, vol. 90, 2006: p. 2063-2090.

Part III

The EU enhanced cooperation model: possible application to the entry into force of the Comprehensive Nuclear-Test-Ban Treaty?

Chapter VII

The notion and uses of enhanced cooperation concept in international law

Chapter VII - The notion and uses of enhanced cooperation concept in international law

1. Enhanced cooperation as a legal concept

The goal of this chapter is to refer some examples and different uses of the concept of enhanced cooperation in international law, without having the intention of being comprehensive; it also intends to point out some of the characteristics of the concept developed by EU in different contexts.

Enhanced cooperation is an entity that when used in EU law it dances alone while in international law it is mostly a duet composed by independent partners and therefore they can be easily separated. In EU law no separation is possible. Having said so, this does not mean that EU always uses enhanced cooperation in that legally binding sense⁷⁵⁹, as in some cases it does not do more than all the others international organisations and refers to it as the usual combination of just a noun and an adjective or modifier.

The notion of enhanced cooperation is not unknown to international law and to political science. However, only the European Union has fully developed it as a legal concept⁷⁶⁰, even if there are other rather similar situations in international organizations and elsewhere. In most of the cases enhanced cooperation is used as a noun (cooperation) with an added modifier (enhanced) with no specific legal meaning. It is not unusual that the modifier is replaced by other modifiers referring to the same idea, some of them being “closer” or “greater”⁷⁶¹. Even the EU started by using closer, but eventually opted to clearly distinguish, formalize and institutionalise the concept and, in the Treaty of Lisbon, the preoccupation to clearly legally define the concept led to the

⁷⁵⁹ *Case C-40/05, Kaj Lyyski v Umeå Universitet, Opinion of Advocate General Stix-Hackl*, para. 8 or *Case C-209/97, Commission of the European Communities supported by the European Parliament v Council of the European Union supported by the French Republic*, para. 27.

⁷⁶⁰ Richardson, Scott Kevin, *The design for coordinated policing systems, as a viable and complementary vehicle for achieving Enhanced Cooperation in the European political landscape*, Lincoln: Lincoln University, 2008: p.4.

⁷⁶¹ Panitchpakdi, Supachai, “Addressing the crisis through enhanced cooperation among Latin America and Caribbean countries”, *UNCTAD Regional Seminar on Trade and Competition: Prospects and Future challenges for Latin America and the Caribbean*, Caracas, 20-12 April 2009: 6p.

creation of another one (structured cooperation), which is a deviation of enhanced cooperation, but it cannot be called as such, once not all of its features are the same.

Despite the recurrent use given to enhanced cooperation the fact is that it is mostly a discursive artifice without intending by itself to be an autonomous concept or to be any sort of notion comprising defined attributes or qualities, and even less to any sort of normativity in itself. Moreover, enhanced cooperation used elsewhere than within the European Union lacks a fundamental element to make it a legal concept that is its compliance nature⁷⁶². Nowhere but in EU law is enhanced cooperation mechanism fully defined regarding the rules of its implementation, its decision procedures or the control of its compliance.

Not only in international law, but also in domestic law enhanced cooperation is often used, but again not meaning more than just a kind of improved cooperation, and not with a view to consider it a full legally autonomous concept⁷⁶³.

While in EU law enhanced cooperation is a procedural legal mechanism, in other International Organizations it is basically a means of a process, again by only using the cooperation concept and its modifier enhanced as such, without any legal provision beneath or behind it⁷⁶⁴. However, in some cases there is a preoccupation on the use of enhanced cooperation (or some other expression that may refer to the same idea) so that the rules of its application are sufficiently defined. However, for these cases the normativity of enhanced cooperation is not fully achieved, only EU includes it in its primary law, while the others use it on a case by case, even if with some common elements.

There is no aprioristic opposition on using enhanced cooperation in any domain (except in EU for defence matters), but the more technical is the domain, the easiest it is

⁷⁶² *Commitment and Compliance. The Role of Non-Binding norms in the International Legal System*, edited by Dinah Shelton, 2nd. ed., Oxford: Oxford University Press, 2007: 560p.

⁷⁶³ Among innumerable possible examples, we quote just a few. Within international law: *Speakers in General Assembly stress merits of enhanced cooperation between United Nations, regional organizations*, Press Release GA/10282, 21.10.2004, p.3; *Memorandum of Understanding for Strengthened Cooperation between the Government of People's Republic of China and the United Nations Development Programme*, 22.09.2010: 3p.; *Africa-India framework for enhanced cooperation*, Second Africa-India Forum Summit, Addis Ababa, 2011: 8p.; Findley, Eric A., Inge, Joseph R., *Final report on Canada and the United States (CANUS) Enhanced Military Cooperation*, Colorado Springs: Peterson Air Force Base, 2006: 152p. and in domestic law, DeCesare, Dale, Augenblick, John, Myers, John, *Examining resource use and areas for enhanced cooperation in York County's School Districts*, Denver: Augenblick, Palaich and Associates Inc., 2008: 45p.

⁷⁶⁴ *Technical Assistance. Supporting enhanced cooperation among Southeast Asian equity markets – Project number 39349*, Asian National Bank, 2005: 12p.

to find the concept cooperation added by enhanced once this enhancement is normally defined in concrete terms⁷⁶⁵, usually more to impose limits on that enhancement. In international law, the economical arena is particularly fertile in uses of enhanced cooperation, but as for an abstract utilisable mechanism, solidly legally defined, like in EU law, the examples are very few and none is as fully developed as in EU law, in particular none gives it the necessary legal normativity⁷⁶⁶. Some organisations develop some of its characteristics and refer to the EU notion as a possible endeavour to follow (that is the case of ASEAN or APEC), although there is not always a direct reference to the origin of the EU concept as a legal entity (most probably for political reasons).

2. Different uses of enhanced cooperation in international organisations and international law

It would be impossible to list all enhanced cooperation forms developed in the world or even in the different international organisations. However, a few examples have been chosen to illustrate some of the possible and diverse uses of the concept. In some cases some of the features that EU law has developed are already present, in other cases there is no intention to do so. The presentation that follows intends to reflect the versatility of the concept and its possible differentiated uses and applications. Like the EU model, it generally allows other participants to accede at a later phase.

Apart from the multiple cases where enhanced cooperation is used in UN documents in the sense previously referred, that is a composed noun, there are, nevertheless, occasions where some differences of approach may be identified, mostly in the sense of enlarging its scope and by doing so ensuring a more defined framework for its understanding and use. In some cases some of the attributes of the enhanced cooperation as the EU defines it are included in those uses.

⁷⁶⁵ Zukang, Sha, *Open consultations on enhanced cooperation on international public policy issues pertaining to the Internet. Closing Remarks*, New York, 14.10.2010: p.1

⁷⁶⁶ Weil, Prosper, "Towards relative Normativity in International Law?", *American Journal of International Law*, vol. 77, n. 3, 1983: p. 413-442.

2.1. The case of the United Nations organs

The UN General Assembly has used enhanced cooperation in several occasions, one of them being to refer to the cooperation between all relevant partners, in particular in the private sector. It is difficult to identify any specificity on that kind of enhanced cooperation when compared to any more developed cooperation, but which is not institutionally laid down. Moreover the reports by the Secretary General have hardly any mention to enhanced cooperation as such, besides the one in the title⁷⁶⁷.

However there is one particular reference that reflects, even if not in a very expressive way, the aim of enhanced cooperation to be an open system thus allowing more coherence in its action⁷⁶⁸. The idea is that the enhanced cooperation between UN and the private sector should not be restrained to the partners mentioned in the documents and instead be opened to future relations with other partners.

The concept of enhanced cooperation in UN discussions is used mostly as a political notion and not as an individualized legal concept as the EU has defined it, even if some of the elements that have been developed by EU have occasionally been identified or considered to be necessary for a set up of a given form of cooperation. However, it must be recognised that, in general terms, enhanced cooperation is typically just used as a composed binomium of two independent words juxtaposed with their ordinary meaning and without intending to develop a new concept.

2.1.1. The General Assembly

a) The internet case

⁷⁶⁷ *Enhanced cooperation between the United Nations and all relevant partners, in particular the private sector. Report of the Secretary-General, A/66/320, 23.08.2011, 23p. The same applies to former reports on the same subject.*

⁷⁶⁸ *Enhanced cooperation between the United Nations and all relevant partners, in particular the private sector. Report of the Secretary-General, A/64/337, 01.09.2009, p.5.*

The internet – mostly after the creation of the Internet Governance Forum (IGF), following a recommendation of the UN Secretary General⁷⁶⁹ and in line with the Tunis Agenda of the World Summit on the Information Society (WSIS) in 2005⁷⁷⁰ – has been one area where the term enhanced cooperation has been very consistently used. The IGF not only creates the conditions for enhanced cooperation to take place, but it is itself an enhanced cooperation example. It is a flexible and adaptive⁷⁷¹ mechanism, both characteristics of enhanced cooperation according to EU rules.

In this context enhanced cooperation assumes some features of an integration process, as it intends to make all States equal in the discussions and, at the same time, allowing all organisations, including NGOs, to intervene in the discussion and deliberative processes. Even though, there has been critics on the limited role of civil society, and some authors consider that enhanced cooperation should be more comprehensive⁷⁷².

A distinction in “doing” enhanced cooperation and “discussing” enhanced cooperation has been identified⁷⁷³, meaning that the actors who may discuss it and those who are responsible for its implementation are not necessarily the same. These two types of enhanced cooperation is an originality of IGF, but in reality it reflects the fact that we are dealing within the UN framework where States (and potentially international organisations) are the executive actors, which means two different legal orders: the international and the domestic, are always at stake. IGF and its enhanced cooperation were in reality created by WSIS with the aim to meet the identified challenges resulting from a policy vacuum in the area of internet policies.

⁷⁶⁹ *Enhanced cooperation on public policy issues pertaining to the Internet. Report of the Secretary-General*, A/66/77-E/2011/103, 04.05.2011, 9p.; *Enhanced cooperation on public policy issues pertaining to the Internet, Conference room paper prepared by the Division for Public Administration and Development Management (DPADM) of the United Nations Department of Economic and Social Affairs (DESA)*, E/2009/92/CRP1, 18.05.2010, 48p.

⁷⁷⁰ *Tunis Agenda for the Information Society*, World Summit on the Information Society, WSIS-05/TUNIS/DOC/6(Rev. 1)-E, 2005, para. 69-71.

⁷⁷¹ Australian Domain Administrator, *auDA response to the Open Consultation on Enhanced Cooperation on International Public Policy Issues Pertaining to the Internet*, <http://gibc.biz/wp-content/uploads/2010/11/IGF-Future-AUDA.pdf>, 2010:p. 2, 6.

⁷⁷² Malcolm, Jeremy, *Arresting the decline of multi-stakeholderism in Internet governance*, http://api.ning.com/files/Wh7TRjCBsBLpqaitVgT9FPgRSxMZXpcqLj4F9QH5C3QtRmijZBsxpNcmFy mUFp9HIW8HeYNRTCuWyX4L2jNxdq*Q8y6vttsh/giganet2011_submission_9.pdf, 2011: p. 9.

⁷⁷³ IT for Change, *Is “Enhanced Cooperation” a Legitimate Topic for Discussion at the IGF?*, Bangalore, 2006: p.2

Enhanced cooperation in this context is thus a platform to act, once there is no other forum where cooperation on internet matters can take place, despite the works of the International Telecommunication Union, the World Intellectual Property Organization or the United Nations Educational Scientific and Cultural Organisation. It especially allows all the different actors to participate in equal footing. Some authors argue that the goals of EU enhanced cooperation and the enhanced cooperation as used by WSIS and IGF differ, in the context of internet governance the idea is to create a common forum for discussion and decision on basic and fundamental principles⁷⁷⁴ defined by enhanced cooperation, while in EU the main purpose of enhanced cooperation is integration, based on basic and fundamental principles previously agreed, that is, in EU enhanced cooperation is a more active process than an essential procedure with a view to define a framework of action.

It is relevant to note that although WSIS and IGF use the concept of enhanced cooperation, in reality they do not provide a concrete definition of it⁷⁷⁵. There is only one exception of area of intervention which is referred in the Tunis agenda from the very beginning, as it excludes “the day-to-day technical and operational matters that do not have an impact on international public policy issues”⁷⁷⁶ from enhanced cooperation. The lack of a concrete definition has raised some criticism.

Remarkably, even without defining enhanced cooperation, there is a decision to follow such path. Some States, like Egypt, have strongly criticised this option, nevertheless there is recognition of some of its characteristics which the EU also applies to its definition, i.e., the fact that enhanced cooperation refers to a process initialized by a small group which may be extended to more partners or that the decisions taken may be applied by parties that did not participate in the starting group of the process. In the WSIS and IGF context there is always the view of enhanced cooperation as a process which ultimately should be globally inclusive, an idea that is not strange to EU’s definition as well.

⁷⁷⁴ Komaitis, Konstantinos, *Europe’s “Enhanced Cooperation” in the Context of Internet Governance*, <http://www.mcgeorge.edu/documents/centers/global/Internet%20Governance%20The%20European%20Response%20for%20Enhanced%20Cooperation.pdf>, 2008: p. 15

⁷⁷⁵ *Enhanced cooperation on public policy issues pertaining to the Internet. Report of the Secretary-General*, A/66/77-E/2011/103, 04.05.2011, p.2.

⁷⁷⁶ *Enhanced cooperation on public policy issues pertaining to the Internet. Report of the Secretary-General*, A/66/77-E/2011/103, 04.05.2011, p. 5.

b) The Rio Conventions

A different way to refer to enhanced cooperation has been found within the context of the Rio Conventions⁷⁷⁷ (the Convention on Biological Diversity (CBD), the United Nations Convention to Combat Desertification (UNCCD) and the United Nations Framework Convention on Climate Change (UNFCCC)). Here the concept is used only to refer to the cooperation regarding the implementation of legal texts, but in reality it also refers to the cooperation that may be developed just by combining different means of action referred simultaneously in more than one Convention⁷⁷⁸.

It is a different use of the concept, where a very specific area and very specific purposes are considered. The EU, however, and within the context of the Rio Conventions, identifies areas where enhanced cooperation is possible, but by doing so it does not import its own definition of enhanced cooperation, but considers the concept as all other partners do. The identified areas for enhanced cooperation by the EU are:

- i) Identification of common areas of reporting, including overlaps of information and data;
- ii) Encouragement of the use of common terms and definitions;
- iii) Facilitation of coordinated reporting to the three Conventions at the national level.

2.1.2. The Security Council

The UN Security Council has used enhanced cooperation as well in its deliberations, but it did not assume any kind of institutionalization of the process. It has been used either by Presidents of the UNSC, by the UNSC as a whole or by members of the UNSC, but always in the more simple way, that is by considering the enhancement

⁷⁷⁷ *Views on the paper on options for enhanced cooperation among the three Rio Conventions*, United Nations Framework Convention on Climate Change, Subsidiary body for scientific and technological advice, Bonn, 18-26 May 2006: 17p.

⁷⁷⁸ *Options for enhanced cooperation among the three Rio Conventions*, Note by the secretariat, FCCC/SBSTA/2004/INF.19, Subsidiary Body for Scientific and Technological Advice, Twenty-first session Buenos Aires, 2 November 2004: 13p.

or development of the cooperation⁷⁷⁹ but without conferring it any sort of special or specific normativity.

2.1.3. The General Secretariat

The idea of One-UN, where several UN agencies work under the same umbrella, though reducing costs and developing synergies among them, could also be a stage for enhanced cooperation, but no concrete example has been identified. For this to happen a better regulatory system would have to be adopted, once relations have been settled bilaterally between organizations and not by all of the participating organizations at the same time⁷⁸⁰. The pilot States chosen for this initiative were Albania, Cape Verde, Mozambique, Pakistan, Rwanda, Tanzania, Uruguay, and Viet Nam. Although the purpose of the *Deliver as One* initiative intends mainly to enhance cohesion by reducing bureaucratic procedures, the fact is that with enhanced cooperation this project could easily be more efficient, and by adopting this type of cooperation it would not be violating the four principles of the program: One Leader, one budget, one programme, one office.

2.2. The specialized agencies of the United Nations and Organizations

2.2.1. UNCTAD and UNDP

UNCTAD (United Nations Conference on Trade and Development) uses the term enhanced cooperation often, but just with the sense of a more developed cooperation, not including any sort of institutionalization in its use. Unlike other examples, and because of the aim of this organization, enhanced cooperation is

⁷⁷⁹ Security Council resolution 1631 (2005), on Cooperation between the United Nations and regional organizations in maintaining international peace and security, 17.10.2005:3p.

⁷⁸⁰ *Delivering as One*, Report of the UN Secretary-General's High-Level Panel, 2006: 57p.

commonly regionally limited to an area, in particular to South-South cooperation⁷⁸¹, something also considered by other organisations like UNDP⁷⁸².

There has been a suggestion within the UNCTAD framework to use enhanced cooperation - in the sense of a more developed cooperation - to establish regional bond markets⁷⁸³ to help solving the financial crisis. The example comes from the Chiang Mai initiative used in the past for the Asian markets (but in that case, in the context of ASEAN - Association of Southeast Asian Nations). The use of regional banks may prove to be an effective means to achieve enhanced cooperation concerning bond markets.

2.2.2. IAEA

Many States argue upon their enhanced cooperation with the IAEA as a sign of good will and as a justification for their opposition to some of the IAEA decisions, by doing so they basically refer only to a supplementary effort of their cooperation, which in most of the cases is nothing more than just the implementation of the safeguards agreement and/or the additional protocol. The figure of an institutionalised process of enhanced cooperation distinct from a normal cooperation process is absent in IAEA formulations, rules and procedures.

There are agreements between States and the IAEA that refer to enhanced forms of cooperation on specific areas, but no specific mechanism or procedure results from the use of the concept “enhanced cooperation”⁷⁸⁴, even if some of the traces of the EU concept can be identified, for instance, there is a reference to the fact that enhanced

⁷⁸¹ Panitchpakdi, Supachai, “Addressing the crisis through enhanced cooperation among Latin America and Caribbean countries”, *UNCTAD Regional Seminar on Trade and Competition: Prospects and Future challenges for Latin America and the Caribbean*, Caracas, 20-12 April 2009: 6p.

⁷⁸² *Memorandum of Understanding for Strengthened Cooperation between the Government of People's Republic of China and the United Nations Development Programme*, 22.09.2010: 3p.

⁷⁸³ Panitchpakdi, Supachai, “Addressing the crisis through enhanced cooperation among Latin America and Caribbean countries”, *UNCTAD Regional Seminar on Trade and Competition: Prospects and Future challenges for Latin America and the Caribbean*, Caracas, 20-12 April 2009: p.4.

⁷⁸⁴ That is the case, for instance, of the agreement between IAEA and South Korea on light water reactors, Park, Wan-Sou, Kim, Byung-Koo, Yim, Seuk-Soon, Choi, Young-Myung, *Enhanced cooperation between IAEA and Republic of Korea on safeguards implementation at light water reactors*, Daejeon: Korea Atomic Energy Research Institute, 2006: 8p.

cooperation is a starting point with a small group, but that small group is not the end in itself.

2.2.3. CTBT

In the case of CTBT, some uses of the enhanced cooperation concept can also be found. To start with in the sense the UNGA uses the concept, when it refers to the cooperation with the United Nations and its programs, funds and specialized agencies. The agreement between CTBTO and UN clearly states that example of advanced cooperation but without defining any special form of its implementation and scope of such concept⁷⁸⁵. Another example of enhanced cooperation mentioned in CTBTO documents refers to the cooperation with the scientific community⁷⁸⁶ and in particular with WMO regarding Atmospheric Transport Modelling (ATM) since 2003. Despite the attempts to find other specific areas where the concept enhanced cooperation could be found within the CTBT context, apart from sporadic references, no other specific areas were identified, especially as far as ratification, accession or entry into force procedures are concerned.

One recent example of the use of enhanced cooperation within CTBT framework was mentioned in the speech of the Executive Secretary in Astana⁷⁸⁷, but again it was only used as a vague notion and not as a legal one. However, it has the merit to be applied to non-proliferation and disarmament.

2.3. OPCW

⁷⁸⁵ *Statement by the Executive Secretary of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, Mr. Wolfgang Hoffmann, 57th Session of the United Nations General Assembly, New York, 20 November 2002: 5p.; Address by the Executive Secretary of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, Mr. Tibor Tóth, 65th Session of the United Nations General Assembly, New York, 13 December 2010, 4p.*

⁷⁸⁶ *Opening Statement of the Executive Secretary, Ambassador Tibor Tóth, 33rd Session of the Preparatory Commission, Vienna, 16 November 2009: 5p.*

⁷⁸⁷ Tóth, Tibor, "Message from the Executive Secretary of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, OSCE Summit, Astana, Kazakhstan, 1-2 December 2010", CTBTO, 2010: 8p.

The concept of enhanced cooperation has been present in the works and speeches of OPCW. However, and once again, it is basically used as a combination of a noun and and adjective and not as a legal mechanism. OPCW does not provide any special conditions or characteristics for this use. However, at least in one case, it is interesting to note that it speaks of enhanced cooperation among Member States with a specific purpose: the enforcement of the Convention's prohibitions⁷⁸⁸. Not only the Director General of OPCW refers to enhanced cooperation, but different instances of the organisation use it, even if with the usual limited approach⁷⁸⁹.

2.4. ASEAN (Association of Southeast Asian Nations)

The EU enhanced cooperation model of integration has generated similar views in other integration organizations. Due to the fact that ASEAN acts basically as an economic integration organization (although the purpose of its creation was a political one, and despite that an ASEAN Economic Community is only foreseen for 2020⁷⁹⁰), as EU was at its beginning, it is not unsurprising to recognize in the ASEAN process some similarities with the EU process⁷⁹¹. From the institutional point of view, the ASEAN does not require the transfer of national sovereignty⁷⁹², thus being different from the EU, and that includes the differences in using the enhanced cooperation mechanism in its policy.

The flexible mechanism of integration within ASEAN was formerly suggested by the Thai Prime Minister in 1998 and was called “enhanced interaction”. It differs

⁷⁸⁸ Bustani, José, *The OPCW and the Global Struggle against Terrorism*, EC-XXVII/DG.3, <http://www.opcw.org/about-chemical-weapons/chemical-terrorism/the-opcw-and-the-global-struggle-against-terrorism/>, 2001: p.1.

⁷⁸⁹ *Report of the Seventh Session of the Scientific Advisory Board, SAB-7/1*, The Hague: OPCW, 2005: 32p.; *Summary report of the regional workshop on the chemical weapons convention, Dubrovnik, 11-14 April 2000*, The Hague: OPCW, 2008: 2p.; Pfirter, Rogelio, *Opening Statement by the Director General to the Second Special Session of the Conference of the States Parties to review the operation of the Chemical Weapons Convention*, RC-2/DG.2, The Hague: OPCW, 2008: 11p.

⁷⁹⁰ Guerrero, Rosabel B, “Regional Integration: The ASEAN Vision in 2020”, *IFC Bulletin*, n. 32, 2010: p. 53.

⁷⁹¹ Chang, Pei-Fei (Veronica), “Enhanced Cooperation in the EU and ASEAN? Provision of Enhanced Cooperation in the European Union in Comparison to Similar Institutional Developments in the Association of Southeast Asian Nations”, *Political Perspectives*, Electronic vol. 2, n.2, 2008: p.3

⁷⁹² This is not an exclusive question of ASEAN, *Flexibility in Constitutions. Forms of closer cooperation in federal and non-federal settings. Post-Nice edition*, edited by Annette Schrawen, Groningen: Europa Law Publishing, 2002: 134p.

from the formal way in which ASEAN used to act and cooperate. The new proposal allowed some flexibility to be used, but clearly set some boundaries by imposing the full respect of the principle of non-interference in internal affairs⁷⁹³ of its members. Although at a first stage this kind of openness and flexibility was kept intramural⁷⁹⁴, the fact is that it evolved and today it may include partners outside ASEAN, the difference is that it was created as a political means, while the use that is given to it in this broad manner is mainly for economic purposes.

The enhanced interaction has different shapes, like the ASEAN minus X or the co-shepherd mechanism (which includes two States only or two States that conduct together the process), and it is intended to deepen cooperation without any sovereignty transfer to the organization. The institutionalization of the enhanced interaction is not intended to take place as fully as the EU enhanced cooperation does⁷⁹⁵.

Although the Bangkok Declaration⁷⁹⁶ that launched ASEAN intended first to be a political framework, it would eventually evolved to an economically strong organization, where indeed new cooperation forms have been attempted.

Flexibility is today understood within ASEAN as a fundamental means to integration⁷⁹⁷, even if the idea is not clearly stated – because of political constraint –, but it will hardly be institutionalized in a legal text as it might require some sovereignty

⁷⁹³ Despite that some authors prefer to refer to the principle of non intervention, according to the Friendly Relations Declaration (UN General Assembly, 1970), the principle at stake is defined as “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law”. Therefore, the intervention is just one of the forms of interference, while in ASEAN the idea is to bar them all.

⁷⁹⁴ Haacke, Jürgen, “The Concept of Flexible Engagement and the Practice of Enhanced Interaction: Intramural Challenges to the “ASEAN Way””, *The Pacific Review*, vol.12, n. 4, 1999:p. 581–611.

⁷⁹⁵ “A much less intrusive principle than flexible engagement, enhanced interaction reflected an uneasy truce between the reformists and the conservatives. The principle of non-interference remained the norm for the region, but states could voice their concerns over developments in one country that could affect them or the whole region. Adopting an optimistic perspective, enhanced interaction illustrates the debates taking place within the organization and reflects a step taken in the right direction. It is an expression of the changes, albeit incremental and evolutionary, taking place in the ASEAN Way and hence the way ASEAN engages in regional security cooperation to manage new security challenges”, Loke, Beverly, “The “ASEAN Way”: towards regional order and security cooperation?”, *Melbourne Journal of Politics*, vol.30, 2005: p. 10.

⁷⁹⁶ The constitutive instrument of an international organization does not have to forcefully be a treaty. Shaw, Malcolm, *International Law*, 6th ed., Cambridge: Cambridge University Press, 2008: p. 1303-1304; International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in armed conflict*, *Advisory Opinions*, I.C.J. Reports, 1996: p. 75.

⁷⁹⁷ Tong, Goh Chok, “Deepening regional integration and co-operation”, WEF East Asia Economic Summit, Kuala Lumpur, 08.10.2002: p. 3.

transfer - an anathema in ASEAN context - to the regulatory body of the enhanced interaction.

The recourse to a concept starting with *inter* reflects the ASEAN view of intergovernmentality and not of community, after all, for now, it is only an association, even if there is an intention to transform it into a community⁷⁹⁸.

ASEAN works closely with other institutions to develop its own model of enhanced cooperation at economic level. One of the partners that is very present in this implementation is the ADB (Asian Development Bank). The ADB raises extra questions on the flexibility promoted by ASEAN. It speaks of horizontal and vertical integration to identify different relations between partners within ASEAN itself. In technical terms, the ADB is used to facilitate the cross-border collaboration among partners, namely regarding capital markets⁷⁹⁹. The programs adopted by ADB and ASEAN to enhance cooperation in some areas have proven to force the Members of ASEAN to adopt legislation and regulations to facilitate such cooperation, as for ADB there is a need of some harmonization to enhance cooperation as far as capital and equity markets are concerned. The harmonization does not, however, answer any Treaty principles, but it is just the result of the need to cooperate, there is no legal obligation of such harmonization, but it is a consequence of the cooperation and not a preceding requirement. The goal is just to make the enhanced cooperation more efficient.

Flexibility in ASEAN exists, but it is much more restrained when compared to EU different forms of flexibility. As for the implementation of the enhanced interaction, when compared with enhanced cooperation, the difference is quite significant. In the case of the EU model, the mechanism has been defined in the Treaty and its rules may be applied to a specific case as a last resort mechanism; in the case of ASEAN, a project is constructed from the beginning as an enhanced interaction act and it is not a last resort mechanism, but a choice of the partners. The ASEAN mechanism is open to all members of the organization, but it excludes at least one from the very beginning and that one will always be excluded, thus the integrative character of the ASEAN mechanism blocks the possibility of being applied to all ASEAN Members.

⁷⁹⁸ Roberts, Christopher, "ASEAN Institutionalisation: The Function of Political Values and State Capacity", S. Rajaratnam School of International Studies Working Papers, n. 217, Singapore, 2010: p. 2-3.

⁷⁹⁹ *Technical Assistance. Supporting enhanced cooperation among Southeast Asian equity markets – Project number 39349*, Asian Development Bank, 2005: p.1 and 5.

One special characteristic of the flexibility modes within ASEAN is that they were first thought as a mechanism by which the Member States could decide to exclude another Member State due to political reasons. This is a huge difference with the EU enhanced cooperation, as in EU enhanced cooperation it is not intended to exclude any partner, but to allow those who want to cooperate to move ahead, while in ASEAN the excluded Member cannot participate.

Some authors consider that the flexibility applied by ASEAN may be a violation of the “ASEAN Way”, intended to be strictly respectful of the principle of non-interference⁸⁰⁰. On the other hand, it is only because some flexibility is possible that ASEAN may develop programs and projects with China, Japan and Korea (the formula ASEAN+3) and especially in the economic area this cooperation ensures a much more effectiveness to the aims of such programs and projects, like the local currency-denominated bond markets, where ADB has a major role.

2.5. SAARC (South Asian Association for Regional Cooperation)

The limitation of action imposed by the principle of non-interference in domestic affairs is also identifiable in the South Asian Association for Regional Cooperation⁸⁰¹. The areas of cooperation are clearly identified, as well as the means and forms of such cooperation, being the form of enhanced cooperation developed in SAARC less developed than in ASEAN and basically applied to the economic arena⁸⁰².

2.6. APEC (Asia-Pacific Economic Cooperation)

⁸⁰⁰ Goh, Gillian, “The “ASEAN Way” Non-Intervention and ASEAN’s Role in Conflict Management”, *Stanford Journal of East Asian Affairs*, vol. 3, n. 1, 2003: p. 113-118.

⁸⁰¹ Guillard, Olivier, *Désarmement, coopération régionale et sécurité en Asie du Sud*, Paris : L’Harmattan, 1999 : p. 162.

⁸⁰² Dutz, Mark Andrew, “Harmonizing regulatory mechanisms. Options for deepening investment integration in South Asia”, *Promoting economic cooperation in South Asia. Beyond SAFTA*, edited by Sadiq Ahmed and Saman Kelegama, New Dehli: Sage, 2010: p. 196 and 206.

The APEC created a mechanism which in many ways is similar to EU enhanced cooperation, in particular for its openness⁸⁰³ – a clear contrast with the ASEAN model – as the cooperation may start even if not all Members of APEC are ready or interested to follow it but they can all join at a later stage. The process has the name of pathfinder initiative. APEC promotes the pathfinder among its Members in order to enlarge the participation of partners in a common interest.

The concept of pathfinder was introduced in 2001⁸⁰⁴. According to the pathfinder initiative, the elaboration of the projects must respect the interest of all parties and cannot be in prejudice of any of the APEC members. There is a solidarity value in the institutionalisation of the mechanism of the pathfinder initiative that recalls the EU enhanced cooperation⁸⁰⁵.

Unlike ASEAN or SAARC, the integration in APEC has, however, been much weaker, forcing a voluntary multilateralism, like the pathfinder initiative. It is important to note that it is not with the aim of integration that the pathfinder has been used, but as the only possibility to cooperate, as the integration level within APEC is very low⁸⁰⁶, once, as the APEC defines itself, the organisation decisions are non-binding⁸⁰⁷. Nevertheless, it should be kept in mind that APEC is indeed an integration organisation⁸⁰⁸, even if not very deep, its framework is much more comprehensive between partners than a simple formal cooperation relation between private investors, traders or businesses.

Like the EU enhanced cooperation which has as ultimate goals the development of the EU goals, the APEC pathfinder initiative has always in the horizon and at its

⁸⁰³ Elek, Andrew, "Pathfinder initiatives and APEC guiding principles for facilitation", *PECC, Trade Policy Forum*, Lima, May 2002: 2p.

⁸⁰⁴ *Meeting new challenges in the new century*, APEC Economic Leaders' Declaration, Shanghai, 21 October 2001: para. 30, appendix 1, para II; *A World of Differences: Partnership for the Future*, APEC Leaders' Declaration, Bangkok, 21 October 2003, para. 1.

⁸⁰⁵ Su, Hung-Dah, "Politics of differentiation: enhanced cooperation in the EU and the pathfinder in APEC", *Asia Europe Journal*, vol. 5, n. 1, 2007: p. 51-66.

⁸⁰⁶ Feinberg, Richard, "Voluntary multilateralism and institutional modification: The first two decades of Asia Pacific Economic Cooperation (APEC)", *The Review of International Organizations*, vol. 3, n. 3, 2008: p. 239-258.

⁸⁰⁷ As APEC states in its site, "APEC is the only inter governmental grouping in the world operating on the basis of non-binding commitments, open dialogue and equal respect for the views of all participants. Unlike the WTO or other multilateral trade bodies, APEC has no treaty obligations required of its participants. Decisions made within APEC are reached by consensus and commitments are undertaken on a voluntary basis", <http://www.apec.org/About-Us/About-APEC.aspx>.

⁸⁰⁸ Su, Hung-Dah, "Politics of differentiated integration: A comparative study of enhanced cooperation in the EU and the pathfinder in APEC", *EUSA Ninth Biennial International Conference*, Austin, Texas, <http://aei.pitt.edu/id/eprint/3027>, 2005: p. 3.

basis the Bogor declaration⁸⁰⁹ that created APEC. Unlike EU enhanced cooperation, the pathfinder initiative was quickly adopted and implemented in different areas⁸¹⁰.

From the institutional side, both the EU and APEC have opted for a single structure, i.e., keeping the institutional framework that existed in each of the organisations and not duplicating or creating new structures, services or institutions. In the definition of the pathfinder initiative, and unlike EU's enhanced cooperation, APEC has chosen to establish a very loose framework, which eventually may be, if needed, more complex. One of the problems in APEC is its rigidity of the rules of decision which only allow consensus decisions; it is not excluded that it might in the future be overcome by the formula ASEAN+3 due to this rule of decision which impeded flexibility and by doing so contradicts the initiative.

2.7. Regional Economic Communities (REC)

In Africa, the option for REC is clearly defined by the African Union. At this moment there are eight REC: Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD); Southern Africa Development Community (SADC). The Regional Economic Communities are used by the African Union to facilitate the development in Africa and one of the goals of the African Union is to enhance cooperation between REC, either between two of them or several ones⁸¹¹ at the same time.

⁸⁰⁹ Su, Hung-Dah, "Politics of differentiated integration: A comparative study of enhanced cooperation in the EU and the pathfinder in APEC", EUSA Ninth Biennial International Conference, Austin, Texas, <http://aei.pitt.edu/id/eprint/3027>, 2005: p. 13.

⁸¹⁰ Su, Hung-Dah, "Politics of differentiated integration: A comparative study of enhanced cooperation in the EU and the pathfinder in APEC", EUSA Ninth Biennial International Conference, Austin, Texas, <http://aei.pitt.edu/id/eprint/3027>, 2005: p. 16.

⁸¹¹ African Union, *Brainstorming au Commission/Regional Economic Communities/African Financial Institutions on "Building an African Union for the 21st Century"*, Addis Ababa, 2003: 9p.

By doing so, a legal and regulatory harmonization is considered in order to achieve those goals. These purposes are similar to those stated by former South-African President Thabo Mbeki when he spoke of African Renaissance⁸¹²:

- i) Establishing institutions and procedures, which enable Africa to collectively deal with challenges of democracy, peace and stability;
- ii) Achieving sustainable economic development, that results in the continuous improvement of the standards of living and the quality of life of the masses of the people;
- iii) Qualitatively changing Africa's place in the world economy, freeing it from its international debt burden, and transforming it from being a supplier of raw materials and an importer of manufactured goods.

REC exist elsewhere, *inter alia*, in Latin America (Mercosur, Andean Pact), or North America (NAFTA). One of the major areas where enhanced cooperation may be well developed is the competition framework⁸¹³. This does not mean that it has to be strictly in EU terms⁸¹⁴.

2.8. WTO (World Trade Organisation)

Nothing is agreed until everything is agreed.

How often have we heard this in multilateral negotiations is impossible to say? Only one organisation has made it its own motto and created a concept that impedes any flexibility or any kind of differentiated integration. Negotiations in WTO proceed concurrently and not consecutively and all negotiators must agree to everything. This

⁸¹² *The African Renaissance Statement of Deputy President, Thabo Mbeki*, SABC, Gallagher Estate, <http://www.dfa.gov.za/docs/speeches/1998/mbek0813.htm>, 13 August 1998: 5p.

⁸¹³ Terhechte, Jörg Philipp, "International Competition Enforcement Law. Between Cooperation and Convergence - *Mapping a New Field for Global Administrative Law*", Working Paper CCLP (L), n. 26, Oxford: Centre for Competition Law and Policy- University of Oxford, 2011: p. 13.

⁸¹⁴ Malamud, Andrés, Schmitter, Philippe C., "The Experience of European Integration and the Potential for Integration in South America", *New Regionalism and the European Union. Dialogues, Comparisons and New Research Directions*, edited by Alex Warleigh-Lack, Nick Robinson, Ben Rosamond, London and New York: Routledge, 2011: p. 140.

is the so-called Single Undertaking⁸¹⁵. Unlike other organisations, in reality most of them, in WTO the EU mechanism or even a lighter form of enhanced cooperation is impossible.

It must be said that there has been a huge difference from GATT times to WTO rules. The plurilateral Codes adopted in the GATT and by the end of Tokyo Round could be taken like a EU form of variable geometry, but the single undertaking principle put an end to that flexibility. Critics have reiterated that the conclusion of an agreement is not a synonym of its efficiency and implementation⁸¹⁶ and question the single undertaking obsession in WTO for considering it more of an obstacle than of help in negotiations.

As it is assumed these days in WTO, the single undertaking is not at all flexible and does not allow differentiated processes among negotiators⁸¹⁷.

On the other hand, the WTO allows the celebration of Preferential Trade Agreements which introduce asymmetric integration among WTO members. However a parenthesis should be made here to clarify the difference between this approach and the EU one. While PTAs are used to implement preferential relations, they do not create new legal procedures or scope of intervention. In enhanced cooperation, Member States opt for creating new rules on specific areas and not just to establish “special” relations between them⁸¹⁸.

2.9. Some other examples of enhanced cooperation

The number of examples of enhanced cooperation in the simplest sense of the concept is countless worldwide. However, it must be referred that the concept is not a EU ownership, even if as an institutional mechanism it is. The EU was the first

⁸¹⁵ Wolfe, Robert, “The WTO single undertaking as negotiating technique and constitutive metaphor”, *Journal of International Economic Law*, vol. 12, n. 4, 2009: p. 835.

⁸¹⁶ Levy, Philip I., “Do we need an undertaker for the Single Undertaking? Considering the angles of variable geometry”, *Economic Development and Multilateral Trade Cooperation*, Edited by Simon J. Evenett and Bernard M. Hoekman, New York: Palgrave-McMillan and World Bank, 2006: p. 428.

⁸¹⁷ Wolfe, Robert, “The WTO single undertaking as negotiating technique and constitutive metaphor”, *Journal of International Economic Law*, vol. 12, n. 4, 2009: p. 846.

⁸¹⁸ We disagree with Cantore, Carlo Maria Cantore when he intends to see PTAs similar to enhanced cooperation decisions, “We’re one, but we’re not the same: Enhanced Cooperation and the tensión between unity and asymmetry in the EU”, *Perspectives on Federalism*, vol. 3, n. 3, 2011: p.14-15.

international organisation to use it as a legal norm and it has developed it much more than any other of the international organisations. The use of the concept can also be found in domestic public policies, in bilateral relations, in the most diverse areas, from economic to education, from nuclear energy to finances, among many others. Moreover, there is sometimes the use within EU of enhanced cooperation to refer to a form of deeper cooperation without intending to recur to the enhanced cooperation mechanism as it is defined in the Treaties. That is the case, for instance of vocational education and training⁸¹⁹ or the enhanced cooperation areas foreseen by the EU-Morocco Association Council for its development and granting of a *statut avancé* to Morocco.

Enhanced cooperation is sometimes taken as a procedural way of acting, but also as a value that should preside a given action in order to fulfil the program that is intended to be covered, one example of such posture is the identification of enhanced cooperation in York County's school districts, in the USA⁸²⁰. In this case the problem of sovereign transfer is very well dealt with and it is not put into question⁸²¹.

In times of financial crisis and regulatory requirements and suspicions, it is not surprising that enhanced cooperation – meaning a deep involvement of the parties in order to reach a common level of preparedness to act – is sometimes evoked as a possible way to move forward, and in some cases the form chosen for that enhanced cooperation includes a clear definition of its purposes, its limits and the issues of the relations between partners, and it may go even further and define some of the policies involved⁸²².

The BRICS (Brazil, Russia, India, China and South Africa) States have agreed among themselves on a tougher form of cooperation to be developed in order to overcome the dependence of their economies on the American Dollar. This cooperation will be extended to investment, trade and economic relations, but there is

⁸¹⁹ *Enhanced cooperation in vocational education and training*, Stocktaking report of the Copenhagen Coordination Group, 2003: p.3.

⁸²⁰ DeCesare, Dale, Augenblick, John, Myers, John, *Examining resource use and areas for enhanced cooperation in York County's School Districts*, Denver: Augenblick, Palaich and Associates Inc., 2008: 45p.

⁸²¹ *Flexibility in Constitutions. Forms of closer cooperation in federal and non-federal settings. Post-Nice edition*, edited by Annette Schrawen, Groningen: Europa Law Publishing, 2002: p. 44

⁸²² Kaplan, Barbara T., Keinan, Yoram, "Enhanced cooperation between the banking supervision in the Bank of Israel and the banking authorities in the United States", *The National Law Review*, <http://www.natlawreview.com/article/enhanced-cooperation-between-banking-supervision-bank-israel-and-banking-supervisory-authori>, 24.09.2011: 2p.

no legal framework already adopted or any project of institutionalized form of cooperation, but in the negotiations this is a subject that has been pointed out with a view to a definition of concrete measures. It seems that, without an institutionalized framework, the goals can hardly be achieved.

Brazil and Argentina have a deep cooperation regarding nuclear energy in several domains, not only for medical purposes, but also for the construction of centrals. On the other hand, it is not surprising that the former President of Brazil Lula da Silva and the Argentinean President Cristina Kirchner have agreed in November 2011 to intensify such cooperation and used the need of energy by the Mercosul as an extra reason for their cooperation. The fact is that it generated similar initiatives, even if only at an emergent stage, between Chile and Venezuela. The cooperation within Mercosur has so far not developed any mechanism like EU enhanced cooperation, but there are many references to enhanced cooperation between EU and Mercosur. The reason is the stage of the integrative process in Mercosur⁸²³.

There is a full enhanced cooperation program between Papua New Guinea and Australia⁸²⁴. It is a very comprehensive program with full definition of actors, projects, goals and means for its implementation. It is interesting to note that, although this is a program between two partners which have a clear view on what is enhanced cooperation. It is presented as a form of cooperation that should be understood outside the more comprehensive development budget program⁸²⁵ that exists between the two States and which has been understood not to be as flexible as needed. The option to add an enhanced cooperation program was due to the need to make some of its elements more flexible, both in terms of calendar and of use of resources. But the need of an efficient management structure is presented as of utmost importance⁸²⁶.

⁸²³ Malamud, Andrés, Schmitter, Philippe C., "The Experience of European Integration and the Potential for Integration in South America", *New Regionalism and the European Union. Dialogues, Comparisons and New Research Directions*, edited by Alex Warleigh-Lack, Nick Robinson, Ben Rosamond, London and New York: Routledge, 2011: p. 135-157.

⁸²⁴ Dixon, Geoff, Gene, Michael, Walter, Neil, *Joint review of the enhanced cooperation program ECP*, Report prepared for the Governments of Papua New Guinea and Australia, 2008: 70p.

⁸²⁵ Dixon, Geoff, Gene, Michael, Walter, Neil, *Joint review of the enhanced cooperation program ECP*, Report prepared for the Governments of Papua New Guinea and Australia, 2008: p. 15.

⁸²⁶ Dixon, Geoff, Gene, Michael, Walter, Neil, *Joint review of the enhanced cooperation program ECP*, Report prepared for the Governments of Papua New Guinea and Australia, 2008: p. 18.

The USA and Canada built up an enhanced cooperation program as far as defence is concerned⁸²⁷, but the use of the concept of enhanced cooperation is too little developed. The word enhanced is basically a modifier with no specific legal meaning. However, and although it is a strictly bilateral program, there are signs of a certain openness of that cooperation when it refers to the “enhanced coordination with NATO”, as if it could be open as long as it can be enhanced.

The concept is also used in the relations between States and organisations, that is, for instance, the case of the Memorandum of Understanding between China and UNDP⁸²⁸ where strengthened cooperation is considered, or between India and the African Union⁸²⁹.

The enhanced cooperation idea has also been used as a theoretical form of action without necessarily being connected to any regional area or State. One of examples that have been identified referred to the possible means to help solving some difficulties in the litigation area. The subject is complex and goes beyond the aim of this study, but a reference, especially for the new approach to the concept, should be made here⁸³⁰.

Many more examples could be quoted here, but the intention was just to illustrate the diversity of the uses of the enhanced cooperation concept, and not to be unrealistically exhaustive.

3. Major elements of EU enhanced cooperation mostly commonly accepted in international law

Following upon the examples quoted, one element seems to be clear: the more integrative process, the more complete the enhanced cooperation may be. This may be a truism but in reality it would be possible to argue – as many in EU have done, and still

⁸²⁷ Findley, Eric A., Inge, Joseph R., *Final report on Canada and the United States (CANUS) Enhanced Military Cooperation*, Colorado Springs: Peterson Air Force Base, 2006: 152p.

⁸²⁸ *Memorandum of Understanding for Strengthened Cooperation between the Government of People's Republic of China and the United Nations Development Programme*, 22.09.2010: 3p.

⁸²⁹ *Africa-India framework for enhanced cooperation*, Second Africa-India Forum Summit, Addis Ababa, 2011: 8p.

⁸³⁰ Croson, Rachel, Mnookin, Robert H., “Does disputing through agents enhance cooperation? Experimental evidence”, *Journal of Legal Studies*, vol. XXVI, 1997: p. 331-345.

do – that enhanced cooperation differentiates more than integrates. But enhanced cooperation should be understood – special at EU level – as a mechanism directed towards integration, by allowing successive participations.

The open character of the enhanced cooperation is reiterated in different formulas that have opted by using this procedure. This openness is a fundamental aspect to ensure the integrative character. The obstacles that in some cases are found regarding this open character (in particularly ASEAN) are less and less and a change has been identified towards a more flexible unity, bearing in mind that the idea of unity is always retained.

The question of openness must be carefully looked into. Although in the EU, the enhanced cooperation mechanism is open to all Member States at any stage of the process; it is not open when it comes to leave the enhanced cooperation. According to the Treaty there is no provision allowing it, nor impeding it, but if it is not mentioned, then it should not be inferred⁸³¹. As to other forms of enhanced cooperation there is not any specific detail on this matter, but, on the other hand, none of the other forms is so legally binding.

The delimitation of the matter of the enhanced cooperation also contributes to its implementation, once its deeper definition allows a legal framework to be applied in a more consistent way and it also may force some legal and regulatory harmonisation between the different partners, as it is often understood that with a similar legal framework it is easier to implement the enhanced cooperation and to accomplish the goals it was set for.

An aspect that the EU developed in a much larger scale is the institutionalisation of the enhanced cooperation, although not doubling existent institutions or creating new ones. This option for not creating new and more institutions is also a concern for different agents in different scenarios. Institutionalising comprehends all decisions tending to establish a regulatory and legal framework of procedures that fix the limits of the enhanced cooperation. The limits of the enhanced cooperation are of major importance once they also define the capacity and scope to act or react by partners.

⁸³¹ *Withdrawal from enhanced cooperation: the Committee's evidence session with Baroness Wilcox*, House of Commons - European Scrutiny Committee, Thirty-ninth Report of Session 2010– 12, London: The Stationery Office Limited, 2011: 24p.

One feature which is very important for EU – that is, the enhanced cooperation must be a last resort mechanism – is not necessarily echoed in other enhanced cooperation initiatives. In the case of APEC, for instance, in reality it is the opposite; the enhanced cooperation (the pathfinder initiative) is triggered as a challenge to partners and not as a result of failed negotiations.

Chapter VIII

Proposal to overcome the entry into force impasse of CTBT

Chapter VIII - Proposal to overcome the entry into force impasse of CTBT

1. Comparative law⁸³²

In order to attempt a comparative law exercise, as it is intended here, a methodological work should be developed beforehand in order to better define the path that is intended to be followed. As we speak of comparative law, it seems, however, very restrictive to identify ourselves with a single school of thought, as we shall see we share different elements of different schools. Moreover, the literature, as far as the method is concerned, is abundant and there is no intention here to theoretically speculate about it, but instead to use the elements that have been largely identified by scholarship and that may be useful for this research. Besides the method to be applied⁸³³, the question of the concepts must necessarily be taken into account as well⁸³⁴.

The stalemate of the entry into force of CTBT is a result mostly due to its own limitative rules, nevertheless, and unlike the article XIV conferences have been doing; it is still possible to address new forms to implement the treaty before its entry into force. Two proposals have been made (vd. Part I, Chapter III), but they both were made within the same framework, that is, by making use of the CTBT treaty provisions only, just anticipating the application of the treaty without providing innovative ideas for it, and not answering the difficult question associated with the provisional application of the treaty. It is not intention here to establish any sort of *ultra vires* interpretation of article

⁸³² Regarding the methodology on comparative international law, a few references should be made: *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann, Reinhard Zimmermann, Oxford: Oxford University Press, 2008, in particular the chapter on the functional method by Ralf Michaels, p. 339-382; Zweigert, Konrad, Kötz, Hein, *Introduction to Comparative Law*, 3rd ed., Oxford: Oxford Press, 1998: 714p., Jaluzot, Béatrice, "Méthodologie du droit comparé : bilan et prospective", *Revue Internationale de Droit Comparé*, vol. 57, n.1, 2005: p. 29-48 and also Zapatero, Pablo, "Modern international law and the advent of special legal systems", *Arizona Journal of International and Comparative Law*, vol. 23, n. 1, 2005: p.55-75; Kakouris, C. N., "Use of the Comparative Method by the Court of Justice of the European Communities", *Pace International Law Review*, vol. 6, n. 2, 1994: p. 267-283.

⁸³³ Jaluzot, Béatrice, "Méthodologie du droit comparé : bilan et prospective", *Revue Internationale de Droit Comparé*, vol. 57, n.1, 2005: p. 35.

⁸³⁴ Laer, C.J.P. van, "The applicability of Comparative Concepts", *Electronic Journal of Comparative Law*, vol. 2, n. 2, <http://www.ejcl.org/22/art22-1.html>, 1988: p. 5

XIV, but instead to find a way to use it to overcome what it has of more restrictive: the entry into force.

Besides those proposals, it should also be referred Austria's suggestion in June 1995 to include a provision allowing that a simple majority of the states party to the CTBT could decide to apply the Treaty provisionally. This proposal was then refused. It could be a way of answering the requirement of article 25, n. 1, al. a) of VCLT. We consider that the present *statu quo* of the treaty cannot remain as it is forever, once its credibility will eventually be put into question and that might implode the treaty. At this stage, this does not seem to be the large majority of States' option, or else they would not tenaciously participate in the Preparatory Commission and other Policy Making Organs works and would not meet their financial obligations regarding the treaty.

Although article 25 refers to the provisional application of a treaty and not to another legal instrument on provisional application of a treaty, it does not exclude it as well. The fact is that when considering provisional application, both situations must be taken into consideration together⁸³⁵. It could be of value to try this different approach⁸³⁶, by combining the elements already elsewhere identified and use them differently, recurring to other international law instruments. The recourse to diverse legal orders as models, namely the EU legal order, should be useful as well⁸³⁷.

The ultimate aim in this study is to try to apply EU legal provisions as models to an international law specific situation. From the political point of view, it is necessary to always bear in mind that any attempt to do it in a real scenario might face the present increasing suspicion regarding EU initiatives as far as the multilateral context is concerned.

This attempt will be made keeping in mind the specificities of EU law compared to international law⁸³⁸, and it must also be taken into account the fact that international

⁸³⁵ Geslin, Albane, *La mise en application provisoire des traités*, Paris: Éditions A. Pedone, 2005: p. 342 ; *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, edited by Rene Lefebvre and Jan Klabbers, Leiden: Martinus Nijhoff, 1998: p. 95

⁸³⁶ Jayakumar, S., "UNCLOS – two decades on", *Singapore Year Book of International Law*, vol. 9, 2005: p.6.

⁸³⁷ *International Law: Classic and Contemporary Readings*, edited by Charlotte Ku and Paul F. Diehl, 3rd ed., Boulder-Colorado: Lynne Rienner Publishers Inc, 2008: p. 467, in particular the idea of "European way of law"; *Developments of International Law in Treaty making*, edited by Rüdiger Wolfrum and Volker Röben, Heidelberg: Springer, 2005: p. 297-300.

⁸³⁸ *Case C-26/62, NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, European Court Reports 1963, 05.02.1963: p. 12.

law does not have any source of legislative regulation, like EU law does, being forced to renew and re-conclude treaties on the same subjects⁸³⁹ just to introduce new elements.

“In reality, as long as institutions are non-universal, only problems can play the role of a constant”⁸⁴⁰, it is also with this background that the questions of entry into force and provisional application will be dealt with. Although CTBTO, UN and EU are very different organizations, the fact is that when it comes down to law, the problems are often the same and likely to be treated in a very similar way. International politics and international law evolve, can and should adapt themselves to different circumstances. Even if a solution for a case may not be fully used in a different context, it may still be considered in some of its elements.

Although *praesumption similitudinis* should be considered, it does not mean that it necessarily has to result in the confirmation of a full similitude. Only by comparing the law systems may we know what are the applicable alternatives and the possibilities of adaptation. The presumption of similarity has nevertheless to be established to allow possible similar aspects to be identified.

As far as disarmament and non-proliferation are concerned, not only hard law is applied by States and courts, but also a reasonable set of soft law instruments is often adducted⁸⁴¹. The definition of soft law is large and encompasses several elements that contribute for the full characterization of international law⁸⁴². Moreover, the soft law option may make negotiations easier because of its non binding character⁸⁴³. The pervert effect is that it may eventually become international customary law, and can be argued as a valid source of international law⁸⁴⁴. On the other hand, because treaties are

⁸³⁹ Pescatore, Pierre, “International Law and Community Law—a Comparative Analysis”, *Common Market Law Review*, vol. 7, n.2, 1970: p. 172.

⁸⁴⁰ *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann, Reinhard Zimmermann, Oxford: Oxford University Press, 2008: p. 367.

⁸⁴¹ *Developments of International Law in Treaty making*, edited by Rüdiger Wolfrum and Volker Röbens, Heidelberg: Springer, 2005: p. 39

⁸⁴² Boyle, Alan, Chinkin, Christine, *The Making of International Law*, Oxford: Oxford University Press, 2007: p. 212-213.

⁸⁴³ Hillgenberg, Hartmut, “A Fresh Look at Soft Law”, *European Journal of International Law*, vol. 10, n. 3, 1999: p. 499-515.

⁸⁴⁴ Article 38 of the Statute of the International Court of Justice, *Statute of the International Court of Justice*, <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>, 55p.

written, they may become obsolete, and they need to be updated, while soft law may be easily transformed⁸⁴⁵.

Again, soft law is another source, though not a legally binding one, to the configuration of international law. The option to use soft law as a “ballon d’essai” of hard law is often chosen.

One of those soft law elements is UNGA resolutions⁸⁴⁶. These elements may be an important contribution to customary international law, especially because they contribute for the formation of the necessary *opinio juris*⁸⁴⁷. The case of treaties, that have been approved by a UNGA resolution and then have been signed by a large majority of States and ratified by a large number as well, must be taken, at least, as examples of customary international law, if they are not in force and cannot be considered hard law yet. That is the case of CTBT. We shall avoid sustaining – although we agree – that the repetition of a subject or act makes it customary law, as scholarship argues and the ICJ opposes⁸⁴⁸.

The creation of preparatory commissions is:

- i) often included as an annexe to a treaty creating an international organisation. This was, for instance the case of the IAEA.
- ii) The preparatory commission may also be envisaged in the text of the treaty itself⁸⁴⁹.
- iii) In the case of the CTBTO, it is an element which is referred to in the treaty, but it is not established in the treaty. The preparatory commission is created by a “text” annexed to a UNGA resolution⁸⁵⁰, thus making it a

⁸⁴⁵ Boyle, Alan, Chinkin, Christine, *The Making of International Law*, Oxford: Oxford University Press, 2007: p. 241.

⁸⁴⁶ *Commitment and Compliance. The Role of Non-Binding norms in the International Legal System*, edited by Dinah Shelton, 2nd. ed., Oxford: Oxford University Press, 2007: p.466, 487.

⁸⁴⁷ Goldsmith, Jack, Posner, Eric A., *The Limits of International Law*, New York: Oxford University Press, 2005: p. 26-28

⁸⁴⁸ Reuter, Paul, *Introduction au droit des Traités*, 3rd ed., Paris: Presses Universitaires de France, 1995: p. 99 and International Court of Justice, *North Sea Continental Shelf Cases*, I.C.J. Reports, 1969: p. 44, para. 77.

⁸⁴⁹ Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge: Cambridge University Press, 2007: p. 175-176.

⁸⁵⁰ *Resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization*, adopted by the States Signatories on 19 November 1996, http://www.ctbto.org/fileadmin/user_upload/public_information/2009/prepcom_resolution.pdf.

somehow provisional application of a particular aspect of the CTBT, thus replenishing a possible soft law enclave in the treaties⁸⁵¹;

- iv) The preparatory commission can take decisions, it has legal personality and it is almost an International Organisation⁸⁵². Besides the implied powers it may have, the text, for instance, that creates the CTBTO Preparatory Commission also defines some powers, competences, rights and obligations of the Commission.

One of the first questions regarding a possible provisional application has to do with the reception of international law by domestic legal orders⁸⁵³. If in many cases international law, and in particular multilateral treaties, impose themselves on domestic orders (as it is the case of Australia, Canada, the Netherlands), in many others, like India, United Kingdom or South Africa they require national legislation to be effective. This distinction goes beyond the difference between the monism/dualism debate. The role of courts in addressing questions arising from international treaties, independently of the approach to the form of incorporation of the Treaties into domestic national orders, is much differentiated⁸⁵⁴.

The interpretation rules applied to treaties by the national courts depend on the form the international law is incorporated in national legal orders as well as on the general rules of interpretation of treaties⁸⁵⁵. The imperfect reception of the provisional application protocol by domestic orders might suggest it is impeded of producing effects for that particular State. The fact is that it would not affect the rights and obligations towards another party of the treaty.

⁸⁵¹ Hillgenberg, Hartmut, "A Fresh Look at Soft Law", *European Journal of International Law*, vol. 10, n. 3, 1999: p. 499-515.

⁸⁵² *Resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization*, adopted by the States Signatories on 19 November 1996, http://www.ctbto.org/fileadmin/user_upload/public_information/2009/prepcom_resolution.pdf, article 7 of the annex; Rama-Montaldo, Manuel, "International Legal Personality and Implied Powers of International Organizations", *British Yearbook of International Law*, vol. 44, 1970: p. 111-155; Amerasinghe, Chittharanjan Felix, *Principles of the Institutional Law of International Organizations*, 2nd ed., Cambridge: Cambridge University Press, 2005: 538p.

⁸⁵³ Goldsmith, Jack, Posner, Eric A., *The Limits of International Law*, New York: Oxford University Press, 2005: p. 91

⁸⁵⁴ *The role of domestic courts in Treaty enforcement. A comparative study*, edited by David Sloss, New York: Cambridge University Press, 2009: 626p; *The law of the treaties. Beyond the Vienna Convention*, edited by Enzo Cannizzaro, Oxford: Oxford University Press, 2011: p. 256-278.

⁸⁵⁵ Linderfalk, Ulf, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of the Treaties*, Dordrecht: Springer, 2007: 414p.

2. Unratified treaties⁸⁵⁶ and entry into force difficulties

The cases of unratified treaties are numerous, namely in the case of multilateral ones⁸⁵⁷. The fact is that one party may impede the rest of the parties to take advantage of a treaty, as its non-ratification may imply the non-entry into force⁸⁵⁸ of the treaty. That is the case of CTBT⁸⁵⁹, because of annex 2 to the Treaty. Nevertheless, the act of signing a treaty establishes a compromise⁸⁶⁰ that, even if not legally binding, it has a normative character that should not be ignored. Both the VCLT, in its article 18, and the ICJ sustain this position⁸⁶¹. We consider that article 18 reproduces principles of international customary law, reiterated several times, therefore, even States that are not parties to VCLT, are bounded by those principles.

The question of retarding the ratification is often used as a political weapon, especially because the signature does not legally impose its ratification⁸⁶², even if that it is expected to happen in a near future, there is no binding nexus between both stances, but signature is clearly the first step for a State to assume a position on a particular treaty⁸⁶³, and it creates rights, duties and obligations. The same is valid – and even stronger – in the cases of accession to treaties.

Compliance in the case of arms control, disarmament and non-proliferation instruments depend on the effectiveness of entry into force of those treaties but for that to happen there is a serious of negative and positive incentives that may be applied and which literature has extensively developed. As negative incentives we point out the use of sanctions; while as positive incentives the scientific and technological cooperation, as

⁸⁵⁶ Lantis, Jeffrey S., *The Life and Death of International Treaties. Double-edged diplomacy and the politics of ratification in comparative perspective*, Oxford: Oxford University Press, 2009, p. 6-10

⁸⁵⁷ Rogoff, Martin A., “The International legal obligations to an unratified treaty”, *Maine Law Review*, vol. 32, n. 2, 1980: 269-270.

⁸⁵⁸ Lantis, Jeffrey S., *The Life and Death of International Treaties. Double-edged diplomacy and the politics of ratification in comparative perspective*, Oxford: Oxford University Press, 2009, p.1.

⁸⁵⁹ The question of unratified treaties and CTBT in particular has been already considered in chapter III.

⁸⁶⁰ International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C. J. Reports, 1951: p. 28.

⁸⁶¹ International Court of Justice, *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain*, Merits – Judgement, I. C. J. Reports, 2001: p. 68, para. 89.

⁸⁶² Rogoff, Martin A., “The International legal obligations to an unratified treaty”, *Maine Law Review*, vol. 32, n. 2, 1980: p. 267, and in particular footnote 11.

⁸⁶³ International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C. J. Reports, 1951: p. 28.

well as the civilian use of the means of a treaty may be considered⁸⁶⁴. Moreover, the option for provisional application of this kind of treaties is not unusual⁸⁶⁵.

The idea of compliance in the case of treaties that deal with peace and security assumes a greater relevance that makes their entry into force even more urgent. Without it, and even if soft law or customary international law issues may be included, the chances of those treaties becoming law are very thin. The provisional application is of merit to help solving this problem.

3. A few examples of provisional application of treaties

It would be impossible to assess here all the examples of provisional application of treaties, the option made was to choose differentiated possibilities both as far as procedures and scope of the treaties are concerned, as well as diverse domains of those treaties where it has been used, in order to demonstrate that there is no *ab initio* restriction to the provisional application. One particular case is the treaties that create Preparatory Commissions of International Organizations⁸⁶⁶ (as it was the case of ICAO, IMO, OPCW and CTBTO). They are usually set to create an institution that can develop tasks that are required before the entry into force and which will be necessary for the implementation of the treaty, namely by facilitating training and scientific studies on the subjects concerned, and by fulfilling the tasks that are required for the entry into force take place, for instance, the establishment of monitoring systems.

The most famous case of provisional application is perhaps the Protocol of provisional application of the General Agreement on Tariffs and Trade⁸⁶⁷, as it lasted from 1947 to 1994. This Protocol⁸⁶⁸ lays out the provisional application of the

⁸⁶⁴ *Making Treaties Work. Human Rights, environment and arms control*, edited by Geir Ulfstein, Cambridge: Cambridge University Press, 2007: p. 250-251.

⁸⁶⁵ Michie, Andrew Gordon, "The provisional application of arms control treaties", *Journal of Conflict and Security Law*, vol. 10, n. 3, 2005: p. 345-377 and *The provisional application of treaties with special reference to arms control, disarmament and non-proliferation instruments*, Pretoria: University of South Africa, 2004: 199p.

⁸⁶⁶ Sagar, David, "Provisional Application in an International Organization", *Journal of Space Law*, vol. 27, n.2, 1999: p. 103.

⁸⁶⁷ *The law of the treaties. Beyond the Vienna Convention*, edited by Enzo Cannizzaro, Oxford: Oxford University Press, 2011: p.88.

⁸⁶⁸ *Protocol of provisional application of the General Agreement on Tariffs and Trade*, <http://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-A-814-English.pdf>, 30.10.1947.

agreement concerned, but establishes a distinction among its different constitutive parties. This means that not all of the General Agreement on Tariffs and Trade is provisionally applied. Withdrawal from the protocol is also possible.

The Protocol on provisional application of the revised treaty of Chaguaramas⁸⁶⁹, for instance, restrains its application by excluding some of the articles of the treaty, which clearly reflects that, although the Protocol may be complimentary to the treaty, and it does endorse its full scope, some of its provisions are not included in the provisional application. Article 25 VCLT refers to a “treaty or part of a treaty”, which means that both possibilities are clearly admitted in international law.

In the case of UNCLOS⁸⁷⁰, the agreement on implementation of Part XI of the Convention is indeed an additional protocol on provisional application of the treaty⁸⁷¹, even if only of a part of the Convention. Unlike the precedent examples, this agreement includes much more provisions making it a treaty with broader characteristics. Interestingly, its article 7 refers to the provisional application of the treaty, although in a complex way⁸⁷². Curious situation, once this agreement serves to provisional apply a part of the convention. Moreover, alinea a) of that same number stipulates that the agreement will be provisionally applied by all the States that have consented to its adoption by the UNGA. Although it is an implementation agreement, it should not be taken as only that, as in reality it presupposes the application of UNCLOS⁸⁷³ (part of it). This was also a way to reflect the concerns of some States that otherwise would never ratify UNCLOS⁸⁷⁴. In our view this option goes beyond what article 25 VCLT directly foresees and extends several aspects of that article.

As article 25 of VCLT establishes, this agreement may include a temporal provision fixing a date for the termination of the agreement⁸⁷⁵. The question of

⁸⁶⁹ *Protocol on provisional application of the revised treaty of Chaguaramas*, <http://www.caricomlaw.org/Details.aspx?EntryId=104>, 04.02.2002.

⁸⁷⁰ Jayakumar, S., “UNCLOS – two decades on”, *Singapore Year Book of International Law*, vol. 9, 2005: p.1-8.

⁸⁷¹ *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, http://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm, 28.07.1994.

⁸⁷² Geslin, Albane, *La mise en application provisoire des traités*, Paris: Éditions A. Pedone, 2005: p. 48

⁸⁷³ Anderson, D.H., “Legal implications of the entry into force of the UN Convention on the Law of The Sea”, *International & Comparative Law Quarterly*, vol. 44, n. 2, 1995: p. 313-326.

⁸⁷⁴ Shaw, Malcolm, *International Law*, 6th ed., Cambridge: Cambridge University Press, 2008: p. 632-633.

⁸⁷⁵ *Council Decision of 20 December 2011 repealing Council Decision 2011/491/EU on the signing, on behalf of the European Union, and the provisional application of the Protocol between the European*

termination of provisional application answers different questions which literature has already deeply developed⁸⁷⁶.

In the case of UNCLOS there is a more developed model which includes:

- i) not only a possible date for its cessation (in reality two, either the entry into force of the Convention or 16 November 1998, in case its entry into force is not possible);
- ii) a complete process for the conclusion of participation in the agreement;
- iii) the possibility of an opt-out clause. It is clear that UNCLOS allows an intervention by the whole international community as far as common interests are concerned, like the attack on piracy and on terrorism, making UNCLOS a convention that reflects a will from the States to address those common problems, even if there are aspects that may require a distinct approach⁸⁷⁷ (like the questions regarding the seabed).

Another example of a protocol on provisional application is to be found within the context of the Treaty on Conventional Armed Forces in Europe⁸⁷⁸. In this case there was a deliberate option to only include some of its articles. There is a temporal framework for its implementation. In the case of the Treaty on Conventional Armed Forces in Europe, several declarations were adopted at the same time, complementing the interpretation given by the States to the provisional application. This Protocol⁸⁷⁹, although not referring to all the provisions of the Treaty, clearly includes those mentioned in its article One and that they will be applied in light and conformity with the whole Treaty (i.e. Treaty on Conventional Armed Forces in Europe). A way of

Union and the Kingdom of Morocco setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, Official Journal of the European Union, L 6, 10.01.2012: p. 1-2.

⁸⁷⁶ Geslin, Albane, *La mise en application provisoire des traités*, Paris: Éditions A. Pedone, 2005: p. 292; Reuter, Paul, *Introduction au droit des Traités*, 3rd ed., Paris: Presses Universitaires de France, 1995: p. 62

⁸⁷⁷ Hart, Sharelle, *Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*, Gland: IUCN, 2008: 36p.

⁸⁷⁸ Schulte, Paul, *The Precarious State of Flux of the Conventional Armed Forces in Europe Treaty*, Carnegie Council – Conference paper, [http://www.carnegiecouncil.org/resources/articles_papers_reports/0106.html/_res/id=sa_File1/The_Precarious_State_of_Flux_of_the_Conventional_Armed_Forces_in_Europe_Treaty_\(CFE\).pdf](http://www.carnegiecouncil.org/resources/articles_papers_reports/0106.html/_res/id=sa_File1/The_Precarious_State_of_Flux_of_the_Conventional_Armed_Forces_in_Europe_Treaty_(CFE).pdf), 2011: 10p.

⁸⁷⁹ *Protocol on provisional application of the Treaty on Conventional Armed Forces in Europe*, http://www.fas.org/nuke/control/cfe/text/prot_provapp.htm, 18.11.1990.

respecting article 18 VCLT principles as far as the obligation not to defeat the object and purpose of the treaty is concerned.

The Open Skies treaty⁸⁸⁰ defines on its own text the conditions for the provisional application, namely its scope, as not all the treaty is envisaged for the provisional application⁸⁸¹. The time frame of the application is also included in the treaty⁸⁸².

The Energy Charter Treaty⁸⁸³ is another example of provisional application⁸⁸⁴. The EU, by then CE, took a decision⁸⁸⁵ which firmly establishes its provisional application without any other criteria or factor sustaining it, apart from a previous communication by the European Commission that considered the Energy Charter Treaty of foremost importance for Europe. It must be said that article 45 on provisional application⁸⁸⁶ includes the procedures for the application and forces the Parties that do not want to apply it provisionally to clearly make an opt-out of the article. An annex to the treaty refers the Czech Republic, Germany, Hungary, Lithuania, Poland, and Slovakia as States that do not accept the provision of article 45⁸⁸⁷.

The provisional application of these treaties, as well as others, makes *lege ferenda* to become *lex lata*⁸⁸⁸. A controversial transformation as usually it implies the replacement of one for the other, while as we have seen above, there may be cases of

⁸⁸⁰ *Treaty on Open Skies*, <http://www.osce.org/library/14127>, 24.03.1992.

⁸⁸¹ Spitzer, Hartwing, "The Treaty on Open Skies – Status quo and prospects", *OSCE Yearbook* 2004, Vienna: Center for OSCE Research, 2004: p. 369-380.; "The Open Skies Treaty: Entering full implementation at low key", *Helsinki Monitor*, vol.17, n.1, 2006: p. 83-91.

⁸⁸² Klabbers, Jan, *Treaty Conflict and the European Union*, Cambridge: Cambridge University Press, 2009: p.11.

⁸⁸³ *Energy Charter Treaty*, http://www.encharter.org/fileadmin/user_upload/document/EN.pdf, 17.12.1994.

⁸⁸⁴ Çal, Sedat, "Reciprocity and provisional application under the energy charter treaty", *European Energy Law Report VI*, edited by Martha Roggenkamp and Ulf Hammerp, Antwerpen: Intersentia, 2009: p.189-226.

⁸⁸⁵ *Amended proposal for a Council Decision on the signing of the European Energy Chart Treaty and its provisional application by the European Atomic Energy Community (94/C 372/08)*, Official Journal of the European Communities, C-372, 28.12.1994: p. 16

⁸⁸⁶ *The law of the treaties. Beyond the Vienna Convention*, edited by Enzo Cannizzaro, Oxford: Oxford University Press, 2011: p.90-102.

⁸⁸⁷ However, the council decision allows the EC to do it and therefore it makes this opt-out more difficult to be implemented.

⁸⁸⁸ Malanczuk, Peter, *Akehurst's modern introduction to international law*, 7th ed., London-New York: Routledge, 2010: p.35 and 54.

simultaneity of *lege ferenda* and *lex lata* regarding the same treaty. This relevant dichotomy has also been raised and developed regarding the CTBT ⁸⁸⁹.

While nothing in the TEU and the TFEU refers to any possible provisional application of those treaties, article 218 TFEU (former article 300 TCE) kept the already existing provision that authorizes the Council to sign treaties on behalf of the EC and, if the case may be, to allow the provisional application of the Treaties. The provision of article 37 TEU - granting rights to the EU to conclude treaties within CFSP - must also be taken into account. This happened with the Energy Charter Treaty and later with the Open Skies Treaty⁸⁹⁰.

It is questionable if the provisional application of a treaty may grant rights and obligations towards third parties, namely signatory parties, but in some cases third parties may also be granted rights just for the provisional application from some other parties. To avoid doubts on this matter, as well as abuses, it might be of use to expressly mention the ruling on this matter in the protocol on provisional application. However, if the aim is to move forward, it may be well the case that by granting those rights, it can be motivation for other States to sign and to ratify, as well as to provisionally apply the treaty.

The provisional application is intended to answer some questions caused by the delay in entry into force of treaties:

- i) Urgency of the matter⁸⁹¹;
- ii) If ratification is sure, then provisional application is just an anticipation;
- iii) To ensure that there is no breach in the legal development or implementation of the treaty. One example, as we have seen, is the creation of preparatory commissions to prepare the grounds for the entry into force.

⁸⁸⁹ Tabassi, Lisa, "The nuclear test ban: *lex lata* or *de lege ferenda*?", *Journal of Conflict and Security Law*, vol. 14, n.2, 2009, p. 309-352.

⁸⁹⁰ *Decision of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 25 April 2007 on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand* (2007/339/EC), Official Journal of the European Union L 134, 25.5.2007: p.1-3.

⁸⁹¹ Malanczuk, Peter, *Akehurst's modern introduction to international law*, 7th ed., London-New York: Routledge, 2010: p. 135; Geslin, Albane, *La mise en application provisoire des traités*, Paris: Éditions A. Pedone, 2005: p. 23-28 ; Vignes, Daniel, "Une Notion Ambiguë: L'application à Titre Provisoire des Traités", *Annuaire français de droit international*, vol. 18, 1972: p. 181-199.

4. The possibility of provisional application of CTBT

Nothing in the Treaty refers to this possibility, neither is it excluded. According to VCLT, article 25: “1. A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed.” It should be noted that in the definitions list of article 2 VCLT provisional application or provisional application are not included⁸⁹², but the heading in article 25 VCLT restraints its content to provisional application and we shall consider that only this is a possibility⁸⁹³.

In the case of CTBT, States may have one or more of three different statuses: Negotiating States, Signatory States and Ratifying States. We would recall that a ratifying or signatory States does not necessarily have to be a negotiating party. Article XIV of the treaty determines that only ratifying and signatory States are supposed to participate in the Conference that should deal with the question of entry into force.

We consider that negotiating States referred in article 25 would be applied to the negotiating States of the additional protocol that may be adopted for the purpose of provisional application and not to the negotiating States of the treaty, so that States that have ratified but did not participate in the negotiations might be excluded, which would be in our view *contra legem*, as the States might have differentiated rights. The provisional application of the treaty shall not impact on negotiating states that eventually did not sign, ratify or accede to the treaty, as they are not part of it. Thus both CTBT and VCLT could be fully respected⁸⁹⁴, even if a broader reading of article 25 VCLT is needed.

Likewise some of the provisions of the large majority of multilateral treaties are by their own legal character supposed to be exercised previously to the entry into force⁸⁹⁵; therefore the provisional application of at least parts of a treaty is no strange figure in law and practice. Moreover, n. 2 of article XIV of the treaty states that the

⁸⁹² Geslin, Albane, *La mise en application provisoire des traités*, Paris: Éditions A. Pedone, 2005: p. 111.

⁸⁹³ Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge: Cambridge University Press, 2007: p. 172

⁸⁹⁴ Geslin, Albane, *La mise en application provisoire des traités*, Paris: Éditions A. Pedone, 2005: p. 64-66.

⁸⁹⁵ What Anthony Aust calls the “breathing space between signature and entry into force”, *Modern Treaty Law and Practice*, 2nd ed., Cambridge: Cambridge University Press, 2007: p. 168.

measures to be decided have to respect international law, which means that these measures may refer to international law instruments that address the issue in the cases where the article is silent on any question within its scope.

Article XIV speaks about “measures consistent with international law may be undertaken to accelerate the ratification process in order to facilitate the early entry into force of this Treaty”. In a very restrictive reading, it seems that provisional application is not directly addressed in this provision, and therefore it seems that only VCLT provisions could apply for that case, as “measures consistent with international law”. We do not share this limitative and narrow interpretation.

Quite the opposite, the use of the words “accelerate” and “early” makes the use of article XIV more flexible. The question is that it does not seem possible that all States that have not ratified the treaty, or even those that have, would accept a provisional application, especially because it was not agreed beforehand. We consider that the provisional application could be object of an additional protocol, which in reality would be a new legal instrument, thus contributing for the CTBT to move forward and thus to promote its universalisation.

This additional protocol would have to comply with a few criteria, *inter alia*:

- i) respect of customary international law⁸⁹⁶;
- ii) respect of peremptory norms of international law (*jus cogens*);
- iii) respect of the treaty’s text, Parties’ duties, obligations, and rights.

One extra problem with provisional application of the CTBT would be the financial support of the PTS and of the whole IMS and IDC, as the treaty establishes the payment by signatory States, who may not be the same as for the additional protocol and which may decide not to let it be at the service of the provisional application protocol.

A new instrument may impose the same provisions as the original treaty, but it will be valid only for the states that decide to move forward, as it would happen with

⁸⁹⁶ Guzman, Andrew T., “Saving customary international law”, *Michigan Journal of International Law*, vol. 27, n.1, 2005: p. 115-176.

the normal entry into force in the case of those states that would not ratify and for whom the treaty would not be in force⁸⁹⁷.

On the one hand, the fact that the question of provisional application is treated in a separate instrument of the treaty in question may facilitate its implementation. It can be argued that the provisional application based in a non-ratified treaty can hardly be admissible⁸⁹⁸, that is, the provisional application by a non-ratifying party, even if desired, may be questioned. Nevertheless, and especially in the case of arms control, disarmament and non-proliferation treaties, there may be a political reason for it, that is, a party may not want to ratify before another one does so, but from the legal and technical perspective, the treaty in question may be very well implemented.

The additional instrument regarding provisional application may be considered materially complementary to the treaty in question, once its legal value depends upon the treaty it refers to. This is very relevant. Although separate instruments, it must be clear that the additional protocol on provisional application requires the main treaty, without which it is ineffective.

In the case of CTBT, this additional protocol, besides the legal questions it may involve regarding procedural matters of its approval, ratification and entry into force, it will also have to deal with the complicated problem of compatibility with the technical provisions of the treaty.

At first, the problem of use of data and of its confidentiality would have to be addressed, should it include all the available data, or only of the States that would agree on provisional application of the treaty? Can the states that opt for not participating in the provisional application of the treaty impede the interchange of data once it would be done by using the IDC network? Once even without the provisional application of the CTBT the data is already available to all Signatory States, it seems there is no reason to impose any limitation on the matter in case of provisional application.

⁸⁹⁷ Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., Cambridge: Cambridge University Press, 2007: p. 172.

⁸⁹⁸ Geslin, Albane, *La mise en application provisoire des traités*, Paris: Éditions A. Pedone, 2005: p. 161, 185.

Finally, OSI could still not be applied for the simple fact that the organ that should take a decision upon it (the Executive Council⁸⁹⁹) does not exist without the entry into force and to transfer its competences to a different organ might seem to go much beyond the provisional application of the treaty. However, we tend to admit this possibility but as long as it does not change the Treaty architecture. We shall argue that the exercise of the competences of the Executive Council could be granted to an *ad-hoc* council of the States that decide to provisionally apply the Treaty. This *ad-hoc* council should respect the same proportional rule envisaged for the Executive Council in the Treaty

The role of the provisional technical secretariat would remain as it is and it should keep receiving the financial contributions envisaged in the legal instrument that creates it⁹⁰⁰.

We shall remind here that all treaties include some provisions requiring at least a tacit provisional application, namely as far as procedural tasks are concerned (*inter alia* translation, ratification and deposit). These tasks are normally uniform provisions to treaties⁹⁰¹ and do not have a direct link with the specific object and purpose⁹⁰² of the treaty. A provisional application agreement is a legal instrument and therefore it has legal effects and not only political effects⁹⁰³, which would be the case of a decision by the Conference of Article XIV, or even by AGNU. This should be the venue for the adoption of the text, but it would only be legally binding after its entry into force, like any other treaty⁹⁰⁴.

⁸⁹⁹ Lavieille, Jean-Marc, *Droit International du Désarmement et de la matière des armements*, Paris : L'Harmattan, 1997: p.177-180.

⁹⁰⁰ *Resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization*, adopted by the States Signatories on 19 November 1996, http://www.ctbto.org/fileadmin/user_upload/public_information/2009/prepcom_resolution.pdf, article 5 of the annex.

⁹⁰¹ Treaty Section of the Office of Legal Affairs of the United Nations, *Final Clauses of Multilateral Treaties*. New York: United Nations, 2003: 125p.

⁹⁰² Linderfalk, Ulf, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of the Treaties*, Dordrecht: Springer, 2007: p. 204-234.

⁹⁰³ Geslin, Albane, *La mise en application provisoire des traités*, Paris: Éditions A. Pedone, 2005: p. 339 - 340.

⁹⁰⁴ The rules of procedure of article XIV Conference of 2011, and which are not very different from previous conferences, in its article 30 considers that only ratifiers states have the right to vote in case of decisions. For this particular case, and despite the fact that the rules of procedure have been very clear ("isions on the measures referred to in paragraph 2 of Article XIV of the Treaty shall be taken by consensus of ratifiers, taking into account, to the maximum extent possible, views expressed at the Conference by signatories"), we sustain that the rule should be revised to allow signatory states to be more involved with the provisional application of the Treaty.

In the case of CTBT, the resolution that creates the Preparatory Commission and its Secretariat⁹⁰⁵ launched the legal basis for the development of some of the goals of the treaty, due to the technical requirements needed before entry into force. If it is true that the VCLT stipulates that only entry into force makes a treaty legally binding, the fact is that there are other forms of making some of its rules binding even before the entry into force⁹⁰⁶, whether simply by including a provision on provisional application in the treaty or with a protocol on provisional application and/or by including customary international law or peremptory norms of international law in the treaty. Furthermore, as we have seen, both international custom and *jus cogens* are binding.

This is the case of CTBT, i.e. the main object of the treaty is today a customary rule, even if it has been violated. Moreover, as far as explosions are concerned, and according to the ICJ, the fact is that declarations by States may be assumed as a binding legal instrument⁹⁰⁷, thus making that customary law a compulsory law. Some of the negotiating States that have not signed or ratified the treaty may be bound by its main aim (these are the cases of India and Pakistan). It is important to note that even non-members in any form of CTBT, may be affected by these customary international principals. One case was the use of the CTBT information by the UNSC to fundament its allegations of North Korea nuclear tests as a violation of international law obligations. Even if the UNSC does not refer to CTBT – because it is still a non-binding instrument – it is the data collected by the IMS and IDC and which are of possible use by its Signatory States that technically sustain, for instance, and along with IAEA data, UNSC resolution 1874.

The CTBT does not allow any kind of reservations, as we have seen before, except for its protocol and respective annexes. Identically, the possible provisional application instrument should not be opened to reservations; furthermore this is the usual case of provisional application instruments⁹⁰⁸.

⁹⁰⁵ *Resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization*, adopted by the States Signatories on 19 November 1996, http://www.ctbto.org/fileadmin/user_upload/public_information/2009/prepcom_resolution.pdf.

⁹⁰⁶ Reuter, Paul, *Introduction au droit des Traités*, 3rd ed., Paris: Presses Universitaires de France, 1995: p. 62.

⁹⁰⁷ International Court of Justice, *Nuclear Tests (Australia v. France)*, *Judgement*, I.C.J. Reports, 1974: p. 267, para. 43.

⁹⁰⁸ Geslin, Albane, *La mise en application provisoire des traités*, Paris: Éditions A. Pedone, 2005: p. 319.

5. Why a provisional application of CTBT?

Taking into account the delay and impasse on the entry into force of the CTBT, its provisional application may facilitate the development of important technologies which may be useful for the future implementation of the treaty. Moreover, the CTBT is a repository of legally binding provisions, which may not be assumed as such before the entry into force of the treaty, while it is clear that the CTBT is an important means to guarantee an extra element to international efforts regarding peace. The normative character defined by CTBT can in some aspects be applied provisionally without compromising an eventual ratification or precluding its entry into force. The provisional application would only confer legal effectiveness⁹⁰⁹ to the normative character of the treaty, even by making some of its aspects legally binding for some parties.

The option for a new legal instrument on the provisional application to include provisions that can only take place on entry into force if they depend on the overall organic of the treaty is a sensitive one. That could be the case of the OSI, as they depend on the Executive Council, which shall not exist before entry into force. It is no surprise that Angel Anastassov⁹¹⁰ excludes OSI from provisional application. We consider that provisional application of a treaty should be kept as close as possible to the treaty in question there is a way to circumvent the difficulty regarding OSI.

The Executive Council cannot be replaced by another permanent instance once it is formed by a restrictive number of ratifying States, which mean that the CTBT needs to enter into force for its creation. The provisional application should not create competitive institutions to those that the treaty creates, in reality the closer it is to the treaty, the easiest it will be to grasp ratifying States, and even signatory States. Nothing should impede, nevertheless, that a group of States that wants to move forward quicker is blocked to so because of an institutional question that can be solved. If the provisional application is strictly voluntary, so should OSI be. It cannot be the Preparatory Commission to replace the Executive Council, but within the group of

⁹⁰⁹ Zumbansen, Peer, "Law's Knowledge and Law's Effectiveness: Reflections from Legal Sociology and Legal Theory", *Comparative Research in Law & Political Economy*, vol. 5, n. 2, 2009: p. 3.

⁹¹⁰ Anastassov, Angel, "Can the Comprehensive Nuclear-Test-Ban Treaty Be Implemented before Entry into Force?", *Netherlands International Law Review*, vol. 55, n.1, 2008: p. 96-97.

States that would adopt the provisional application protocol, there could be a provision “duplicating”, in an *ad-hoc* way, the Executive Council.

Any provisional application has to ensure some flexibility, namely by allowing the possibility of withdrawal, especially in the case of CTBT where withdrawal is also possible⁹¹¹.

We have addressed the possibilities of provisional application of CTBT that scholarship has presented⁹¹² so far, only to conclude that none has made a real breakthrough, even if they identify the major problems for it to happen. Nothing can assure our proposal might be a solution or accepted by the States.

Clearly, once the treaty does not specifically refer to provisional application, a decision on that issue could be considered by all the negotiating States of CTBT, but it does not have to be approved by all of them, but only by those who might be affected by the provisional application or that can decide upon it, meaning that the text can be discussed by the Preparatory Commission⁹¹³. Although the Treaty was negotiated in the Conference on Disarmament, the fact is that the Conferences of article XIV are intended to address the problem of entry into force. We concur with Anguel Anastassov⁹¹⁴ on

⁹¹¹ *Comprehensive Nuclear-Test-Ban Treaty*, 10 September 1996, http://www.ctbto.org/fileadmin/content/Treaty/Treaty_text.pdf, article IX.

⁹¹² See Part I, Chapter III.

⁹¹³ According to rules 21 and 22 of *Rules of Procedure of the Preparatory Commission*, http://www.ctbto.org/fileadmin/content/reference/legal_resources/rules_procedure.pdf

⁹¹⁴ Anastassov, Anguel, “Can the Comprehensive Nuclear-Test-Ban Treaty Be Implemented before Entry into Force?”, *Netherlands International Law Review*, vol. 55, n.1, 2008: p. 96-97. For the benefit of reading, and once a proposal on entry into force will be attempted, we re-quote here the two possibilities known which have been addressed in Part I, Chapter III, starting with Anastassov’s proposal:

Preamble

The States Members of the Preparatory Commission (hereinafter referred to as “the Member States”, Underlining the objective of the CTBT to contribute effectively to the prevention of the proliferation of nuclear weapons in all its aspects, to the process of nuclear disarmament and therefore to the enhancement of international peace and security,

Concerned about the slow pace of ratification process and slim prospects of entering into force of the CTBT in a near future,

Called for the early signature and ratification of the CTBT by all States that have not yet done so and for them to refrain from acts which would defeat its object and purpose in the meantime, by, inter alia, preserving the announced moratoria on nuclear testing,

Have agreed as follows:

Article I. Purpose of the Operational Protocol

The purpose of this Operational Protocol is to put the CTBT into effect on a *mutatis mutandis* basis even though the Treaty as a whole has not yet entered into force.

Article II. The Organization and scope of activities

1. The Preparatory Commission shall be the principal organ of the Organization. It shall consider any questions, matters or issues within the scope of the CTBT, including those relating powers and

using as much as possible the means foreseen in the treaty for a possible approval of such an instrument, but not exclusively, as long as legally possible, as not only article XIV is vaguer, but also article 25 VCLT leaves room for alternative interpretations⁹¹⁵.

It is true that if it is decided to use only the conference of article XIV to adopt the decision of the enhanced cooperation protocol, some negotiating parties of CTBT would be excluded. On the other hand, as the provisional application is to be decided after the treaty has been approved, as a separate instrument and only affecting those

functions of the Executive Council and the Technical Secretariat, in accordance with the CTBT and its provisional application.

2. The Preparatory Commission shall not act as a substitute for the Executive Council on issues related to on-site inspections. The latter may be performed as a confidence-building measure at the initiative of and as an act of good will by the Member States concerned.

3. The Provisional Technical Secretariat shall assist the Preparatory Commission in the performance of its functions, in accordance with the CTBT.

Article III. Adoption of the Operational Protocol and accession

This Operational Protocol shall be adopted by consensus by States participating at the Conference on Article XIV (2). Any Member State may accede to this Operational Protocol at any time by sending a formal letter to the Chairperson of the Commission thereafter.

Article IV. Entry into force

This Operational Protocol shall enter into force immediately after its adoption by the Conference on Article XIV (2).

Article V. Duration

1. This Operational Protocol shall be applied on a temporary basis for a period of 10 years, or until the CTBT enters into force earlier.

2. After the expiration of 10 years States may decide by consensus to extend the duration of this Operational Protocol for another period, or periods.

3. The provisional application of the CTBT in no way affects the existing requirements for ratification and entry into force of the Treaty as a whole.

and Johnson, Rebecca, "Beyond Article XIV: Strategies to save the CTBT", *Disarmament Policy*, n. 73, <http://www.acronym.org.uk/dd/dd73/73ctbt.htm>, 2003: p. 8.

1. To promote the implementation of the Comprehensive Nuclear-Test-Ban Treaty, as opened for signature on September 24, 1996, hereinafter referred to as the Treaty, the States Parties hereby agree to the provisional application of certain provisions of the Treaty.

2. Without detriment to the provisions of Article XIV of the Treaty, the States Parties shall apply provisionally all other Articles, Protocols and Provisions of the Treaty.

3. The Treaty shall be applied provisionally [on DATE] by all States which have signed and ratified the Treaty, unless they notify the Depositary in writing that they do not consent to such provisional application.

4. The Treaty shall be applied provisionally by any State which has signed the Treaty, which consents to its provisional application by so notifying the Depositary in writing. Such provisional application shall become effective from the date of receipt of the notification by the Depositary.

5. Regardless of whether a signatory State has agreed to provisionally apply the Treaty, financial contributions for supporting Treaty implementation and verification shall remain as agreed in the Schedule [give details] unless a State notifies the Depositary in writing of its intention to alter its financial contribution.

6. Provisional application shall terminate upon the entry into force of the Comprehensive Nuclear-Test-Ban Treaty. In conformity with Article IX of the Treaty, any State may also withdraw its consent from provisional application by notifying the Depositary in writing, and must include a statement of the extraordinary event or events related to the subject matter of this Treaty which the State regards as jeopardizing its supreme interests.

⁹¹⁵ Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 442-449

who have ratified or signed it, it does not seem required that negotiating parties that are not part of any of those groups intervene, as the treaty shall not affect them and they do not have to comply with the treaty, as the other two groups have (mainly because of article 18 VCLT).

Any decision on provisional application must fully respect the object and purpose of CTBT⁹¹⁶. This is a mandatory principle, or else instead of being a tool to allow provisional application, it would be then a revision of CTBT or a treaty on a different matter and on different grounds, and by being so we would be dealing with a distinct situation than the one that is intended to be addressed here.

The CTBT has developed an IMS system which has been paid by the States and it is a valuable technical mechanism, and not only for disarmament and non-proliferation reasons. States also support a provisional technical secretariat, meaning that part of the treaty is, in fact, already being applied provisionally.

Theoretically, it could be possible to argue that CTBT goes much beyond the disarmament and non-proliferation law, as it encompasses, for instance, environmental and humanitarian law features⁹¹⁷. Nevertheless, after 16 years, the World has changed, so must politics and law and an approach which points out civilian purposes of the treaty may be easier to sustain for some States. Moreover, the State Members of the Preparatory Commission and the participants in the article XIV conferences have been repeating the value of the IMS and the IMS data for civilian purposes⁹¹⁸. For a full use of these data, and besides what the treaty and its protocols define, an extra effort could be made in order to facilitate its operationality.

6. Enhanced cooperation and CTBT

The provisional application of CTBT will always count on strong opposition by many States, both signatory and ratifying States, as well as negotiating States of the

⁹¹⁶ Paolillo, Felipe H., "Some General Reflections on the Acceptance of Treaties as a Means of Expanding the Body of International Law", *The Journal of International Law and Economics*, vol. 10, 1975: p. 361.

⁹¹⁷ Sheldon, Jill M., "Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstances?", *Fordham International Law Journal*, vol. 20, n. 1, 1996: p. 188, 239 – 244.

⁹¹⁸ Part I, Chapter III.

CTBT. The approach regarding such an attempt must ensure it is transparent, inclusive and flexible. All these are characteristics of the EU enhanced cooperation model. The idea here is to suggest using this model for the provisional application of CTBT and not to make it a CTBT mechanism.

Some of the concerns mirrored in the Treaties on enhanced cooperation are worries that could be shared by the negotiating, signatory and ratifying States of CTBT, but the EU model has provided answers to the majority of those uncertainties. Some specificities of EU enhanced cooperation – namely regarding the questions of legislative authority – shall not be considered for the problem at stake, once they are not applicable to international law, as there is no legislative instance, as we have explained before.

The enhanced cooperation may promote vertical application, once it make it easier to add different areas of intervention, as well as horizontal application, as no limit on the number of states is to be imposed in this cooperation, thus fulfilling the inclusiveness character that a possible provisional application of CTBT must respect.

Often the case of CTBT is compared with the situation of CWC. OPCW has already sustained enhanced cooperation among Member States to improve the implementation of the Convention⁹¹⁹ and, as we have seen before⁹²⁰, the concept of enhanced cooperation is not unknown within the CTBT context, even if used in a general and non-legal way.

To resort to the EU enhanced cooperation model as it is foreseen in the Treaties may not be fully possible, but again by counting on *praesumption similitudinis* it is possible to arrive to concrete results. It shall not be possible to institute a full enhanced cooperation at EU standards in CTBT, but many of its fundamental elements may be applied. These elements include the reasoning behind enhanced cooperation and the purposes for its launching. With this methodology, States may give another input to the implementation of article XIV and of CTBT.

⁹¹⁹ “Enhanced cooperation amongst Member States in the enforcement of the Convention’s prohibitions”, introduction by the OPCW Director-General, José Bustani, <http://www.opcw.org/about-chemical-weapons/chemical-terrorism/the-opcw-and-the-global-struggle-against-terrorism/> to the Note by the Secretariat, *OPCW capabilities relevant to the global struggle against terrorism*, S/294/2002, http://www.opcw.org/index.php?eID=dam_frontend_push&docID=270906.02.2002

⁹²⁰ Part III, Chapter VII.

7. Justification for the proposal for the provisional application of CTBT as an enhanced cooperation model

It is no aim here to rewrite CTBT, but to contribute with a proposal to overcome the entry into force impasse of CTBT, bearing in mind that even if legally it may be a feasible suggestion, the fact is that it will always depend on the political will of the States involved, which is far from granted.

The flexibility allowed by EU enhanced cooperation both regarding the participation, the aims it includes and the decision making process may well be a stimulus for provisional application of CTBT.

EU enhanced cooperation assumes that it cannot be used unless it is addressed at the aims of the Treaties and it should only be used as a last resort option⁹²¹. In the case of the CTBT the respect for the purpose of the treaty, and because it is precisely a treaty, is beyond question, especially because article 18 VCLT also forces the full respect for the object and purpose of the treaty. This also means that the possible instrument to be adopted should not try to rewrite CTBT (as we have seen, this is not always the case, like it happened with UNCLOS and its protocol on provisional application of part XI of the Convention). The enhanced cooperation ensures the full respect for the Treaties⁹²², and so should the instrument on provisional application of CTBT do.

We consider that there is no reason for a treaty that does not admit reservations to be changed before entry into force, especially in the case of CTBT because at this stage a large majority of States has already signed and ratified the treaty.

Like in any other treaty, a possible protocol on provisional application will only be binding on the States that take the decision to implement it⁹²³. As far as the deliberations process is concerned, and after the adoption of the Protocol on provisional

⁹²¹ Briboisia, Hervé, *Les coopérations renforcées : Quel modèle d'intégration différenciée pour l'Union Européenne. Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d'autres coopérations renforcées « prédéterminées » en matière sociale, au sein de l'Espace de liberté, sécurité et justice, et dans l'Union économique et monétaire*, Florence : European University Institute, 2007 : 606p.; Urrea Corres, Mariola, *La Cooperación Reforzada en la Union Europea. Concepto, naturaleza Y régimen jurídico*, Madrid: Colex - Constitución Y Leys, S.A., 2002: 421p.

⁹²² Article 326 TFEU.

⁹²³ In line with *pacta sunt servanda*, article 26 VCLT and with article 20 TEU.

application of the CTBT, we are of the view that all interested States should be able to participate in the process – as long as they are also able to participate in the Preparatory Commission –in order to preserve consensus. However, if voting might be necessary, only States affected by those deliberations, that is, the parties to the provisional application protocol, should vote⁹²⁴. This distinction can facilitate States to accept this idea easier.

The possibility of letting non-members of the protocol to participate in its deliberations ensures transparency and attractiveness to the process. Furthermore, and like EU enhanced cooperation is conceived⁹²⁵, any Signatory or Ratifying State should be allowed to accede to the Protocol at any time. This openness may also be useful to let more States to participate. Although enhanced cooperation does not include a withdrawal clause, we consider that this option should be given to the parties, especially as it is a possibility foreseen in EU for structured cooperation, which deals with defence matters⁹²⁶.

An important difference regarding EU enhanced cooperation is that, in our view, if the number of States is reduced to a smaller number than the one necessary to establish one, then the *rebus sic stantibus* principle applies (although we do not foresee, as previously explained, how this could be possible). This is not the case with a protocol on provisional application for the fact this is a full treaty and not a provision within a legal instrument, but an autonomous one. Because it is a treaty, the safeguard of article 55 VCLT⁹²⁷ allows it to be kept valid, and this cannot be applied to EU enhanced cooperation because that is no treaty, nor is there any provision in the existing Treaties, to support it. The idea of initiating a process with a view towards a protocol on provisional application following EU enhanced cooperation mechanism has to be developed in order to identify the actors in the process and their competences.

It is impossible to refer to a relative number as the universe of putative members is still flexible. Only concrete figures are to be admissible. Relative references will be impossible as the reference universe is not defined. To consider the Annex 2 States would be to duplicate CTBT and, what is worse, the difficulties for its entry into force.

⁹²⁴ This is the rule foreseen in article 20 TEU and in article 330 TFEU.

⁹²⁵ Article 328 TFEU.

⁹²⁶ Part II, Chapter V

⁹²⁷ Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of the Treaties*, Leiden-Boston: Martinus Nijhoff Publishers, 2009: p. 690-694.

A number equal to annex 2 States, which is 44, seems to be adequate. That same number – of signatory or ratifying parties, and not negotiating parties – would be enough for provisional application of the treaty. We consider, however, that an extra layer could be added, and that it would be that within the minimum of 44 States, all the regions of annex 1 of the CTBT should be present, independently of how many States of a particular region would take part in the protocol. The goal of universalisation would be better kept this way.

The request for the enhanced cooperation for a Protocol – which text is to be adopted at an article XIV Conference – should be addressed to the Preparatory Commission, which, supported by the Provisional Technical Secretariat⁹²⁸, that already exists, should have the competence to validate its legal consistency with the content of the treaty. The Preparatory Commission should be the organ to decide upon the possibility to go ahead with such an initiative.

The consistency of a possible protocol on provisional application with the CTBT, that in its original text does not refer to its provisional application, is to be found in the combined reading of different sources and taking into account precedents in international law. Two major legal sources should be consistently and simultaneously considered: CTBT article XIV⁹²⁹ and article 25, n. 1, al.b) VCLT⁹³⁰. VCLT is silent regarding the time frame for a protocol on provisional application, both as far as its duration is concerned and far as its adoption.

At first it seems the best option would be to adopt along or within the treaty it refers to, but it has been demonstrated that its need may be only subsequently identified

⁹²⁸ Following the rules of enhanced cooperation in article 20 TEU and articles 329 and 334 TFEU.

⁹²⁹ Article XIV reads in its n. 2 “The Depositary shall convene a Conference of the States that have already deposited their instruments of ratification on the request of a majority of those States. That Conference shall examine the extent to which the requirement set out in paragraph 1 has been met and shall consider and decide by consensus what measures consistent with international law may be undertaken to accelerate the ratification process in order to facilitate the early entry into force of this Treaty”, *Comprehensive Nuclear-Test-Ban Treaty*, 10 September 1996, http://www.ctbto.org/fileadmin/content/Treaty/Treaty_text.pdf.

⁹³⁰ Article 25 of VCLT reads “1. A treaty or a part of a treaty is applied provisionally pending its entry into force of:

(...)

(b) the negotiating States have in some other manner so agreed”, *Vienna Convention on the Law of Treaties*, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

and not at the signing moment of the treaty⁹³¹. This is the case of CTBT. The so-called enthusiasm of 1996 fade away after the American Senate refused to ratify the treaty, making its implementation a hard question to deal with.,

Some of the major benefits of EU enhanced cooperation may be well applied to CTBT, thus reinforcing the possible application of this mechanism for the provisional application of the treaty. Taking into account what was previously presented⁹³², we will try to see that in its application to CTBT:

- i) It includes a group that is big enough to ensure effectiveness of the provisional application and it is an open group which means that any possible allegation of exclusion, common when dealing with, arms controls, disarmament and non-proliferation treaties, cannot be accepted ;
- ii) Prevents bilateral arrangements between parties and may allow the use of CTBT structures. The proposed model ensures a level of flexibility that makes it easier for States to participate. At the same time, while there is a common project on provisional application of the treaty, possible intentions of having just bilateral agreements on this matter may be avoided⁹³³;
- iii) Minimises the risk of institutional tension between the different States and with the provisional technical secretariat, as it was involved in the process from the beginning.

8. Proposal of a text on the provisional application of CTBT to be adopted by an article XIV Conference

⁹³¹ That was the case of *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, [http://www.un.org/Depts/los/ convention _agreements/convention_overview_part_xi.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm), 28.07.1994.

⁹³² Part II, Chapter V.

⁹³³ Guzman, Andrew T., *How International Law works: a rational choice theory*, Oxford: Oxford University Press, 2008: p. 121

The text should be adopted at an article XIV Conference as a decision⁹³⁴. The idea is to avoid the multiplication of instances and instruments and benefit from the inclusive nature of the Preparatory Commission (something that the Conference on Disarmament would not have for this purpose)⁹³⁵, as this would be the organ to decide on the possibility to go ahead, as the conference of article XIV is not a political organ, but just a venue for the act to take place.

Although formally it is a decision, in reality it will adopt a text of a treaty which launches an enhanced cooperation even if depending on another treaty. The fact is that article XIV only refers to “measures consistent with international law”, and enhanced cooperation is consistent with international law, as we have already seen.

A possible text could be drafted as follows:

Protocol on provisional application of the Comprehensive Nuclear Test Ban Treaty

Preamble

The Signatory Members of the Comprehensive Nuclear Test Ban Treaty⁹³⁶ (hereafter the Member States),

Appealing to all States that have not still done so, to proceed with the signature and ratification of the Comprehensive Nuclear Test Ban Treaty to facilitate its entry into force and at the same time appealing for meanwhile maintain the announced moratoria on nuclear testing,

Recalling the object and purpose of the Comprehensive Nuclear Test Ban Treaty⁹³⁷,

Having regard to the Comprehensive Nuclear Test Ban Treaty and in particular article XIV thereof,

⁹³⁴ *Conference on facilitating the entry into force of the Comprehensive Nuclear-Test-Ban Treaty, 23 September 2011, Draft Rules of Procedure, CTBT-Art.XIV/2011/1, 5 May 2011.*

⁹³⁵ We do not agree with Rebecca Johnson, *Unfinished Business. The Negotiation of the CTBT and the End of Nuclear Testing*, Geneva: UNIDIR - United Nations Institute for Disarmament Research, 2009: 363p.

⁹³⁶ These include both the Preparatory Commission members and the participating states in the article XIV conference. All ratifiers are by nature signatory States.

⁹³⁷ A clear reference to article 18 VCLT, which as we have seen before, it is considered as customary international law.

Having regard to encouraging the progressive development of international law and its codification⁹³⁸,

Having regard to the request made by at least 44 Signatory Members of the Comprehensive Nuclear Test Ban Treaty,

Having regard to the decision by Preparatory Commission,

Having regard to the opinion the Provisional Technical Secretariat,

Have agreed as follows:

Article I – Object and purpose of the agreement

1. Following the request presented by at least of 44 Member States to the Preparatory Commission, Member States decided to agree on enhanced cooperation between those States for the conclusion of a protocol between interested Member States to proceed with the provisional application of the Comprehensive Nuclear Test Ban Treaty. The decision adopting the text of the enhanced cooperation shall be taken by consensus.

2. The present working structure (Preparatory Commission, Working Group A, Working Group B, Advisory Group, Provisional Technical Secretariat⁹³⁹) will remain unchanged.

3. The Provisional Technical Secretariat will analyse the technical and legal consequences of the enhanced cooperation and will formulate a non-binding opinion on the request.

4. Decisions shall be taken by consensus and if needed by voting of the enhanced cooperation members according to the rules of procedure of the Preparatory Commission proportionally adjusted to the number of Members of the enhanced cooperation.

5. Decisions taken will only affect the Member States of the enhanced cooperation and cannot be regarded as binding instruments on other Signatory or Ratifier States of the Comprehensive Nuclear Test Ban Treaty or Third Parties.

⁹³⁸ The CTBT text has been adopted by the UNGA, *United Nations General Assembly Resolution A/RES/50/245, Comprehensive Nuclear-Test-Ban Treaty*, 10 September 1996, which means that in itself it is also a contribution for the development of international law. The protocol that is now being suggested may be considered as a “progressive” element in that effort.

⁹³⁹ Part I, Chapter II.

6. With the agreement of the Preparatory Commission, common structures, and instruments, *inter alia*, namely the Provisional Technical Secretariat may be fully at the disposal of the enhanced cooperation Member States.

Article II – The Preparatory Commission

1. Until the definite entry into force of the Comprehensive Nuclear Test Ban Treaty, the Preparatory Commission will remain the principal decision organ. It shall not be able to revise the decision on the protocol of provisional application of the Comprehensive Nuclear Test Ban Treaty, neither of the *ad-hoc* enhanced cooperation council referred in article III.

2. The enhanced cooperation Member States shall have the obligation to inform the Preparatory Commission of the uses they will consider for and give to International Monitoring System (IMS) and the IDC (International Data Center) data.

Article III – On-site inspections

1. Member States part of enhanced cooperation agree on on-site inspections (OSI) according to the general rules of the Comprehensive Nuclear Test Ban Treaty and its Protocol adjusted to the number of Member States part of enhanced cooperation.

2. For the purposes of OSI, Member States of the enhanced cooperation will agree on an *ad-hoc* executive council which will be the sole responsible for OSI. The *ad-hoc* executive council will be constituted following the same proportionality as foreseen in the Comprehensive Nuclear Test Ban Treaty for the Executive Council,.

Article IV – Costs of enhanced cooperation

Costs arising from the enhanced cooperation shall be born only by the Member States that participate in the enhanced cooperation.

Article V - Signature and ratification

This Protocol shall be open to all States for signature before its entry into force. It shall be subject to ratification by signatory States according to their respective constitutional processes.

Article VI – Accession and withdrawal

1. This protocol is open to all Member States that want to join at further notice. In this case, a notification to the Chairman of the Preparatory Commission is required.

2. Each Member State shall, in exercising its national sovereignty, have the right to withdraw from this Protocol if it decides that extraordinary events related to the subject matter of this Protocol or the Comprehensive Nuclear Test Ban Treaty have jeopardized its supreme interests.

Article VII – Depositary

1. The Secretary-General of the United Nations shall be the Depositary of this Protocol and shall receive signatures, instruments of ratification and instruments of accession.

2. The Depositary shall promptly inform all States Signatories and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession and the date of the entry into force of this Protocol.

3. The Depositary shall send duly certified copies of this Protocol to the Governments of the States Signatories and acceding States.

4. This Treaty shall be registered by the Depositary pursuant to Article 102 of the Charter of the United Nations.

Article VIII – Authentic texts

This Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish

texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

Article IX – Validity and entry into force

1. The present Protocol will remain valid as long as the Comprehensive Nuclear Test Ban Treaty does not enter into force. On that occasion its effects will immediately cease.

2. The present Protocol enters into force 30 days after the twenty-second deposit of ratification or accession.

Conclusion

Conclusion

1. Comparative law

In the attempt to achieve the aim of this study, *The EU enhanced cooperation model: possible application to the entry into force impasse of CTBT*, we were faced with a parallel evaluation within International and European law regarding enhanced cooperation. Although a comparison between the two legal jurisdictions as such was not intended, an assessment was made in order to recognise similarities in the usage of the concept, just to conclude that nowhere but in EU is the concept so largely developed in legal terms, even if it is used (sometimes in slightly different format) in other stances.

We argue that European law may well provide examples and solutions to International Law issues, and not necessarily just by imposing its own model. Clearly European law endorses the main concerns of International Law, as this is clearly stated in the Preamble of the Treaties, and its legal development is unique and can be translated into other realms outside Europe.

The EU is facing a very serious crisis, mostly financial, but also social, demographic, cultural and political. It is a serious situation that must be looked at carefully as it seems clear that in the future no EU state will have the possibility to survive alone, that is, without being integrated within EU⁹⁴⁰.

The Treaty of Lisbon has put EU at stake at international level by granting the EU a legal personality and so far it has not been able to assume its role. Despite the UNGA resolution on its status, the fact is that in many other instances, EU still does not have a status; such is the case of CTBT, a situation that makes it more difficult to act in the international arena. Within this logic, we wanted to demonstrate that the EU legal order is a living and adaptable one and can be applied in very different situations, suffice it to be politically handled with care.

⁹⁴⁰ Piris, Jean-Claude, *The Future of Europe. Towards a two-speed EU?*, Cambridge: Cambridge University Press, 2012: 166p.

If the EU is clearly an economic entity⁹⁴¹, we cannot forget that the Treaties also speak of an “ever closer Union”, which, in our view, is not attainable just by economic reasons, even if this can be its first or one step⁹⁴². The EU will be stronger and closer if it stops looking exclusively to itself and reaches the outside changing world by widening the scope of areas where its intervention, model and expertise can de an added-value, and where it can clearly be a reference. The legal development can clearly be one of the arms of EU external relations, just as important as its economic role in the world.

The role of the European States and the EU as a whole as far as International Law is concerned is unquestionable. Mostly multilateral international instruments commonly use EU Member States law (both civil law jurisdiction and common law), even if added with inputs from other jurisdictions, like Islamic law or others. This happens not only because it is diverse, but also because it has been developed for long and exported to many other States which have used EU Member States Law for the fundamentals of their own jurisdictions. Due to the fact that EU law is itself a combination of civil law jurisdiction and common law, it is able of a kind of flexibility that national jurisdictions might not be able to cope with alone.

Within this comparative framework, between European Law and International Law, also between CTBT and VCLT, this study has tried to point out similarities that contribute to solidify the urgency to pressure for the entry into force of CTBT. We tried to identify correspondences between different elements to prove that there is a consistency that contributes to make norms binding easier.

Enhanced cooperation is largely used both within and outside the EU, but hardly in its proper legal meaning. The EU, even if still recurrently using the two terms without any legal meaning, went further by giving this *binomium* a specific connotation, both politically and legally. However, its use took some time to be applied and it is still surrounded by lots of suspicions within EU.

⁹⁴¹ *Towards a genuine Economic and Monetary Union*, Herman Van Rompuy, President of the European Council in close collaboration with José Manuel Barroso, President of the European Commission, Jean-Claude Juncker, President of the Eurogroup Mario Draghi, President of the European Central Bank, 05.12.2012 or *Communication from the Commission. A blueprint for a deep and genuine economic and monetary union. Launching a European Debate*, COM(2012) 777 final, 28.11.2012: 51p.

⁹⁴² *Communication from the Commission. A blueprint for a deep and genuine economic and monetary union. Launching a European Debate*, COM(2012) 777 final, 28.11.2012: p. 13.

Nevertheless, it recently has been used and evoked for very different contexts and we are convinced that the legal model could be transposed into International Law. It is a way of going further, without compromising the common goal. We have suggested it to be used for the provisional application of CTBT, but the same could also be said regarding other treaties, such as the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations or The “Rotterdam Rules” (i.e., the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea), which are still not in force, though a thorough analysis is required.

2. The multiple uses of enhanced cooperation

After divorce and patent, now taxes⁹⁴³, it is clearly a proof that enhanced cooperation may be applied to generally all sort of issues, as long there is the will for it. By doing so, it does not change the Treaties, it allows flexibility to the States to participate or not, and once in force it may entice less receptive States to change their mind. Collectively, enhanced cooperation allow tasks to be executed that otherwise could not be implemented. Its contribution to deepening the EU should prevail over the “attacks” sometimes enhanced cooperation receives for allegedly jeopardizing the integration rhythm of EU⁹⁴⁴. This is a false quarrel; enhanced cooperation somehow existed since the beginning of the EEC or the EU and it does not fragment the EU or its legal framework, but instead it is a step ahead, a step all that want may take. The important fact of this mechanism is that it does not replace or contradict the *acquis*, and therefore it cannot be accused of being responsible for any fragmentation. There must be, however, some attention to avoid confusing enhanced cooperation with intergovernmental initiatives, as the enhanced cooperation is at its root a EU mechanism

⁹⁴³ *Proposal for a Council Decision authorising enhanced cooperation in the area of financial transaction tax*, Brussels, COM(2012) 631 final/2,25.10.2012: 12p.

⁹⁴⁴ As the European Council of 18 October 2012 clearly states, *Communication from the Commission. A blueprint for a deep and genuine economic and monetary union. Launching a European Debate*, COM(2012) 777 final, 28.11.2012: p. 16.

created by the Treaties⁹⁴⁵ and not an intergovernmental instrument. Although an agreement between a few, it is constituted according to the Treaties.

Enhanced cooperation is thus a very effective means for an “ever closer Union”⁹⁴⁶, especially with a growing number of Member States. The fact that the enhanced cooperation is an open model, meaning all States can join at any moment, reflects the spirit of integration behind the Treaties.

If it is true that EU enhanced cooperation has an integrative purpose – at least this is our view –, the fact is that its legal model can be used in a more loose way in International Law, just helping to define procedures and roles and not necessarily being exclusively focused on integration. However, in this case we would question, is not a treaty always an example of integration, in the sense that two or more parties share the same goal and join forces to its reach?

The consequences raised by a non-entry into force of a treaty are probably more of political nature than of legal logic. However, there have been cases where the legal framework has been used to justify the political option not to move forward with the procedures to bring a treaty into force. In the case of arms control, non-proliferation and disarmament treaties there is often some misuse of the legal question while in reality the goal is purely a political one, in many circumstances to force decisions in different matters involving same partners. The CTBT is one of those cases.

3. The special case of provisional application of treaties – the CTBT case

Any provisional application of a treaty must keep as final goal its entry into force. The enhanced cooperation model does not include any element that may impede it in any sort of way, thus using its norms it may be possible to conclude a protocol on

⁹⁴⁵ *Case C-370/12, Thomas Pringle v Government of Ireland, Ireland and the Attorney General*, 27.11.2012, paras. 166-169.

⁹⁴⁶ *Communication from the Commission. A blueprint for a deep and genuine economic and monetary union*. Launching a European Debate, COM(2012) 777 final, 28.11.2012: 51 p. We have seen in the past that the “threat” on enhanced cooperation give the opportunity for the European Arrest Warrant. We do not expect in the future – just because the number of Member States has greatly increased – that this kind of pressure may enable so fast results, but we are confident that in the medium and long term it will have similar effects.

provisional application that respects all the rights of the States, still it is flexible on its application and does not preclude anything regarding the effective entry into force of the CTBT. However, taking into account that it is an EU model, it can politically cause suspicion in non-EU Member States when suggested in international fora, but that should not be a reason to avoid the attempt.

In general, some of enhanced cooperation model characteristics are shared by International Law when referring to this kind of instrument. The open character of enhanced cooperation is usually referred in other instances. However, if openness is ensured as to participation, it is not always considered as far as withdrawal is concerned. This is the case of enhanced cooperation in EU law, but not of structured cooperation. We consider that the subject matter of CTBT, as it happens with the treaty (article IX of the Treaty) justifies the possibility of withdrawal.

Article XIV provides a venue for the adoption of such a Protocol; our proposal does not exclude any Signatory States. All ratifying States are also Signatory States, and the provisional application should be granted to Signatory States for the simple fact that a Signatory State has duties (like financial duties towards the PrepCom) and rights (as for instance access to IMS/IDC data). Those States that have excluded themselves from the process, even if they had been negotiating parties of the Treaty, should not interfere with a provisional application that shall not affect them.

One other aspect that is relevant for enhanced cooperation is the clear definition of its purpose, and we have worded our proposal in that sense, that is, the idea here is to apply enhanced cooperation as a legal procedure allowing the provisional entry into force of CTBT, but it does not foresee any other aspect of the treaty. The different inclusions in the proposal on specific matters were made to, first, justify the provisional application, and then to enlighten on what it refers to. It was not our intention to apply enhance cooperation to the whole CTBT, but to use it just for one specific matter.

The EU model insists that enhanced cooperation should be used only as a last resort provision. This is not shared by all International Law when using enhanced cooperation or similar procedures, but again we consider that one of the added-value of the EU Law is the ability to answer to difficulties that no other solution has found. Moreover, if enhanced cooperation would be possible from the start without any other attempt, one could question the logic behind a treaty that is intended to be universal, or

better, comprehensive. All the same, the case of CTBT entry into force, especially after so many unfruitful conferences on the subject, is well positioned to admit a “last resort” project.

We have included a provision on ulterior participation by States so that it reflects its openness character, as it happens in the case of the EU model. This openness is by no means strange to the CTBT, which foresees the possibility of accession. In the proposal presented in this study, the large majority of procedural steps that are referred to in the Treaties have been included, after the necessary adaption to a different universe.

With a protocol on provisional application and specially by using the enhanced cooperation method, we can conclude that for us the CTBT has another chance to be implemented. This is also an experience from the legal point of view that could be of value to EU Law, by showing its advantages and reflecting its possibilities.

Enhanced cooperation, as we have demonstrated, can be applied theoretically to a wide range of domains without having necessarily to be applied within EU law framework. It is a legal mechanism likely to be used as an alternative to full participation of all members to any instrument, facilitating the process to move forward and not jeopardizing any rights of participants or non-participants. In the case of CTBT we do not see any other option for its implementation that does not allow some flexibility taking into account the formalities foreseen in the treaty. It seems that there is indeed a need to find alternative paths to make CTBT a reality.

The Comprehensive Nuclear-Test-Ban Treaty is the product of decades of discussions on non-proliferation and disarmament instruments, and also arms control. It includes some provisions – even if adapted – of other treaties on related subject matters. It is the mirror of a specific moment in time, as it follows the 1995 conference of revision of NPT, the end of Cold war and the change of the defence paradigm in the World that came with it. There was always an effort – still very much sustained by the PTS and many State Members – that CTBT is a technical treaty and should not be politicized. However, reality has demonstrated that this is more often than not just a telluric idea (the same goes to the IAEA).

For the first time, and unlike previous treaties, CTBT includes a ban on all nuclear tests in all environments. The treaty is very detailed on the verification regime, but lacks to impose itself due to an entry into force clause that makes the treaty hostage

of 44 specific States' political will. It will never be excessive to recall that States should do all that is possible to ensure ratification and entry into force of a treaty⁹⁴⁷. It clearly has not been the case with CTBT. We reviewed the treaty text not focusing so much on its technicalities of the verification regime, but to identify and point out elements that could facilitate the entry into force, as this was our challenge. The question on entry into force is included in article XIV, but it is necessary to see the whole treaty, so that elements that may help the process of entry into force may be identified.

The proposal presented in the last part of this study for the provisional application of CTBT intends to allow a large majority of States to be able to use it fully and by doing so incentivise others to do the same. It is necessary to find ways to overcome the impasse of CTBT, as more than 150 States are hostages of just a few, and in some cases there seems to be no indication they will change their position regarding the CTBT in the near future.

Clearly on line with VCLT, there is no intention to consider provisional entry into force (which some States, like Portugal, even refuse constitutionally) but just its application until full entry into force. This provisional application option has been used elsewhere⁹⁴⁸ with proven success.

The venue for the adoption of the Protocol on Provisional Application of the CTBT has also been subject to an analysis taking into account that the CTBT has been negotiated in the Conference on Disarmament; the treaty text was adopted by a UNGA resolution; and submitted to the States for its signature and ratification. The possible Protocol could take advantage of the possibility open by the conferences foreseen in article XIV of the CTBT.

4. Possible changes in the enhanced cooperation model

If there is political will, there is always a possibility for a change to happen. Regarding the EU enhanced cooperation model, two aspects may be object of concern, the minimum number of States in a growing number of Members of the EU and the

⁹⁴⁷ International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Preliminary Objections*, I. C. J. Reports, 1998: p. 275-327.

⁹⁴⁸ Namely in the case of GATT

possibility of leaving the enhanced cooperation. In this particular case, the situation seems to be very odd, as Member States can leave the EU and structured cooperation, but not the enhanced cooperation, that is, there is no legal provision in the Treaties that allow it. Would it be possible to create an opt-out situation for enhanced cooperation? Theoretically it seems possible, but politically it seems to contradict the aim of the enhanced cooperation regarding the enhancement of integration.

As far as enhanced cooperation could be applied to International Law, it remains to be seen the context and the legal instruments – if we were to think only about the provisional application of a treaty – that are at stake. The advantage is, as the model does not have a legal international base, but it just a legal model, it could be adapted or adjusted in the instruments⁹⁴⁹ that are to be adopted for its putative implementation.

5. Final note on concepts used

As far as CTBT is concern we tend to admit both disarmament and non-proliferation in reference to the Treaty, but would rather avoid arms control. Even if the goal of impeding nuclear explosions may inevitably contribute to arm controls, and the Treaty refers that all aspects of disarmament and non-proliferation should be taken into account, we tend to consider that arm controls is one specific chapter within that process and CTBT is a comprehensive treaty. We consider it should be clearly differentiated from multilateral export control regimes like the NSG or MTCR.

The approach as far as concepts regarding military treaties has been intended to clarify the different possibility of uses of those concepts and in particular its scope. Not only the definition of the purpose of such treaties is important, but also the meaning given to some of the concepts used in those treaties may set the boundaries for the analysis. Moreover, some of these concepts, in particular for some States due to internal reasons, acquire a more significant relevancy than others. One of the possible mitigation

⁹⁴⁹ This is one of the reasons we sustain that the enhanced model can be used for the entry into force of CTBT. Moreover, the enhanced cooperation model includes different legal procedures that facilitate its implementation. We tried to include at least some of them in our proposal. Some adjustments had to be made, for several reasons, namely for the fact that EU has 27 (almost 28) States, while CTBT has 185 Signatory States, and the EU already has a *corpus legis* that includes it on general terms, while CTBT does not have any provision on enhanced cooperation.

of the concepts, and which is identifiable in treaties, political statements and scholarship has been the adding up of qualifiers that restringe (or enlarge) the scope and implementation of the concepts.

We have analysed the CTBT and complemented its analysis with other International Law instruments, namely the VCLT. If it is true that VCLT is not a binding instrument on all the 185 States Signatory of the CTBT, the fact is that some of its provisions are already customary International Law, and others can be assumed as *jus cogens*.

Some of the *jus cogens* principles included in CTBT have *erga omnes* effects. It is interesting to note that CTBT also generated moratoria on States that refused to sign or ratify the treaty, thus clearly demonstrating its *jus cogens* philosophy. Although a peculiar assessment of peremptory norm, the fact is that it still requires a legal instrument to be binding. It is clearly a new approach to *jus cogens*, the norm is not peremptory in itself but reality makes it a peremptory one, we refer to the prohibition of nuclear explosions. We would recall that whether ruled by a treaty, another instrument or being a *jus cogens* norm, nothing can ensure that States will not violate it.

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CURRICULUM

VITAE

CURRICULUM VITAE

1. PERSONAL DATA

NAME: MANUEL ANDRÉ COUTINHO SOBRAL DA CRUZ CORDEIRO

Passport: U109331, valid until 20.08.2016

Student number: 0907197

Birth place and Date: Lisbon, 8 August 1969

Professional address: Embassy of Portugal/ Mission of Portugal to the United Nations (Vienna), Opernring 3/1, 1010 Vienna

Home address: Prinz Eugen Strasse, 16/2/9 1040 Vienna

Telephone: 00431586753625 Mobile: 00436763437527

e-mail: andrescordeiro@yahoo.com

2. ACADEMIC DEGREES

2009-2012 - Candidate to a Doctorate, Faculty of Law, University of Vienna with the dissertation *The EU enhanced cooperation model: possible application to the entry into force impasse of CTBT*. Concluded the scholar period, having passed exams in Legal Methodology (grade: 1); System and Methodology: the Ethics of Spinoza (Grade: 2); European Law (Grade: 1); Introduction to European Community Law (Grade: 1), European Community Law (Grade: 2); International law: the law of the United Nations (Grade 2); Political Philosophy of International Relations (Grade: 1); Free Movement of Persons in European Community Law (Grade: 1). Entry exams in the program on the

following subjects: Austrian Constitutional Law; Austrian Civil Law, both were positive, no grade was attributed.

2001 - Post-Graduation in International Relations, Institute of Social and Political Sciences of the Technical University of Lisbon, Grade 15/20.

(Subjects: External Politics of States; International Power System; International Law; International Commercial System; New International Law; the New GATT; International Protection of the Environment; Revolution in the Eastern Europe and the Redefinition of the Defense Pacts; Reorganization of the European Union; the Pacific Rim; Regional Blocs of Economic Integration; Southern Africa)

1995 / 1998 - Diplôme d'Études Supérieures en Études Européennes, Mention "Cultures et Sociétés", Institut Européen de l'Université of Geneva. Final thesis: "The Cultural Itineraries of the Council of Europe: the search for the European Identity", Grade 5/6.

(Subjects: European Economy; European Law; European Institutions; European Intellectual History of Central and Eastern Europe; Culture Invention: geo-historical perspective. From Renan to Walter Benjamin, 1848-1940; Methodical reflection: Europe and Its Cultural Challenges; Europe in Literature; Problematic of Federalism; Europe and the idea of Peace; Europe facing the Arabic and Jewish Nationalism; Germany and Europe, Germany in Europe; History and Culture of Central Europe, The European Literary Heritage; Cultural Policies for Europe?; Russian Literature of the exile; Regional Cultures, Regional Medias and regional identities; Regional Institutions and Cross-border Institutions)

1992 / 1993 - Post Graduation in European Studies - Juridical Dominance, Catholic University of Lisbon, Grade 13/20

(Subjects: Political Economy of the European Community; European Economic Law; European Institutional Law; Community Litigation; Competition Law; European

Environment Law; European Agricultural Law; Political Aspects of European History - Human Rights; History of the European Community)

1987 / 1991 – Bachelor of Art's in History (4 years), Faculdade de Ciências Sociais e Humanas, Universidade Nova of Lisbon, Grade 15/20.

3. COMPLEMENTARY PROFESSIONAL AND SCIENTIFIC TRAINING

- *Workshop on Nuclear Law for Diplomats*, IAEA, Vienna, 19 July 2012
- *CTBT Intensive Policy Course: Multilateral Verification, Collective Security: The Contribution of the CTBT*, CTBTO, Vienna, 16-20 July 2012
- *Nuclear Non-Proliferation and Disarmament. A short intensive course for practitioners*, Vienna Center for Disarmament and Non-Proliferation, Vienna, 26-30 September 2011
- *E-Course on the Law of the Treaties*, United Nations Institute for Training and Research, Geneva 28 March – 30 April 2011.
- *Seventeenth On-Site Inspection Introductory Course*, CTBTO, Vienna, 19-22 May 2009.
- *Performing effectively in multilateral conferences and diplomacy*, United Nations Institute for Training and Research, Geneva, 20 April – 29 May 2009.
- *Orientation Seminar for Members of Permanent Missions Accredited to the International Organizations in Vienna*, United Nations Institute for Training and Research, Vienna, 30 and 31 October 2008.
- *Arbitration and Dispute Resolution*, United Nations Institute for Training and Research, Geneva, 20 May- 30 June 2004.
- *Modelos de Economia e Gestão para uma Nova Diplomacia*, Lisbon, Ministério dos Negócios Estrangeiros-Instituto Nacional de Administração, 23-24 October 2003.
- *Debt and Financial Management. Course on Negotiation of Financial Transactions*, United Nations Institute for Training and Research, Geneva, 15 September - 23 October 2003.

- *European Diplomatic Program*, September 2002-May 2003.
- *Creating Common Ground: Peacekeeping negotiation*, Pearson Peacekeeping Centre, Cornwallis Park, Nova Scotia, Canada, July-August 2002.
- *Global Terrorism*, United Nations Institute for Training and Research, Program of Correspondence Instruction in Peacekeeping Operations, New York, January 2002.
- Course on Electoral Process in Kosovo by OSCE and KFOR, Ohrid (FYROM), 21 to 26 October 2000.
- Course on Electoral Process in Bosnia Herzegovina by OSCE and SFOR, Trogir (Croatia), 2 to 7 April 2000.
- AUTUMN COURSE *PORTUGAL AND THE NEW DYNAMICS OF THE INTERNATIONAL SYSTEM*, SESIMBRA, INSTITUTO DIPLOMÁTICO AND INSTITUTO DE ESTUDOS ESTRATÉGICOS INTERNACIONAIS, 28 TO 30 OCTOBER 1999.
- Diplomatic Training, 6 September -6 October 1999.
- Seminar *Religions, Security and Defense*, Lisbon, Instituto dos Altos Estudos Militares, 14 to 16 July 1999

4. LANGUAGES

PORTUGUESE: Mother tongue

ENGLISH									
Understanding				Speaking				Writing	
Listening		Reading		Spoken interaction		Spoken production			
C2	Proficient user	C2	Proficient user	C2	Proficient user	C2	Proficient user	C2	Proficient user

FRENCH									
Understanding				Speaking				Writing	
Listening		Reading		Spoken interaction		Spoken production			

C2	Proficient user	C2	Proficient user	C2	Proficient user	C2	Proficient user	C2	Proficient user
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SPANISH / CASTILIAN									
Understanding				Speaking				Writing	
Listening		Reading		Spoken interaction		Spoken production			
C2	Proficient user	C2	Proficient user	C1	Proficient user	C1	Proficient user	B1	Independent user

ITALIAN									
Understanding				Speaking				Writing	
Listening		Reading		Spoken interaction		Spoken production			
A2	Basic User	B2	Independent user	A2	Basic User	A2	Basic User	A1	Basic User

5. PROFESSIONAL CAREER

2012 – Counselor at Embassy of Portugal/Permanent Mission of Portugal to the United Nations (Vienna).

2008 – First Secretary at the Embassy of Portugal/Permanent Mission of Portugal to the United Nations (Vienna); Alternate Permanent Representative to United Nations, IAEA, UNIDO, and CTBTO.

2007 – First Secretary.

2005/2008 – Deputy Head of Mission of the Portuguese Embassy in Tehran.

2004 – Second Secretary.

2002/2005 –General Direction of European Affairs

2002 – Political Director Officer.

2001/2002 – Special Political Affairs Cabinet of the Ministry of Foreign Affairs of Portugal.

–Third Secretary.

1999/2001– Embassy Attaché – Visa Service.

1997/1999 – Advisor to former President of the Republic, H. E. Dr. Mário Soares.

1995/1996 – Portuguese teacher within the consular area of Geneva.

1995 – Advisor to Mr. Francisco Motta Veiga, Director of Musicoteca, Music Editions, Lda.

1993/1995 – Advisor to Mr. José Carlos Megre, Administrator of the Classic Music/Opera Department of Lisbon 94 – European Capital of Culture.

1992 – Public Relations Secretary at the Centro Nacional de Cultura for the organization of the International Seminar *Judeus e Árabes da Península Ibérica: Encontro de religiões, Diálogo de culturas*.

1992 – English teacher at Colégio de Santa Clara da Casa Pia de Lisboa.

5.1. PROFESSIONAL ACTIVITY AND TASKS: PREVIOUS AND CURRENT STATUS

Since October 2012

- Portugal representative in the informal group of Coastal and Shipping States to prepare the Guidelines on transport information according to IAEA resolution GC(56)/RES/9

September 2010-September 2012

- Deputy IAEA Governor
- Speech writer for the Portuguese Governor at the AIEA Board of Governors

Since June 2009

- Member of the EU task force for the Safeguards Resolution of the General Conference of the IAEA
- Active participation in the discussion on EU competences in multilateral fora.
- Participation on the First Preparatory Commission of the Conference of Revision of the TNP in 2015
- Member of the national team for the preparation of the Country Program Framework for the IAEA
- Member of the national team for the preparation of the technical cooperation projects for 2014/2015.
- Member of the Advisory Group of CTBTO
- EU Chef de file for budget and administration affairs of CTBTO
- Active participation at the negotiation of the IAEA General Conference Resolutions
- Special attention to the question of EU competences within multilateral fora
- NAWEG coordinator in 2010.

Since September 2008

- Alternate Permanent Representative to United Nations, IAEA, UNIDO, and CTBTO.
- Vienna Point of Contact on behalf of Portugal for the Wassenaar Arrangement, Nuclear Suppliers Group, Zangger Committee and Hague Code of Conduct.
- Chargé d’Affaires a.i. in the Portuguese Embassy in Vienna in 2008 and 2009.
- Legal and political revision of EU declarations at IAEA, UNIDO, COPUOS, CTBTO and UNCITRAL
- NATO point of contact for Portugal in Vienna
- Consul in the Portuguese Embassy in Vienna, thus responsible for legal affairs on Portuguese Civil Law, Portuguese Electoral Law, Portuguese Notary Law, Labor Law, etc.

- Responsible for bilateral (Portugal-Austria) and EU relations: covering internal and external politics of Austria; financial issues; economic affairs; employment and social affairs; science and education, and institutional and all other questions regarding Austria-EU relations.
- Economic Counselor in the Portuguese Embassy in Vienna.
- Cultural Counselor in the Portuguese Embassy in Vienna.
- Negotiation of the international legal instruments

2005/2008

- Human rights desk focal point. Preparation of EU declarations: legal and political context.
 - Political Counselor in the Portuguese Embassy in Tehran.
 - Economic Counselor in the Portuguese Embassy in Tehran.
 - Cultural Counselor in the Portuguese Embassy in Tehran.
- Consul in the Portuguese Embassy in Tehran, thus responsible for legal affairs on Portuguese Civil Law, Portuguese Electoral Law, Portuguese Notary Law, Labor Law, etc.
- Chargé d’Affaires in the Portuguese Embassy in Tehran in 2005, 2006, 2007 and 2008.
- Presided to 32 meetings during the EU Presidency (6 Political Counselors, 4 Human rights, 11 Economic Counselors, 3 Cultural Counselors, and 8 Administration/Schengen).
- Focal point for the visits of the European Commission and the European Parliament to Tehran during the EU Portuguese Presidency.
- Responsible for the reports of the EU Portuguese Presidency in Tehran: Human Rights fact sheet; EU strategic partnership with the Mediterranean and the Middle East; Additional measures against Iran; EU contingency plan (update); Schengen manual; bilateral report on Human Rights in Iran.
- Representative at the Mini-Dublin Group meetings.
- Support to the Portuguese media officers that were in Tehran for the elections as well as for the Football World Cup 2006.

2002/2004

- Member of the Task Force for the Intergovernmental Conference for the Revision of the treaties: responsible for drafting, suggesting and follow up of new articles on justice and home affairs, defense, institutions; definition of possible variations of qualified majority.
- Member of the Task Force for the Convention for the Future of Europe (Defense and Justice and Home Affairs Groups).
- European Affairs General Direction – Institutions: desk officer for Bulgaria, Belgium, Cyprus, Luxemburg, Malta, Netherlands, Romania, Slovenia, Spain and Turkey, as well as of the European Court of Justice and the European Ombudsman.

2002

- Cabinet of the Political Director.
- Deputy of the Portuguese Observers' Mission to the Presidential elections in East Timor.
- Chief of the Portuguese delegation in the exploratory mission of the European Commission to East Timor (14 to 19 January) with the aim of verifying the possible modalities of communitarian support to the elections for the President of the Republic in East Timor.

2001/2002

- East Timor Desk officer.
- Deputy of the Portuguese observers' mission to the East Timor elections for the Constituent Assembly.
- Portuguese focal point for the EU electoral observers' mission to the elections for the Constituent Assembly in East Timor.
- Chief of the Portuguese delegation in the exploratory mission of the European Commission to East Timor (25 to 28 April) with the aim of verifying the possible modalities of communitarian support to the elections for the Constituent Assembly in East Timor.
- Participation at CSFP COASI meetings – I and II pillar.

- Liaison officer of the Tunisian delegation at the Ministerial Conference on Cooperation of the Western Mediterranean (Dialogue 5+5), 25 and 26 January.
- Chief of the Portuguese delegation at the Commission meetings of the Committee “Visa Model”.

1999/2001

- Participation at the European Union Council meetings on Justice and Home Affairs’ groups: Visa, Frontiers, Migration and Expulsion.
- Chief of the Portuguese delegation at the Commission meetings of the Committee “Visa Model”.
- Supervisor at local elections in Kosovo (28th October 2000), organized by OSCE, deployed to Klina.
- Supervisor at local elections in Bosnia-Herzegovina (8th April 2000), organized by OSCE, deployed to Sarajevo, Ilidza-Federation.
- Desk Officer of the Embassies and consular posts, discriminated hereinafter for all the visa matters (namely: authorizations of concession, evaluation of the processes of the demands, support on procedures, applicable rules and legislation, etc.): Havana, Mexico City, Bogota, Caracas, Valencia, Lima, Buenos Aires, Santiago do Chile, Montevideo, Brasilia, Rio de Janeiro, S. Salvador, Belem, Belo Horizonte, Curitiba, Porto Alegre, Recife, Santos, S. Paulo, Abidjan, Kinshasa, Luanda, Benguela, Lagos, Praia, Rabat, Argel, Tunes, Cairo, Manila, Bangkok, Tokyo, Seoul, Macao, Hong Kong, New Delhi, Goa. Sometimes he is responsible for all Embassies and consular posts.
- Desk officer for the agreements on the abolition of visa requirements and readmission of people on irregular situation.

1999/2000

- Desk Officer of the Embassies and consular posts, discriminated hereinafter for all the visa matters (namely: authorizations of concession, evaluation of the processes of the demands, support on procedures, applicable rules and legislation, etc.): Havana, Mexico City, Bogota, Caracas, Valencia, Lima, Buenos Aires, Santiago do Chile, Montevideo, Brasilia, Rio de Janeiro, S. Salvador, Belem, Belo Horizonte, Curitiba,

Porto Alegre, Recife, Santos, S. Paulo, Abidjan, Kinshasa, Luanda, Benguela, Lagos, Praia, Rabat, Argel, Tunes, Cairo, Manila, Bangkok, Tokyo, Seoul, Macao, Hong Kong, New Delhi, Goa. Sometimes he is responsible for all Embassies and consular posts.

- Proceedings of the processes of the agreements on abolition on visa requirements and readmission of people on irregular situation. Analysis and suggestion of proposals, proceedings of the negotiation processes and formal conclusion of the processes for their entry into force. Study of bilateral and multilateral kinds of treaties.

1999

- Translation of history of art texts into Portuguese for catalogs of exhibitions at the Museum of Evora.

1997/1999

- Proceedings of all international relations themes within the office of Dr. Mário Soares, namely in what concerns European affairs and the International European Movement; Office/document support of the Fact Finding UN Mission to Algeria leaded by Dr. Mário Soares; Theoretical and practical support of Dr. Mário Soares' work on the Independent Task Force sponsored by the Council on Foreign Relations' report on *Strengthening Palestinian Public Institutions*. Bibliographical and document research for Dr. Mário Soares. International contacts because of Mário Soares Foundation projects and Dr. Mário Soares activities. Preparation of files and texts on a wide range of different subjects on international relations.
- Organization of the International Congress *The New Geopolitical Data in Austral Africa, in the Congos and the Great Lakes' Region*, OPorto, 21st to 23rd May: logistics, scientific and international questions.
- Reading, Proceedings and analysis of files on international politics, e.g., human rights, democracy, citizenship, environment, arm controls, culture of peace, peace, the relations between Portugal with other countries, especially with Latin America and the members of CPLP.

- Organization of the meetings of the Steering Committee of the World Water Contract, in January and September 1998.
- Permanent control of the organization of the Congress of the Hague which took place in the Hague from 9th to 11th May 1998.
- Support to the activities of the Mário Soares Foundation under the initiative of its President. Occasional contacts with the press.
- Pre-show production of the invited artists to participate at the cultural events at the Frankfurt book fair (Portugal-Frankfurt 1997) Control of the entry into force of the contracts of those artists.

1995/1997

- Translation of texts of history of art for the Instituto Português do Património Arquitectónico e Arqueológico (IPPAR) for the catalogues of exhibitions on Miró and for the magazine of that Institut. Translation of texts for a brochure of the Museu Nacional de Arte Antiga.

1995/1996

- Portuguese language and culture teacher to primary students residents in Switzerland and children of Portuguese citizens. Work developed within the consular frame, with pedagogical support from the consular services.
- Responsible for the verification of the entry into force and execution of the contracts of representation of music editors hold by Musicoteca. Control of Intellectual Property at the Intellectual Property Society of some of contract dispositions in result of that representation. Check-up of irregular situations as a result of the playing of represented pieces. Proceedings of the solution in those cases. Study of the viability of the representation of Wenger (musical equipment supplier) for Portugal.

1993/1995

- Developed all secretarial work of the administrator of the Department of Classic Music and Opera of Lisbon 94, European Capital of Culture. Responsible for the control

of entry into force and execution of the contracts of the artists for the program of the department; for the control of payments and financial treatment of the expenses of the department; for the executive budget of the department. Developed international contacts within his functions for the execution of the objectives of the department. Participated in translations, revisions and text editions of some of the programs of the area. Co-responsible for all pre-show production (execution of contracts, verification of the existence of all technical requirements for each show, logistics of the numerable participants at the shows - hotels, trips, etc.) of the Department of Classic Music and Opera of Lisbon 94, European Capital of Culture.

1992

- Teaching of English language programs to 7th, 8th and 9th grade, levels 1, 2, 3, 4, 5, 6, at the Colégio de Santa Clara of Casa Pia of Lisbon. Developed extracurricular activities (study and leisure time) with pupils, most of them belonging to problematic contexts, both social and family. Responsible, sometimes alone, for his classes on those activities namely outside the school.
- Responsible for the treatment of the correspondence for the International Seminar *Judeus e Árabes da Península Ibérica: Encontro de Religiões, Diálogo de Culturas*, as well as invitations and information on the Seminar. He worked under the direction of Dr^a Helena Vaz da Silva, President of the Centro Nacional de Cultura.

6. PUBLISHED WORKS

- Articles

“Os caminhos de Santiago. O primeiro itinerário cultural do Conselho da Europa” in *História* (dir. by Fernando Rosas), N. 28, year XIX, new series, Lisboa, Projornal, 1997, pp. 54-61.

- Critical Essays

- Garde, Paul, *Vie et Mort de la Yougoslavie*, Paris, Librairie Arthème Fayard, 1992 in *História* (dir. by Fernando Rosas), N. 21, year XVIII, new series, Lisbon, Projornal, 1996, pp. 62-64.
- Kissinger, Henry, *Diplomacy*, New York, Simon & Schuster, 1994 in *História* (dir. by Fernando Rosas), N. 4, year XVII, new series, Lisbon, Projornal, 1995, pp. 66-68.
- *Le Monde Copte* (Dossier: *La Femme*), N. 16 (dir. by Ashraf Iskander Sadek), Limoges, 1980 in *Hathor - Estudos de Egiptologia* (dir. by Maria Helena Trindade Lopes), Vol. N. 2, Lisbon, Cosmos, 1990, pp. 114-116.
- Lacau, Pierre, *Une stèle Juridique de Karnak* in “Supplément aux Annales du Service des Antiquités de l’Égypte”, cahier N°. 13, IFAO, Cairo, 1984 in *Hathor - Estudos de Egiptologia* (dir. by Maria Helena Trindade Lopes), N. 1, Lisbon, 1989, pp. 109-111.

- Translations

(From English into Portuguese, from Portuguese into English, from French into Portuguese, from Spanish into Portuguese and from Catalan into Portuguese)

- Technical translations (History of Art) for the Museum of Évora, 1999.
- Several technical translations (History of Art) for the Portuguese Institute of Architectonic and Archaeological Patrimony (IPPAR) in 1995, 1996 and 1997.
- *Cadernos do MNAA*, N. 1, *Relíquias e Relicários*, Lisbon, Museu Nacional de Arte Antiga, 1996.
- Several occasional translations for the activities program of Lisbon 94-European Capital of Culture, namely biographies and critical essays, in 1993 and 1994.
- Gschwend, Annemarie Jordan, “Imagens de majestade: O Retrato de Corte em Portugal (1552-1571)” in *Portugal e Flandres - Visões da Europa (1550-1680)*, Lisbon, Mosteiro dos Jerónimos, 1992, pp.113-117.

7. COMMUNICATIONS AND CONFERENCES GIVEN

- *The European Security and Defence Policy (ESDP) – the Portuguese Case*, Wilton Park Conferences, El Escorial, 2nd March 2003.
- *Portuguese Foreign Policy*, Aerial War General Course, Instituto de Altos Estudos da Força Aérea, Sintra, 6th June 2002.

8. DIVERSE

- Member of the *European Law Institute* since 4 October 2011
- Member of the Company of Good Cheer, Pearson Peacekeeping Centre, since August 2002
- Member of the *International Forum on Globalization* since October 2000.
- Member of the European Movement since July 1997.
- Member of *Culturelink*, UNESCO/Council of Europe since January 1997.

Viena, December 2012