

The Variable Geometry in the Experience of Regional Organizations in Developing Countries

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Abstract: Differentiation represents a structural feature not only of the European integration, where it has a limited application, but also and particularly of the regional organizations established outside Europe, where variable geometry is often a typical element of interstate cooperation. Indeed most of such organizations, operating in developing countries, are based on this principle. In practice the variable geometry translates into the fact that each act, produced within the institutional structure in order to pursue the organization's aims, is submitted for consideration to the member states, who are free to accept it and then to incorporate it into the national legal system with a further approval given in accordance with domestic law. This approach implies that all the member states are bound only by provisions originally set out in the basic treaty, while the secondary law adopted to implement statutory rules concerning both substantive and institutional matters bind only the willing states which have given their consent. So, even if the variable geometry is formally intended as a principle of flexibility allowing for progression in cooperation among a sub-group of members, in practice its application can lead to the fragmentation of the integration process by instituting differences and preventing a real in-depth interstate cooperation.

Keywords: variable geometry; differentiation; regional organizations; international agreements; binding organic acts.

INTRODUCTION

As known, according to international law scholars international organizations can be classified in *intergovernmental organizations* and *supranational organizations* on the basis of the dialectical relationship between state sovereignty, on the one hand, and functions conferred by member states to the organization, on the other hand.¹ However, particularly in the areas of developing countries, the phenomenon of international organization is often fulfilled by the features of *soft organizations* which differ from *hard organizations* for the non-binding legal nature of their statutory act.² In some cases, the model of soft organizations represents the prodromic phase of interstate cooperation then evolving into an institutionalized organization by signing an international agreement.³ In this sense,

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¹ About the classical distinction between *intergovernmental organizations* and *supranational organizations* see, lastly, H. Schermers and N. Blokker, *International institutional law. Unity within diversity* (5th ed., Brill, Leiden, 2011), at 58. From a socio-political point of view, see P. Schmitter, “Los conceptos de cooperación e integración regional”, *Puente@Europa* (2011) at 8.

² About the distinction between soft organizations and hard organizations, in literature see, among others, N. Bayne, “Hard and Soft Organizations in International Institutions: Complements not Alternatives”, in J. J. Kirton and M. J. Trebilcock (eds.), *Hard Choices, Soft Law* (Ashgate Publishing, Aldershot, 2004), at 347. About soft organizations in general, see lastly A. Di Stasi, “About Soft International Organizations: An Open Question”, in R. Virzo and I. Ingravallo (eds.), *Evolution in the Law of International Organizations* (Brill, Leiden, 2015), forthcoming.

³ The soft organization model is being experienced also in the European Continent. It has its main example in the OSCE, but it is also embodied by several minor forms of association in Central and Eastern Europe.

the ASEAN represents a relevant example as it operated successfully as soft organization for about 40 years and then it was institutionalized by the ASEAN Charter in 2007.⁴

Notwithstanding their different legal nature and structural features, both soft organizations and hard organizations are characterized by the objective and steady exercise of common international functions in order to realize the goals that member states have agreed upon in the statutory act. For this purpose, each form of association may avail itself of different normative instruments which can differ from an organization to another depending on its legal nature.⁵ They can be: 1) non-binding acts which may have different denominations and a diversified substantive content (declaration, recommendation, statement, action plan, etc.); 2) conventional acts (generally known as protocols, treaties, conventions, etc.) concluded by the member states within the organization, being suggested and/or prepared by its organs and subject to the rules of international law from the formal point of view;⁶ 3) *binding organic acts* adopted by the institutions of the organization and attributable to it, which form the real secondary law of the organization itself. As these are the normative instruments through which the organization pursues the common goals defined by its members in the statutory act, one could suppose, particularly from the Eurocentric perspective, that they are addressed to all members, thus determining an uniform and common development of the interstate cooperation.

However a general look at the phenomenon of international organizations, particularly at regional and sub-regional level in developing areas,⁷ reveals a widespread application of the principle of variable geometry.⁸ This approach implies that all member states are bound only by provisions originally set

⁴ See, Bangkok Declaration, 8 August 1967; Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223.

⁵ Sometimes the normative instruments through which the organization can pursue its statutory goals are expressly indicated by the founding act. More often this does not provide for them; in these cases, against such *statutory silence*, member states develop autonomous practice. About this issue, see P. Pennetta, "Organizzazioni internazionali regionali", *Enciclopedia del Diritto*, *Annali IV* (2011) 844-908, at 879-886.

⁶ It is worth noting that conventional acts can be adopted to: 1) regulate institutional aspects of the cooperation; 2) regulate substantive aspects of interstate cooperation; 3) establish new agencies or organizations endowed with sectorial competences, which are subsidiary and instrumental to the main organization. In particular, regarding conventional acts regulating substantive matters, as they are adopted to implement statutory rules, they can be considered as the secondary law of the organization. However, from the formal point of view, such acts follow the rules of public international law as the primary law of the organization. For this reason they can be regarded as an intermediate category between the primary law and the secondary. In this sense see, S. Deluca, "El Mercosur necesita su Maastricht", *Revista Pensar en Derecho* (2012) 247-265.

⁷ Literature on regionalism is extremely heterogeneous, depending on the perspective from which it is investigated – not only legal but also economic, historical, etc. Currently most of studies on such topic are from a political science perspective; see among others F. H. Lawson, *Comparative Regionalism* (Ashgate, Burlington, 2009); F. Laursen F. (ed.), *Comparative regional integration: Europe and beyond* (Ashgate, Aldershot, 2010); T. Börzel et al. (eds.), *Roads to regionalism: genesis, design, and effects of regional organizations* (Ashgate, Aldershot, 2012). From a legal perspective see, among the most recent, D. Gantz, *Regional trade agreements. Law, policy and practice* (Carolina Academic Press, Durham, 2009); C. Flaesch-Mougin and J. Lebullenger, *Regards croisés sur les intégrations régionales: Europe. Amériques, Afrique* (Bruylant, Bruxelles, 2010); M. Tshiyembe, *Régionalisme et problèmes d'intégration économique* (Pedone, Paris, 2012). Lastly, from a critical legal perspective see, P. Pennetta, "International Regional Organizations: Problems and Issues", in R. Virzo and I. Ingravallo (eds.), *supra* n. 2, forthcoming.

⁸ Variable geometry is the term used to describe a method of differentiated integration, whereby common objectives are pursued by a group of member states able and willing to advance, it being implied that the others will follow later.

out in the founding act, while rules and acts adopted to implement statutory provisions bind only the willing states which have given their consent and then have ratified or incorporated them.⁹

This paper aims at exploring the main features of the principle of variable geometry and how it operates in regional organizations, trying to explain the main reasons for its wide application and to think hard about its consequences. The analysis will be limited to the regional and sub-regional organizations established in developing areas¹⁰ where the phenomenon of international organization is particularly widespread. However, for the purpose of this investigation, only those organizations which have a relevant binding normative production will be taken into account, as just in relation to it the application of variable geometry assumes importance. On the contrary, this paper will not focus on those forms of association which are not operative or adopt only declarations, recommendations or statements because the inner *flexibility* of such acts — deriving from their non-binding nature — makes it less relevant the eventual application of the variable geometry approach. Finally, this investigation will be based on the classical distinction between intergovernmental organizations and supranational organizations and, in the light of the above said, it will take into account also the practice of soft organizations operating in developing countries, in order to make it easier to catch possible connections between the legal nature of the regional organization and the application of variable geometry.

THE PRINCIPLE OF VARIABLE GEOMETRY: SOME EARLY CONSIDERATIONS

Variable geometry is regarded as a form of differentiated cooperation. It operates when a binding (conventional or organic) act, produced within the institutional structure of an organization to pursue its aims, is submitted for consideration to member states, which are free to accept it and then to incorporate it into their national law systems with a further approval given in accordance with their domestic law. In concrete terms, each member state may express its lack of interest in the approval of each (conventional or organic) act and in the meantime its decision not to take part in the decision-making procedure does not prevent its adoption by the other members. So each state is free to choose which acts to be bound by, expressing its consent. Hence, all member states are bound only by provisions originally set out in the founding act, while rules and acts adopted within the organization to implement statutory provisions bind only the willing members which have given their consent and have then ratified or incorporated them.

Firstly, the variable geometry may operate in the early phase of the decision-making procedure, when a state expresses its unwillingness to take part in the formation of a binding (conventional or

⁹ The application of variable geometry in regional organizations outside Europe has been widely overlooked by international law scholars who usually focus on differentiated integration in the EU. About the variable geometry in African regional organizations, see J. T. Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, Working Papers Series No. 20 of 2009. Regarding the Central American experience, see V. H. Blanco Fonseca, “La supranacionalidad y la geometría variable en el proceso de la integración centroamericana”, *Boletín Electrónico sobre Integración Regional del CIPEI* (2011) 60.

¹⁰ For the purpose of this investigation the European Union and the other regional organizations established in the European Continent (i.e. Council of Europe, NATO, OSCE, etc.) will not be under consideration because they are already well-known and over-analyzed. However some references to the EU experience will be inevitable particularly when dealing with the application of the variable geometry in supranational organizations.

organic) act. In such a way this state will not be involved in the adoption of this act which will not be prevented by the lack of its consent.

Secondly, particularly regarding conventional acts, the variable geometry may operate also in the implementation phase. In fact, consistently with the rules of international law, the entry into force of these acts may be subordinated to the deposit of a limited number of ratifications.¹¹ In this case, formerly the member state has given its consent to the formation of the act, but it is free to choose if to give effect to it into its legal order or not.¹² Clearly, its decision will not hamper the entry into force of the conventional act if the prescribed number of ratifications is achieved. It is worth noting that within a regional organization the variable geometry may operate through the joint application of these two procedures; in both of them the act does not produce legal effects towards the state which has not expressed its consent to the formation of the act or has not implemented it. Moreover it is worth noting that the application of the variable geometry does not prevent the *unwilling* state to adhere to this specific (conventional or organic) act later. Indeed, it can decide to bind itself to it in any time expressing its consent and implementing it, as duly provided. In sum, the variable geometry approach guarantees a flexible participation in the organization, allowing member states to agree on further progress of their cooperation and preventing that the lack of agreement and wholeness among all members on a specific issue leads to a deadlock of the organization.

THE VARIABLE GEOMETRY AND THE SOFT ORGANIZATIONS IN DEVELOPING COUNTRIES.

As already said, in the area of developing countries the phenomenon of international organization often assumes the features of soft organization which has its founding act in one or more non-binding political-diplomatic declarations but shares with hard organization the objective and steady exercise of common international functions. The model of soft organization has acquired particular importance in Asia and in the area of formerly Socialist countries where it often represents the prodromic phase of interstate cooperation then evolving into institutionalized organizations by signing an international agreement.¹³ Moreover it has also had a certain wide appeal in Latin America,¹⁴ while it is rare in

¹¹ Generally, the required number of ratifications for the entry into force of a conventional act is expressly indicated in its final provisions.

¹² A member state's failure in the incorporation of an act in relation to which it has expressed its consent may have a political or judicial consequence pursuant to treaty provisions.

¹³ Apart from the ASEAN, the model of soft organization operated also in the Shanghai Forum (then SCO), GUUAM (then GUAM-ODED), BSEC (then OBSEC), before their cooperation was institutionalized by signing a statutory treaty. In this sense see also the experiences of Regional Cooperation for Development (RCD) and of the SARC which were then institutionalized respectively in the Economic Cooperation Organization (ECO) and in the SAARC. See P. Pennetta, *Il regionalismo multipolar asiatico. Contributo al diritto della operazione istituzionalizzata fra Stati* (Giappichelli, Torino, 2003), at 48 and at 52.

Unlike the APEC (APEC Ministerial Meeting Statement, Canberra, 7 November 1989, elevated to Summit level by the APEC Leaders Economic Vision Statement, Seattle, 20 November 1993), the IORA (Resolution on the Adoption of the Charter of the Indian Ocean Rim – Association for Regional Cooperation, Mauritius, 7 March 1997), the BIMST-EC (Declaration on the establishment of the Bangladesh-India-Sri Lanka-Thailand Economic Cooperation, Bangkok, 6 June 1997, renamed *Bay of Bengal Initiative for Multi-Sectorial Economic Cooperation* in 2004) and the ACD (1st ACD Ministerial Retreat Statement, Cha-Am, 18 June 2012) still maintain their features of soft organizations.

Africa and in the Arab-Islamic world.¹⁵ In this complex overview, consistently with the members' purpose and with the goals of their cooperation as well as with the legal nature of this cooperation model, some soft organizations (such as ACD, APEC, IORA, Conseil de l'Entente, Foro del Arco del Pacífico, CELAC) pursue statutory objectives adopting mainly non-binding agreed acts (such as recommendations, declarations, action plans, etc.). As already said, the inner flexibility of such acts, deriving from their non-binding nature, makes it less relevant the provision and application of variable geometry; so these forms of association will not be taken into account in this investigation.¹⁶

Unlike, in some other soft organizations interstate cooperation is achieved not only through declarations or recommendations, but also through the adoption of conventional acts, regulating both institutional and substantive matters. This is the case of ASEAN, SCO,¹⁷ GUAM,¹⁸ BSEC¹⁹ —before their transformation to hard organizations— as well as of BIMST-EC; in relation to them the application of the variable geometry approach acquires a great importance.²⁰

A comparative analysis of their founding acts reveals that they do not contain any provision concerning this principle,²¹ however an in-depth study of the practice of soft organizations under consideration proves its broad application with the sole exception of the SCO.²² Indeed in

¹⁴ In Latin America the soft organization model is embodied by the Mecanismo de diálogo y concertación de Tuxtla (Declaración Conjunta de la Cumbre Extraordinaria, El Salvador, 12 March 2001), the Foro del Arco del Pacífico Latinoamericano (Declaración de Cali, 30 January 2007 - inactive since 2011) and the so-called Grupo de Río now evolved into the CELAC (Declaración de Caracas, 3 December 2011). Then, in the American Continent the soft organization of the Pan-American Union was institutionalized in the Organization of American States (OAS).

¹⁵ In Africa the soft organization model was embodied by the SADCC (Southern Africa: Towards Economic Liberation. A Declaration by the Independent States of Southern Africa, Lusaka 1 April 1980) then institutionalized in the SADC. Currently it characterizes the Conseil de l'Entente (Accord constitutif du Conseil de l'Entente, Abidjan, 29 May 1959), and the recent Sahel G5.

¹⁶ It is worth noting that even if in these organizations the variable geometry approach has never been applied until now to binding acts, in some of them it is provided for by their statutory acts. In this sense, see art. 30 of the Declaración de Caracas; art.2 of the IORA Charter. The voluntary nature of the cooperation process was also asserted by 1995 Osaka Action Agenda regarding the APEC and by the 1997 Joint Statement of the 1st BIMST-EC Ministerial Meeting and BIMST-EC Guidelines. In the light of these statutory provisions, I presume that the opting-out approach could be broadly used also in these organizations when concluding conventional acts, even more so considering their wide membership which could make it difficult to reach the consent of all member states in relation to each matter to be regulated.

¹⁷ Shanghai Forum (Shanghai, 1996) followed by the Declaration on the Establishment of Shanghai Cooperation Organization, Shanghai, 15 June 2001, institutionalized by the Charter of the Shanghai Cooperation Organization, (adopted 7 June 2002, entered into force 19 September 2003).

¹⁸ Strasbourg Joint Communiqué (10 October 1997), followed by GUUAM Yalta Charter (7 June 2001), then institutionalized by Charter of the Organization for Democracy and Economic Development - GUAM (adopted 23 May 2006, applied provisionally 23 May 2006).

¹⁹ Istanbul Summit Declaration on BSEC (25 June 1992), then institutionalized by Charter of the Organization of Black Sea Economic Cooperation (adopted 5 June 1998, entered into force 1 May 1999).

²⁰ Freedom to accede to a treaty (or external protocol) concluded within an organization, is traditionally provided for in universal organizations; in this sense an example is the practice in the ILO.

²¹ It is worth noting that no founding act of soft organizations under consideration contains provisions expressly excluding the application of variable geometry. So, potentially, this principle may have a broad and unconditional application.

²² Indeed, before the institutionalization of the organization, the SCO member states adopted few agreements. See, Agreement on confidence-building measures the military sphere in the border areas (adopted 26 April 1996, entered into force 7 May 1998); Agreement on mutual reduction of armaments in the border area (adopted 24 April 1997, entered into force 6 August 1999); Shanghai Convention on combating Terrorism, Separatism and Extremism (adopted 15 June 2001, entered into force 29 March 2003). They were concluded by all the members and their entry into force was subject to the

organizations whose membership is wide (ASEAN, BSEC) as well as in those established by a limited number of states (BIMST-EC, GUAM), when adopting international agreements as normative tools for interstate cooperation, the variable geometry approach is almost the *rule*. So, whenever a conventional act is going to be adopted within these organizations, notwithstanding the matters covered by it, each member state is free to decide if to take part in the decision-making procedure and then to implement it or not. In this context the member state does not have to accomplish a specific procedure or to justify its decision, but it has just to express its *disinterest* in deepening cooperation in a determined field. So the variable geometry is not applied in last resort, only when a common and shared opinion about the act to be approved cannot be reached. On the contrary, it is usually applied systematically and regarding every field of cooperation. In particular, the experiences of BIMST-EC,²³ ASEAN,²⁴ GUAM²⁵ and BSEC²⁶ demonstrate that flexibility characterizes above all agreements concerning substantive matters, even those which are central for the achievement of statutory goals (such as the establishment of free trade area, customs union, etc.). Sometimes variable geometry applies to conventional acts regulating technical matters; in this sense there are the experiences of BIMST-EC²⁷ and BSEC.²⁸ Rarely, in the soft organizations under consideration, such approach is used in the adoption of agreements establishing new agencies or organizations functional to the main organization, or of protocols disciplining institutional matters, such as the establishment of new bodies. In this regard the only relevant example is that of ASEAN.²⁹

consent of all of them. So, the variable geometry approach was not applied. Maybe the reason lays in the existence of a strong *voluntas cooperandi* among the SCO member states which decided to adopt binding acts only on fully shared matters.

²³ See, for example, Framework Agreement for the BIMST-EC Free Trade Area (adopted 8 February 2004, entered into force 30 June 2004) which was signed by all BIMST-EC members except Bangladesh. The latter joined later.

²⁴ See, among others, Treaty of Amity and Cooperation in Southeast Asia (adopted 24 February 1976, entered into force 21 June 1976); ASEAN Petroleum Security Agreement (adopted 24 June 1986, entered into force 3 April 1988); Agreement on Promotion and Protection of Investments (adopted 15 December 1987, entered into force 23 February 1989); Treaty on the Southeast Asia Nuclear Weapon-Free Zone (adopted 15 December 1995, entered into force 28 March 1997).

²⁵ See, for example, Convention on mutual rendering of GUUAM member states on mutual rendering assistance in consular matters (adopted 7 June 2001, entered into force 9 December 2002); Agreement on the establishment of a free trade area (adopted 20 July 2002, entered into force 10 December 2003); Agreement on cooperation among the Governments of GUUAM participating states in the field of combat against terrorism, organized crimes and other dangerous types of crimes (adopted 20 July 2002, entered into force 25 August 2004).

²⁶ See, for example, Agreement among the Governments of the Black Sea Economic Cooperation participating states on cooperation in combating crime, in particular in its organized forms (adopted 2 October 1998, entered into force 4 October 1999).

²⁷ In the BIMST-EC flexibility was applied particularly in the field of infrastructural cooperation.

²⁸ See, among others, Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on collaboration in Emergency Assistance and Emergency Response to natural and man-made Disasters (adopted 15 April 1998, entered into force 11 March 2003).

²⁹ In this regard see, Agreement on the Establishment of the ASEAN Secretariat (adopted 24 February 1976, entered into force 21 May 1976).

THE VARIABLE GEOMETRY APPROACH IN INTERGOVERNMENTAL ORGANIZATIONS: GENERAL
REMARKS

Currently, on numerical level most regional organizations embody the hard organization model. As known, it has its legal basis in an international treaty and, according to the traditional doctrine, it is characterized by: an objective and steady exercise of international common functions through an autonomous institutional structure; the adoption of binding acts imputable to the organization; the international legal personality.³⁰ As already said, in the light of the *value* attributed to limitations of the state exercise of sovereignty, international law scholars distinguish intergovernmental organizations from supranational organizations. Currently most regional forms of association all over the world embody the intergovernmental model because its institutional and functioning features allow member states to preserve their sovereignty and the organization works according to the general principles of international law. Intergovernmental model is very widespread in the area of developing countries, particularly in Latin America³¹ (SELA,³² ALADI,³³ UNASUR,³⁴ SICA³⁵ /SIECA,³⁶ MERCOSUR³⁷) and in the Caribbean (ACS,³⁸ CARICOM,³⁹ OECS⁴⁰), in the African Continent (UA/AEC,⁴¹ ECOWAS,⁴² COMESA,⁴³ ECCAS,⁴⁴ SADC,⁴⁵ SACU,⁴⁶ IGAD,⁴⁷ CEN-SAD⁴⁸) and in

³⁰ For critical remarks see H. Schermers and N. Blokker, *supra* n. 1, at 31; P. Pennetta, *International regional organizations...*, *supra* n. 7.

³¹ In the American Continent even the OAS —see Charter of the Organization of the American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 47— operates according to the intergovernmental model. It will not be analyzed in this paper as it gathers also developed countries, such as the USA. However in this context the variable geometry approach has a broad application.

³² Panama Convention establishing the Latin American Economic System (SELA, adopted 17 October 1975 entered into force 7 June 1976) 1292 UNTS 337.

³³ Tratado de Montevideo constitutivo de la Asociación Latino Americana de Integración (adopted 12 August 1980, entered into force 16 March 1981).

³⁴ Tratado constitutivo de la Unión de Naciones Suramericanas (adopted 23 May 2008, entered into force 11 March 2011).

³⁵ Protocolo de Tegucigalpa a la Carta de los Estados Centroamericanos (adopted 13 December 1991, entered into force 1 February 1993).

³⁶ Protocolo al Tratado General de Integración Económica Centroamerica (29 March 1993, entered into force 17 August 1995).

³⁷ Tratado de Asunción para la constitución de un mercado común (adopted 23 June 1991, entered into force 29 November 1991) completed by Protocolo adicional al Tratado de Asunción sobre la estructura institucional del MERCOSUR (adopted 17 December 1994, entered into force 15 December 1995; Protocolo de Olivos para la solución de controversias en el MERCOSUR (adopted 18 February 2002, entered into force 1 January 2004); Protocolo constitutivo del Parlamento del MERCOSUR (9 December 2005, entered into force 24 February 2007).

³⁸ Convention establishing the Association of Caribbean States (adopted 24 July 1993, entered into force 4 August 1995) 1895 UNTS 3.

³⁹ Revised Treaty of Chaguaramas establishing the Caribbean Community and Common Market (adopted 5 July 2001, entered into force 4 February 2002) 2259 UNTS 293.

⁴⁰ Revised Treaty of Basseterre establishing the Organization of Eastern Caribbean States – Economic Union (adopted 18 June 2010, entered into force 21 January 2011) which followed the Treaty of Basseterre (adopted 18 June 1981, entered into force 2 July 1981) 1338 UNTS 97.

⁴¹ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 1; Treaty establishing the African Economic Community (adopted 3 June 1991, entered into force 12 May 1994).

⁴² Economic Community of West African States Revised Treaty (adopted 24 July 1993, entered into force 23 August 1995) 2373 UNTS 233.

the Arab-Islamic world (LAS,⁴⁹ OIC,⁵⁰ GCC,⁵¹ UMA⁵²). Moreover intergovernmental model is embodied by most organizations in the Asia-Pacific region (SAARC,⁵³ ECO,⁵⁴ ASEAN, PC,⁵⁵ PIF⁵⁶) and in the area of post Socialist countries (CIS,⁵⁷ EurAsEc,⁵⁸ CSTO⁵⁹) particularly in those evolving from the soft organization model (SCO, GUAM-ODED, OBSEC). In these areas each intergovernmental organization has reached a different level of development. So, consistently with the members' purposes and the statutory objectives as well as with the main features of the intergovernmental model, in some organizations — such as SELA, ALADI, ACS, CEN-SAD, UMA, SACU, CSTO, PC— normative production consists generally in agreed non-binding acts (declarations, joint statements, action plans, etc.) while the adoption of conventional acts is really scanty and whenever they are concluded they often do not enter into force.⁶⁰ So, for the purpose of this investigation, these organizations will not be taken on further consideration.

⁴³ Treaty establishing the Common Market for Eastern and Southern Africa (adopted 5 November 1993, entered into force 8 December 1994) 2314 UNTS 265.

⁴⁴ Treaty establishing the Economic Community of Central African States (8 August 1983, entered into force 18 December 1984).

⁴⁵ Treaty establishing the Southern African Development Community (adopted 17 August 1992, entered into force 30 September 1993), as amended on 14 August 2001.

⁴⁶ Southern African Customs Union Agreement between the governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland (adopted 21 October 2002, entered into force 15 July 2004).

⁴⁷ Agreement establishing the Inter-Governmental Authority on Development (adopted 21 March 1996, entered into force 25 November 1996).

⁴⁸ Traité portant création de la Communauté des Etats Sahélo-Sahariens (adopted 4 February 1998, entered into force 26 May 1999) recently followed by Traité révisé de la Communauté des Etats Sahélo-Sahariens (16 February 2013). Due to the lack of further information about it, even on the organization's website, it is uncertain if the Traité révisé is already in force.

⁴⁹ Charter of the League of Arab States (adopted 25 March 1945, entered into force 10 May 1945) 70 UNTS 237.

⁵⁰ Charter of the Organization of the Islamic Cooperation (adopted 14 March 2008, entered into force 3 September 2009).

⁵¹ Charter of the Cooperation Council of the Arab States of the Gulf (adopted 25 May 1981, entered into force 25 May 1981).

⁵² Traité instituant l'Union du Maghreb Arabe (adopted 17 February 1989, entered into force 1 July 1989).

⁵³ Charter of the Southern Asian Association for Regional Cooperation (adopted 8 December 1985, entered into force 8 December 1985).

⁵⁴ ECO Charter of the Economic Cooperation Organization – Treaty of Izmir (14 September 1996, entered into force 24 September 2002).

⁵⁵ Agreement establishing the South Pacific Commission, as amended (adopted 6 February 1947, entered into force 29 July 1948) 97 UNTS 227.

⁵⁶ Agreement establishing the Pacific Islands Forum (adopted 17 April 1973, entered into force 17 May 1973).

⁵⁷ Agreement on the establishment of the Commonwealth of Independent States (adopted 8 December 1991) and Charter of the Commonwealth of Independent States (adopted 22 January 1993, entered into force 22 January 1994) 1819 UNTS 57.

⁵⁸ Treaty on the Establishment of the Eurasian Economic Community, as amended (adopted 10 October 2000, entered into force 30 May 2001) 2212 UNTS 257.

⁵⁹ Charter of the Collective Security Treaty Organization (adopted 7 October 2002, entered into force 18 September 2003) 2235 UNTS 79.

⁶⁰ In the light of such considerations the issue of the variable geometry application does not concern these organizations, even if their statutory treaties often provide it. In this regard see art. 3 lit. c) of the Tratado Montevideo; art. 20 of the Convention ACS; art.18 of the Convenio Panamá; art.16 of the Traité UMA; art.5 of the CSTO Treaty. It is worth noting that, in application of variable geometry approach, the ALADI promotes the conclusion of *acuerdos de alcance parcial* as well as *acuerdos de complementación económica* among some member states.

Unlike in some other intergovernmental organizations in developing countries the typical normative instruments of interstate cooperation are not only agreed non-binding acts but also —and particularly— the conventional acts.⁶¹ Thus, in order to achieve statutory goals, following the initiative of the institutional bodies of the organization, member states generally conclude international agreements which always require their express consent.⁶² Clearly the normative production of such organizations can be more or less copious according to their *vitality*⁶³ and, as already said, conventional acts may be adopted to: 1) regulate institutional aspects of interstate cooperation; 2) regulate substantive aspects of interstate cooperation; 3) establish new agencies or organisms endowed with sectorial competences, which are subsidiary and instrumental to the main organization.

Finally, in some (few) intergovernmental organizations under consideration — such as UNASUR, MERCOSUR, SICA/SIECA, COMESA, ECOWAS, EurAsEc, OECS — statutory objectives are reached not only through agreed non-binding acts and international agreements, but also through the adoption of organic acts by the institutions of the organization and imputable to it. These may be both binding and non-binding (such as recommendations and declarations) and the variable geometry approach may operate in relation to both categories. However the application of such approach to non-binding organic acts is not particularly relevant in the light of their *already* inner flexibility;⁶⁴ so it will not be discussed further. On the contrary, the application of the variable geometry assumes a great relevance in relation to binding organic acts. So, as for the soft organizations considered above, regarding the intergovernmental organizations the application of variable geometry will be assessed taking into account only those forms of association which adopt binding (conventional and/or organic) acts concretely, firstly analyzing their statutory provisions and then looking for an acknowledgment in their practice.

A comparative analysis of their statutory treaties reveals that generally they are silent about the principle of variable geometry and they do not regulate its application. However, in some cases (UNASUR, CARICOM, SIECA, SADC, LAS, ASEAN, SCO, OBSEC) variable geometry has its —more or less explicit— legal basis in the founding agreement of the organization. Generally it is

⁶¹ Generally no specific instrument of action is established in the statute of regional organizations; in this case the use of the conventional act can be inferred by the practice. However, in some regional organizations the international treaty is explicitly indicated in the statute as the instrument of action.

⁶² Conventional acts are adopted to implement statutory rules and, in this sense, they realize the secondary law of the organization. However, from the formal point of view, being concluded, signed and ratified by member states they cannot be imputable to the organization and follow the rules of public international law. For these reasons they may be regarded as an intermediate category between the primary law (with whom they share the form) and the secondary law (with whom they share the purpose). In this sense see, S. Deluca, *supra* n. 6, at. 247.

⁶³ For example, in the IGAD, ECCAS, CSTO, UNASUR, OECS, PIF and PC the adoption of international agreements is not very copious.

⁶⁴ The adoption of non-binding organic acts is expressly provided for in the ECOWAS and in the COMESA (art. 5 COMESA Treaty). Moreover they are often adopted within the SADC and the CARICOM. In the GCC harmonization of domestic legislation in specific fields is realized through non-binding organic acts and member states are free to accept them into their law systems. Then, after years, the content of such acts is often transposed in binding acts thus becoming compulsory for each member state. Regarding this practice, see P. Pennetta, *Il regionalismo multipolare ...*, *supra* n. 12, at 160.

formulated in general terms with no reference to which category of acts it applies. In particular statutory provisions indicate flexibility as one of the founding principles of interstate cooperation⁶⁵ thus underlining its voluntary nature⁶⁶ and authorizing member states to conclude agreements on matters under the organization competence even involving only some of them.⁶⁷ The variable geometry approach is defined clearly in art. 27 par. 4 of the Revised Treaty of Chaguaramas stating that “a Member State may opt out of obligations arising from the decisions of competent Organs provided that the fundamental objectives of the Community, as laid down in the Treaty, are not prejudiced thereby”.⁶⁸

However, even when it is provided for by statutory agreements, the application of variable geometry is never regulated in details or subordinated to specific procedures or limited *ratione materiae*. In this sense the OBSEC is an exception because its rules of procedure narrow down the use of the variable geometry approach to decisions on specific issues pertaining to technical matters and/or functioning of the organization; indeed art. 18 par. 3 points out that they are binding only for member states which have voted in favor. Unlike, resolutions on substantive issues pertaining to the structure and/or functioning of the OBSEC will be abided by all member states (art. 17 par. 3).

(1) The Variable Geometry in the Practice of Intergovernmental Organizations: the Conventional Acts

As said above, the comparative analysis of statutory treaties does not reveal a homogeneous trend about the regulation of the variable geometry approach in the intergovernmental organizations under consideration; however the study of their practice proves its broad application. Indeed, firstly the variable geometry approach operates in the adoption of conventional acts within those intergovernmental organizations whose statutory treaties authorize its application (UNASUR, CARICOM, SADC, LAS, ASEAN, SCO, OBSEC). Then, it is applied also to international agreements adopted within intergovernmental organizations whose founding treaties do not provide for this principle (such as SICA, MERCOSUR, OECS, ECO, CIS, EURASEC, UA, ECCAS, ECOWAS, COMESA, IGAD, ASEAN, PIF, OIC, GCC). Only in the SAARC and the GUAM-

⁶⁵ In this sense see art. 21 par. 2 of the ASEAN Charter.

⁶⁶ See art. 22 paras. 4 and 9 of the SADC Treaty; art. 16 of the SCO Charter; art. 18 par. 3 of the OBSEC Rules of procedure.

⁶⁷ In this sense, see art. 12 of the Tratado UNASUR stating that “Las Decisiones del Consejo de Jefas y Jefes de Estado y de Gobierno, las Resoluciones del Consejo de Ministras y Ministros de Relaciones Exteriores y las Disposiciones del Consejo de Delegadas y Delegados, se podrán acordar estando presentes al menos tres cuartos (3/4) de los Estados Miembros”.

See also art. 52 of the Protocolo de Guatemala; art. 9 of the LAS Charter.

⁶⁸ It is worth noting that in that case the term “decision” is not used in a technical meaning, referring to each act adopted within the organization. In the Diskenson Bay Declaration (4 July 2008), CARICOM Heads of states reiterated their support for a variable geometry of integration “[...] which allow for variation in the pace of accession to the integration arrangements”.

ODED the variable geometry approach is not applied when adopting international agreements; indeed their conventional acts require the adhesion of all member states.⁶⁹

The analysis of the intergovernmental organizations' practice reveals also that the application of variable geometry is not affected by the size of the organization membership; indeed it operates in forms of association with wide membership as well as in those with few members. Moreover in most intergovernmental organizations under consideration the variable geometry is applied almost systematically, whenever a conventional act is adopted. Unlike, in some others (OECS, MERCOSUR, ASEAN, GCC) its application is not generalized and it operates only in relation to specific agreements depending on issues they regulate. Thus, sometimes in these organizations agreements are concluded by all member states and their entry into force requires the consent and ratification by all of them.⁷⁰

Finally, the analysis of intergovernmental organizations' practice reveals that the opting-out system is not limited *ratione materiae*. Thus, firstly in almost all intergovernmental organizations under consideration it applies to international agreements regulating substantive matters. They may concern every field of cooperation; precisely, the variable geometry can operate in relation to any conventional act regulating not only new and ancillary policies, but also those which were formerly provided for by the founding treaty and are primary, central for the achievement of statutory goals. In this regard you can see the experiences of MERCOSUR⁷¹ and SICA⁷² in Latin America and of OECS⁷³ and CARICOM⁷⁴ in the Caribbean. Regarding the UNASUR it is worth noting that currently just one conventional act has been adopted and, consistently with the practice of the other Latin American organizations, the variable geometry approach has been applied.⁷⁵

⁶⁹ It is worth noting that SAARC Charter (art. 10) excludes expressly the application of variable geometry; differently a similar provision is not contained in the GUAM/ODED statutory treaty, so it is presumable that in this organization the variable geometry could operate in the future, maybe in relation to thorny issues.

⁷⁰ In the GCC, for example, variable geometry applied to the GCC Monetary Union Agreement (adopted 30 December 2008) which was concluded only by four out of the six GCC member States. Unlike, the Economic Agreement between the GCC states (adopted 31 December 2001) was concluded by all members and entered into force after being ratified by all of them.

⁷¹ See, for example, Protocolo de cooperação e assistência jurisdiccional em material civil, commercial, trabalhista e administrativas (adopted 27 June 1992, entered into force 17 March 1996); Protocolo de medidas cautelares (adopted 16 December 1994, entered into force 9 September 1998); Protocolo de San Luis en materia de responsabilidad civil emergente de accidente de tránsito entre los estados miembros del MERCOSUR (adopted 25 June 1996, entered into force 20 November 2001); Acordo de estradição entre os estados partes Mercosul (adopted 10 December 1998, entered into force 2 November 2006); Protocolo de defesa da concorrência do Mercosul (adopted 10 December 1998, not yet in force).

⁷² About a useful collection of the SICA normative instruments, consult the following book edited by the Secretary-General, *Instrumentos jurídicos del Sistema de Integración Centroamericana* (3rd ed., Sica, El Salvador, 2011).

⁷³ For example, the variable geometry approach operates in the realization of the OECS economic union. In fact the Protocol on the Economic Union is annexed to the Revised Treaty of Basseterre, so its entry into force is linked to that of the Revised Treaty. Concretely the latter was signed by 6 out of 9 OECS member states and its entry into force is subordinated to the deposit of 4 instruments of ratification (art. 25). It is also worth noting that at the time of ratifying the Revised Treaty a state, which is party to the Treaty of Basseterre of 1981 may make reservation in respect of the Economic Union Protocol.

⁷⁴ The variable geometry approach is applied also to the CARICOM Single Market and Economy (CSME). For the agreements adopted within the CARICOM in application of such approach see <http://www.caricomlaw.org/Legislation.aspx>

⁷⁵ See Protocolo adicional al Tratado constitutivo de UNASUR sobre compromiso con la democracia (adopted 20 November 2010, entered into force 3 December 2014).

This trend is also confirmed by the practice of UA,⁷⁶ SADC,⁷⁷ ECOWAS,⁷⁸ COMESA,⁷⁹ IGAD⁸⁰ and ECCAS⁸¹ in Africa; of LAS,⁸² OIC⁸³ and GCC⁸⁴ in the Arab-Islamic world; of CIS,⁸⁵ OBESCE,⁸⁶ ECO,⁸⁷ EurAsEc⁸⁸ and SCO⁸⁹ in the post Soviet area; and of ASEAN⁹⁰ and PIF⁹¹ in the Asia-Pacific region.

⁷⁶ For an overview of conventional acts adopted within the UA pursuant to the variable geometry, consult <http://www.au.int/en/treaties>.

⁷⁷ See, for example, Protocol on Trade (adopted 24 August 1996, entered into force 25 January 2001); Protocol on the development of tourism (adopted 14 September 1998, entered into force 26 November 2002); Protocol on gender and development (adopted 17 August 2008, not yet in force); Protocol on trade in services (adopted 18 August 2012, not yet in force). For a complete overview of SADC normative production to which variable geometry applies, see <http://www.sadc.int/index.php/documents-publications/protocols>

⁷⁸ See, among others, Protocol relating to mutual assistance of defense (adopted 29 May 1981, entered into force 30 September 1986); Protocol relating to the mechanism for conflict prevention, management, resolution, peace-keeping and security (adopted 10 December 1999, entered into force temporarily 10 December 1999); Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security (adopted 21 December 2001, entered into force 20 February 2008); ECOWAS energy protocol A/P4/1/03 (adopted 31 January 2003, entered into force temporarily 31 January 2003).

⁷⁹ See, for example, Protocol on Free Movement of Persons, Services, Labour and the Right of Establishment and Residence (adopted 29 June 1998, not yet entered into force). More in general, variable geometry approach is being applied to the realization of the customs union to which only 14 out of 19 COMESA member states take part.

⁸⁰ For an overview of agreements adopted within IGAD, consult http://igad.int/index.php?option=com_docman&Itemid=144

⁸¹ See, for example, Mutual Assistance Pact between the Member States of ECCAS (adopted 24 February 2000, entered into force 12 January 2004).

⁸² See, among others, Joint Defense and Economic Cooperation Treaty between the States of the Arab League (adopted 17 June 1950, entered into force 22 August 1952); Agreement of Facilitating and Developing Inter-Arab Trade (adopted 27 February 1981); Greater Arab Free Trade Area Agreement (adopted 19 February 1997, entered into force 1 January 1998). For all international agreements adopted within the LAS, see the organization's website www.lasportal.org.

⁸³ For a complete overview of international conventions on substantive matters adopted within the OIC, consult http://www.oic-oci.org/oicv2/page/?p_id=40&p_ref=16&lan=en.

⁸⁴ In this regard, see <http://sites.gcc-sg.org/DLibrary/index-eng.php?action=Subject>.

⁸⁵ See, for example, CIS Free Trade Agreement (adopted 18 October 2011, entered into force 20 September 2012). International agreements concluded within the CIS pursuant to the variable geometry approach are available on the organization's website <http://www.cis.minsk.by/>

⁸⁶ See, among others, Memorandum of understanding on the development of the Motorways of the Sea at the BSEC region (adopted 19 April 2007, entered into force 1 December 2008); Memorandum of Understanding for the Coordinated Development of the Black Sea Ring Highway (adopted 19 April 2007, entered into force 1 November 2008); Agreement on simplification of visa procedures for professional lorry drivers nationals of the BSEC member States (adopted 23 October 2008, not yet in force); Agreement on Simplification of Visa Procedures for the Business people Nationals of the BSEC Member State (adopted 23 October 2008, not yet in force).

⁸⁷ See, among others, ECO Protocol on Preferential Tariffs (adopted 23 May 1991, entered into force 1994); ECO Transit Agreement and Agreement on Simplification of Visa Procedures for the Businessmen of the Member States of ECO (adopted 15 March 1995, entered into force 2002); ECO Transit Road Transport Framework Agreement (adopted 9 May 1998, entered into force 19 May 2006); ECO Trade Agreement (adopted 17 July 2003, entered into force 24 April 2008).

⁸⁸ See, among others, Agreement of reciprocal recognition and equivalence of diplomas, academic degree and title documents (adopted 26 February 2002, entered into force 22 April 2003); Agreement on cooperation in the protection of external borders of the member states of EurAsEc (adopted 21 February 2003, entered into force 16 June 2004); Treaty on the creation of the common customs territory and establishment of the customs union (adopted 6 October 2007, entered into force temporarily 6 October 2007); Agreement on common unified system of customs regulation (adopted 25 January 2008, entered into force temporarily 25 January 2008); Agreement on conducting coordinated policy with regard to technical standards, sanitary and phyto-sanitary measures (adopted 25 January 2008, entered into force 2009).

As already said, in intergovernmental organizations conventional acts can be adopted also to regulate institutional matters of interstate cooperation. Indeed, member states of these organizations often aim to strengthen their cooperation by adapting the institutional structure to political and legal needs arising over time. This determines the adoption of further protocols establishing new organs — such as parliamentary assemblies or consultative bodies dealing with economic and social matters, as well as courts of justice called upon to exercise the jurisdictional function within the organization — which are merely mentioned in the founding agreement or were not originally foreseen.⁹² In this regard, it is of great interest that, under the law of some organizations under consideration (such as SICA,⁹³ CARICOM⁹⁴ in Latin America and the Caribbean; UA,⁹⁵ SADC,⁹⁶ IGAD,⁹⁷ ECOWAS,⁹⁸ COMESA⁹⁹ and ECCAS¹⁰⁰ in Africa; ECO,¹⁰¹ CIS¹⁰² and EurAsEc¹⁰³ in the post Soviet area; LAS¹⁰⁴

⁸⁹ See, among others, Agreement among the Governments of the SCO Member States on Cooperation in the Field of Ensuring International Information Security (adopted 16 June 2009); Agreement on Training of Officers for Counter-Terrorism Agencies of the SCO Member States (adopted 16 June 2009).

⁹⁰ See, among others, ASEAN Multilateral Agreement on the Full Liberalization of Air Freight Services (adopted 20 May 2009, entered into force 13 October 2009); ASEAN Multilateral Agreement on Air Service (adopted 20 May 2009, 13 October 2009); ASEAN Framework Agreement on the Facilitation of Inter-State Transport (adopted 10 December 2009, entered into force 30 December 2011); ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Services (adopted 12 November 2010, entered into force 30 June 2011).

⁹¹ See, among others, Pacific agreement on closer economic relations (adopted 18 August 2001, entered into force 3 October 2002) 2198 UNTS 171; Pacific Islands Countries Trade Agreement (adopted 18 August 2001, entered into force 13 April 2003); PICTA Trade in Services Protocol (adopted 28 August 2012, not yet entered into force).

⁹² Sometimes protocols are approved to introduce new and more stringent regulations on legislative acts.

⁹³ See, among others, Convenio del Estatuto de la Corte Centroamericana de Justicia (adopted 10 December 1992, entered into force 2 February 1994) 1821 UNTS 291; Tratado constitutivo del Parlamento Centroamericano y otras formas de instancias políticas (adopted 15 December 1987, entered into force 1 May 1990) 1777 UNTS 1993, as amended by Protocolo al Tratado constitutivo del Parlamento Centroamericano (adopted 16 July 1991, entered into force 9 June 1992) 1862 UNTS 616, and lastly by Protocolo de reformas al Tratado constitutivo del Parlamento Centroamericano (adopted 20 February 2008, entered into force 7 September 2010) 2711 UNTS 231.

⁹⁴ See, for example, Agreement for The Establishment of An Assembly of Caribbean Community Parliamentarians (adopted 31 July 1992, entered into force 3 August 1994) 2247 UNTS 301; Agreement establishing the Caribbean Court of Justice (adopted 14 February 2001, entered into force 23 July 2002) 2255 UNTS 319. For an overview of CARICOM agreements establishing institutions and agencies adopted in application of the variable geometry approach, consult the organization's website.

⁹⁵ See, for example, Protocol to the Court of Justice of the African Union (adopted 11 July 2003, entered into force 11 February 2009). For an overview, see <http://www.au.int/en/treaties>.

⁹⁶ See, among other, SADC Protocol on Tribunal and rules thereof (adopted 7 August 2000, entered into force 14 August 2001).

⁹⁷ See, for example, Agreement establishing IGAD Inter-Parliamentary Union, (adopted 22 February 2005, entered into force 28 November 2007).

⁹⁸ See, for example, Protocol A/P.1/7/91 on Community Court of Justice (adopted 6 July 1991, entered into force 5 November 1996); Protocol A/P.1/7/93 relating to the West African Monetary Agency (adopted 24 July 1993, entered into force 1 August 1995); Protocol A/P.2/8/94 relating to the Community Parliament (adopted 6 August 1994, entered into force 14 March 2000).

⁹⁹ See, for example, Protocol relating to the fund for cooperation, compensation and development of the COMESA (adopted 23 May 2002, not yet in force).

¹⁰⁰ See, for example, Traité établissant COPAX (adopted 24 February 2000, entered into force 12 January 2004); Protocole instituant le Réseau des Parlementaires de la Communauté Economique des Etats de l'Afrique Centrale (adopted 17 June 2002).

¹⁰¹ See, recently, Charter of the Parliamentary Assembly of the ECO Countries - PAECO (adopted 11 February 2013, entered into force 11 February 2013).

and GCC¹⁰⁵ in the Arab-Islamic world) member states are free to sign such protocols introducing new institutions or institutional regulations. As a consequence, such modifications or additions apply only to the member states that have agreed to sign and ratify the corresponding treaties, thus all the members are bound only by the institutional regulations originally set out in the basic treaty, while the new bodies will exercise their powers and new rules will produce their effects only towards the willing states which have accepted them. So flexibility involves also the institutional structure of the intergovernmental organization. In this regard, an interesting opinion was expressed by the Central American Court of Justice (hereinafter CACJ) which stated that its jurisdiction extends over all member states, even those which are not parties to its agreement of establishment,¹⁰⁶ as they signed and ratified the Protocolo de Tegucigalpa that is the statutory treaty of the organization providing for the establishment of the judicial organ.¹⁰⁷ The CACJ's opinion is absolutely questionable because it forgets that international agreements (as the Convenio del Estatuto de la Corte Centroamericana de Justicia) are *res inter alios acta* for those states which have not signed and ratified them, so they do not produce legal effects to them. As a consequence those members are not bound by the normative acts or judgments of these new bodies. In this sense the application of variable geometry approach to institutional matters makes it really difficult to create a widely common and shared set of rules by all member states of the organization.

Finally, as already said, in intergovernmental organizations conventional acts can be adopted also as founding agreements of new agencies or organisms endowed with sectorial competences which are subsidiary and instrumental to the principal organization. In some forms of association under consideration —such as OIC¹⁰⁸ and LAS¹⁰⁹ in the Arab-Islamic world; CIS,¹¹⁰ ECO,¹¹¹ SCO¹¹² and

¹⁰² See, for example, Agreement on the Status of the Economic Court of the Commonwealth of Independent States (adopted 6 July 1992, entered into force 8.12.1992); Convention on the Inter-parliamentary Assembly of Member Nations of the Commonwealth of Independent States (adopted 26.3.1995).

¹⁰³ See, among others, Treaty on the Commission of the Customs Union (adopted 6.10.2007, entered into force 2 February 2012).

¹⁰⁴ Variable geometry operates, for example, in respect of the Arab Peace and Security Council whose constitutive act, in force since 2007, was ratified just by some of the LAS member states.

¹⁰⁵ See, for example, Statute of the Monetary Council (adopted 30.12.2008, entered into force 27 March 2010).

¹⁰⁶ A similar opinion was shared by the SADC Tribunal which considered admissible the claim against Zimbabwe even if the latter had not ratified its statutory Protocol (supra n. 95) and so it had not accepted its jurisdiction. On the long diatribe between the SADC Tribunal and Zimbabwe and its implications, see among others, W. Scholtz and G. Ferreira, "Much ado about nothing? The SADC Tribunal's Quest for the rule of Law Pursuant to regional integration", 71 *ZaöRV* (2011) 331-358; F. Cowell, "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction", 13 *Human Rights Law Review* (2013), 153-165 [DOI:10.1093/hrlr/ngt004].

¹⁰⁷ See, Case n.1-30-4-2004, *Reyes Wyld v. Guatemala*, 3 January 2005, at 43, and lastly, Case n.123-12-06-12-2011, *FONARE y Fundación Nicaragüesa para el Desarrollo Sostenible v. Costa Rica*, 21 June 2012, at 9 ff.

¹⁰⁸ See, for example, Statute of Islamic States Telecommunication Union (adopted 12 December 1984); Statute of the Islamic Organization for food security (adopted 11 December 2013).

¹⁰⁹ See, for example, Economic Unity Agreement among States of the Arab League (adopted 3 June 1957, entered into force 1965); Arab Cultural Unity Charter (adopted 25 July 1970); OAPC Agreement (adopted 8 January 1968, entered into force 1 September 1968).

¹¹⁰ The CSTO and the EurAsEc were established under Russian drive as "maid" organization of the CIS in specific fields of cooperation.

OBSEC¹¹³ in the post Soviet area; OECS¹¹⁴ and CARICOM¹¹⁵ in the Caribbean; UA,¹¹⁶ COMESA¹¹⁷ and SADC¹¹⁸ in the African Continent— the variable geometry approach applies also to this kind of agreements so that the membership of these subsidiary agencies or organisms is partially different from that of the main organization.

(2) The Variable Geometry in the Practice of Intergovernmental Organizations: the Binding Organic Acts.

As already said, in some (few) intergovernmental organizations —such as MERCOSUR, SICA/SIECA, COMESA, ECOWAS, EURASEC, OECS —statutory objectives are achieved not only through international agreements concluded by member states, but also through binding secondary acts adopted by the institutions of the organization and imputable to it.¹¹⁹ They can be provided for expressly by the founding agreement of the organization or be the outcome of a normative evolution; in any case, their adoption is almost limited.¹²⁰ However, for the purpose of this research it is worth ascertaining the application of the variable geometry principle also in relation to such typology of acts. In reality, this is not easy at all even because information about intergovernmental organizations and their normative production is often incomplete or even inaccessible. So the following considerations will be based on available data and news which are not often helpful. In fact, statutory agreements of these intergovernmental organizations do not provide for or regulate the application of the variable geometry approach to binding organic acts. Furthermore,

¹¹¹ See, among others, Charter of the ECO Cultural Institute (adopted 15 March 1995, entered into force 15 March 1995); Agreement for the establishment of the ECO Shipping Company (adopted 15 March 1995); Charter of ECO Educational Institute (adopted 9 May 1998).

¹¹² See, for example, Agreement between the member states of the Shanghai Cooperation Organization on the Regional Anti-Terrorist Structure (adopted 7 June 2002, entered into force 14 November 2003).

¹¹³ See, for example, Agreement establishing the Black Sea Trade and Development Bank (adopted 30 June 1994, entered into force 24 January 1997).

¹¹⁴ See, among others, Treaty establishing the Eastern Caribbean Telecommunications Authority (adopted 4 May 2000); Agreement establishing the Eastern Caribbean Civil Aviation Authority (adopted 24 October 2003).

¹¹⁵ See, among others, Agreement Establishing a West Indies Shipping Corporation (adopted 3 October 1975, entered into force 30 April 1976) 2324 UNTS 255; Agreement for the Establishment of the Caribbean Telecommunications Union (adopted 28 April 1989, entered into force 17 July 1990) 2245 UNTS 243; Agreement Establishing the CARICOM Regional Organization for Standards and Quality -CROSQ- (adopted 4 February 2002, entered into force 4 February 2002) 2326 UNTS 359; Agreement Establishing the Caribbean Aviation Safety and Security Oversight System -CASSOS- (adopted 8 May 2008, entered into force 3 July 2008) 2670 UNTS 37.

¹¹⁶ See, for example, Agreement for the establishment of the African Rehabilitation Institute (adopted 17 July 1985, entered into force 2 December 1991); Convention on the African Energy Commission (adopted 11 July 2001, entered into force 13 December 2006).

¹¹⁷ See, among others, Eastern and Southern African Trade and Development Bank (established 6 November 1986); COMESA Regional Investment Agency (established 30 June 2006); COMESA Monetary Institute (established 7 March 2011).

¹¹⁸ Charter establishing the Centre for coordination of agricultural research and development in South Africa (adopted 5 November 2010, entered into force 3 May 2011).

¹¹⁹ Regarding the SICA in July 2013 the new *Reglamento para la adopción de decisiones del SICA* (adopted 24 June 2013) entered into force. Its art.9 provides for the adoption of *reglamentos* whose legal features are quite literally similar to those of EU regulations (art. 288 TFEU). A more or less analogous trend to imitate the EU model with reference to organic acts characterizes also the COMESA and the ECOWAS (see, respectively, art. 10 of the COMESA Treaty; art.9 of the ECOWAS Supplementary Protocol A/SP.1/06/06).

¹²⁰ Indeed, no binding organic acts have been adopted until now by the institutions of OECS.

they are generally conceived as normative instruments with general application, binding every member state¹²¹ unless it is expressly provided for by the founding agreement that they address to specific addressees.¹²² In any case, unlike the example of conventional acts analyzed above, when an institution of the organization adopts a specific act, each member state is bound by it and is under the obligation to implement it into its domestic legal system. If it fails, it is in breach of the organization law and may be subject to political or judicial consequences according to treaty provisions. In the light of these considerations it seems that the variable geometry does not apply to organic binding acts. This is undoubtedly true for MERCOSUR whose statutory agreement subordinates the entry into force of organic acts to their approval by all member states according to the principle of *vigencia simultanea* (art. 40 of the Protocolo de Ouro Preto).

Taking into account the available information, the above assumption seems to be confirmed also by the practice of the other regional organizations under consideration. In fact the analysis of the secondary law of ECOWAS, COMESA, EurAsEc, SICA/SIECA reveals that binding organic acts are usually signed by the organ entitled to their adoption and do not indicate if any member state has expressed its *disinterest* in taking part in the decision-making procedure. So, in the light of the available practice it could be presumed that these acts are addressed to and bind all the members.

However, as no founding agreement forbids the application of variable geometry to binding organic acts, it could happen that member states introduce in the statutory treaty provisions authorizing a group of members to use such acts in order to move forward their cooperation in a specific field - in the example of the EU enhanced cooperation. In this sense it seems to express art. 8 par. 9 a) of the OECS Revised Treaty stating that “where the OECS Authority is taking a decision in relation to the Economic Union Protocol, the reference to full Member States in the preceding paragraph shall refer only to those full Member States which are parties to the Economic Union Protocol”.

Unlike the above said, art. 12 of the Tratado UNASUR provides expressly the application of variable geometry to conventional as well as to organic acts. However, as already said, the UNASUR normative production is still scanty and currently no binding organic acts have been adopted, so no further considerations about the application of variable geometry are possible.

THE APPLICATION OF VARIABLE GEOMETRY IN SUPRANATIONAL ORGANIZATIONS

As known, supranational organizations are characterized by legal dynamism which translates into states' intention to restrict the exercise of their sovereignty under certain (strictly defined) conditions

¹²¹ See arts. 9, 15 and 20 of the Protocolo Ouro Preto; arts. 6, 8 and 9 of the Tratado UNASUR; art. 10 par.2 of the COMESA Treaty; art.9 of the ECOWAS Supplementary Protocol A/SP.1/06/06; art.8 par.8 and art.9 par.8 of the Revised Treaty of Basseterre; arts. 8-9 of the Reglamento para la adopción de decisiones del SICA; art.31 par.2 of the Reglamento de organización y funcionamiento de los Consejos SIECA; art.5 of the EurAsEc Treaty.

¹²² In this sense, see art.10 par. 3-4 of the COMESA Treaty; art.9 par.6 of the ECOWAS Supplementary Protocol A/SP.1/06/06; art.10 of the Reglamento para la adopción de decisiones del SICA; art.31 par.3 of the Reglamento de organización y funcionamiento de los Consejos SIECA.

and with regard to specific competences. Generally the European Union is considered the regional organization that better realizes the main features of supranational organizations.¹²³

However, currently even some (few) other sub-regional organizations in developing countries tend to reproduce such model inspiring to the EU integration process. They are the *Comunidad Andina* (hereinafter CAN¹²⁴) in Latin America and the UEMOA,¹²⁵ CEMAC¹²⁶ and EAC¹²⁷ in Africa. The provision of a complex system of sources of law represents an element of particular qualification of supranational organizations. Indeed their founding treaties provide for binding acts approved by the organs of the organization through a more or less complex procedure involving several (not only state) bodies.¹²⁸ Furthermore, even international agreements may be adopted to achieve statutory goals. In the European integration process the adoption of international agreements between the EU member states is secondary and limited to the regulation of ancillary matters in respect to the organization's primary goals, whose competence was not specified by the statutory treaty.¹²⁹ On the contrary in the other supranational organizations under consideration the adoption of conventional acts is quite frequent and they may concern the regulation of institutional¹³⁰ as well as substantive matters¹³¹, sometimes even those which are primary and central in respect to the statutory goals¹³².

¹²³ In this sense see A. T. Guzman, *Doctor Frankenstein's International Organizations*, 2 March 2012, http://works.bepress.com/andrew_guzman/58 and A. Skordas, "Supranational Law", *Max Plank Encyclopedia of Public International Law*, March 2012 who seem to ignore the existence of other regional organizations embodying the supranational model, namely the UEMOA, the CEMAC and the EAC.

¹²⁴ The current regulation of the CAN, which has been repeatedly amended, is expressed by Decisión n.563, Codificación del Acuerdo de integración subregional andino (adopted 25 June 2003).

¹²⁵ *Traité de l'Union Economique et Monétaire Ovest Africaine* (adopted 11 January 1994, entered into force 1 August 1994), as amended and integrated by *Traité modifié de l'UEMOA* (adopted 29 January 2003).

¹²⁶ *Traité révisé de la CEMAC* as well as the *Convention régissant la Union Economique de l'Afrique Centrale* and the *Convention régissant la Union Monétaire de l'Afrique Centrale* (adopted 25 June 2008).

¹²⁷ *Treaty for the establishment of the East African Community* (adopted 30 November 1999, entered into force 7 July 2000) 2144 UNTS 255, as amended 14 December 2006 and 20 August 2007. It is worth noting the realization of the supranational model in the EAC is more veiled than in the other organizations under consideration.

¹²⁸ See art. 43 of the *Traité modifié UEMOA*; art.41 of the *Traité révisé CEMAC*; arts.1-3 of the *Tratado de creación del Tribunal de Justicia de la Comunidad Andina* (adopted 18 May 1979, amended 28 May 1996); art.16 of the *EAC Treaty*.

¹²⁹ Art. 293 of the *Treaty establishing the European Community* (now repealed) provided that member states concluded international agreements to regulate: 1. the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals; 2. the abolition of double taxation within the Community; 3. the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries; 4. the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. Pursuant to this article some Community conventions were adopted, such as the *Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* (adopted 27 September 1968, entered into force 1 February 1973); *EC Convention on the Law Applicable to Contractual Obligations* (adopted 19 June 1980, entered into force 1 April 1991).

¹³⁰ In this sense see, for example, *Convention régissant la Cour de Justice de la CEMAC* (adopted 5 July 1996); *Convention régissant le Parlamento communautaire* (adopted 25 Juin 2008). Regarding the UEMOA see *Traité portant la création du Parlement de l'UEMOA* (adopted 29 January 2003, entered into force 1 February 2014).

Regarding the CAN see *Tartaro constitutivo del Parlamento andino* (adopted 25 October 1979, entered into force January 1984); *Tratado de Creación del Tribunal de Justicia de la Comunidad Andina*, supra n. 128.

¹³¹ In this sense see, for example, the *Accord d'extradition entre les Etats membres de la CEMAC* (adopted 28 January 2004); *Accord de coopération judiciaire entre les Etats membres de la CEMAC* (adopted 28 January 2004); *Pacte de non agression, de solidarité et d'assistance mutuelle entre les Etats membres de la CEMAC* (adopted 28 January 2004).

Moreover, in some cases they are adopted also to establish specialized institutions or organisms which are instrumental to the main organization.¹³³

In this context the application of variable geometry seems to be rare. Firstly, founding agreements of supranational organizations in developing countries —namely UEMOA, CEMAC and CAn— do not provide for or authorize the application of variable geometry in their own legal systems. In this regard they are consistent with the early experience of the European Union, where *unity* and *uniformity* were its main characteristics.¹³⁴ Then, normative practice of supranational organizations under consideration confirms statutory provisions; indeed the member states of CAn, UEMOA and CEMAC have not applied until now the opting-out approach to international agreements adopted within the organization. In fact, external protocols and treaties concerning both institutional and substantive matters are usually concluded by all member states and enter into force after being ratified by all of them.¹³⁵

Furthermore variable geometry does not seem to operate even in respect to binding organic acts. In fact, first of all, it is not regulated by the founding treaties. Then, binding organic acts of CAn,¹³⁶

Regarding the UEMOA, see lastly Acate additionnel n. 04/2013/CCEG/UEMOA instituant la politique commune de l'UEMOA dans le domaine de la paix et de la sécurité (adopted 24 October 2013, entered into force 24 October 2013); Acte additionnel n. 06/2013/CCEG/UEMOA portant institution de la politique commune de développement culturel au sein de l'UEMOA (adopted 24 October 2013, entered into force 24 October 2013).

Regarding the CAn see Protocollo adicional al Acuerdo de Cartagena “Compromiso de la Comunidad andina por la democracia” (adopted 17 October 1998).

¹³² In this sense see, for example, EAC Customs Union Protocol (adopted 8 March 2005, entered into force 1 January 2005); EAC Common Market Protocol (adopted 20 November 2009, entered into force 1 July 2010); Protocol on Establishment of the EAC Monetary Union (adopted 30 November 2013, not yet entered into force).

Regarding the UEMOA see, for example, Protocole additionnel n. III instituant les règles d'origine des produits de l'UEMOA (adopted 19 December 2001, entered into force 1 January 2003).

¹³³ In this sense see, for example, Protocol on the establishment of the Inter-University Council for East Africa (adopted 13 September 2002); Protocol on the establishment of the East African Health Research Commission (adopted 13 September 2008).

¹³⁴ The Treaty of Rome did not regulate the opting-out approach and, apart from the possibility of temporary derogations introduced by art. 15 of the Single European Act in 1986, only the Treaty of Maastricht in 1992 launched the application of variable geometry. About the differentiated integration in the EU, in literature see, B. De Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia, Antwerpen/Oxford/New York, 2001); A. Kölliken, *Flexibility and European unification: the logic of differentiated integration* (Rowman & Littlefield Publishes, Lanham, 2006); D. Leuffen et al., *Differentiated integration. Explaining the variation in the European Union* (Palgrave Macmillan, Basingstoke, 2013).

¹³⁵ As already said, in the EU the application of variable geometry to international agreements dates back to late '80s – 30 years after its institution – and may be considered one of main consequences of successive enlargements that transformed the relatively small and homogenous Community into a wider and looser integration process. Increased political, economic and cultural diversity led to a kind of *structural incapacity* of the EU to conduct always coherent policies and to agree on further progress. In this context differentiation among a limited number of member states offers the possibility to break out this deadlock and, in this sense, it represents a key factor of the European experience able to explore new roads towards integration. However it is worth outlining that in the EU the opting-out approach was/is merely an occasional and temporary phenomenon and concerned/concerns *new* policies, which are ancillary in respect to the original primary statutory objectives. In this sense Case C-370/12, *Pringle*, [2012] ECR 756.

¹³⁶ Within the CAn the legal regulation of binding organic acts is not particularly clear and is only partially influenced by the EU model (arts. 1-3 of the Tratado de creación del Tribunal de Justicia). Institutions may adopt decisions and resolutions which are both binding and directly applicable. For an overview of the copious CAn normative production, consult <http://www.comunidadandina.org/Normativa.aspx>.

UEMOA¹³⁷ and CEMAC¹³⁸ are generally addressed to and bind all member states, unless they indicate expressly specific addressees. Moreover these acts, usually signed by the organ entitled to their adoption, do not indicate any member state which has expressed its *disinterest* in taking part in the decision-making procedure. In sum, normative production of supranational organizations under consideration binds all member states and if they fail in implementing it, they may be subject to an infringement action in accordance with their statutory provisions. This approach is absolutely consistent with the particular legal nature of the cooperation model that these organizations embody, reflecting the existence of a strong common political will of member states to move forward in their cooperation jointly.¹³⁹ In this perspective it is to be considered that statutory treaties of supranational organizations under consideration provide for the possibility to adopt binding organic acts by majority; this means that a member state is bound by an act even if it has expressed its negative vote.¹⁴⁰

Compared to what is said above, the EAC represents an exception because art. 7 lit. e) of the EAC Treaty expressly provides for the application of variable geometry, including it in the EAC operational principles which govern the practical achievement of statutory objectives. No limits or particular conditions are defined for its application which can cover every field of cooperation. So, in the light of treaty provision variable geometry can be applied whenever a group of states within the organization intends to go forward in their cooperation thus realizing wider integration schemes in various fields and at different levels; in this sense the variable geometry system may become a *rule*. However the EAC's practice reveals a different *scenario*. Even if it is authorized by the statutory treaty, this principle has never been applied until now either to international agreements or binding organic acts.¹⁴¹ This reveals the existence of a strong *voluntas cooperandi* among the five EAC member states which are ready to progress together in integration. However the provision of variable geometry among the founding principles of a supranational organization is questionable on the basis of its fundamental features. Indeed, as already said, generally supranational organizations are characterized by a strong political will of member states which translates into their intention to limit the exercise of

¹³⁷ According to art. 43 of the *Traité modifié UEMOA* institutions may adopt regulations, directives, decisions, recommendations and opinions whose legal regulation is very similar to that provided for by the EU Treaty. To consult (conventional and organic) acts adopted within the UEMOA, see <http://www.uemoa.int/Pages/Home.aspx>.

¹³⁸ According to art. 41 of the *Traité revise CEMAC* institutions may adopt regulations, directives, decisions, recommendations and opinions whose legal regulation is very similar to that provided for by the EU Treaty. To consult the CEMAC normative production – both conventional and organic acts – see <http://www.cemac.int/textes-officiels>.

¹³⁹ The current provision of enhanced cooperation in the EU is not in contradiction with the early consideration or is a weak point. On the contrary, its application, strictly regulated and subordinated to specific conditions, is justified by the successive enlargements which make it difficult to agree on further progress of European integration. So the instrument of enhanced cooperation hampers its deadlock allowing willing and able member states to explore new roads towards integration. About the enhanced cooperation, see among others, A. Cannone, *Le cooperazioni rafforzate. Contributo allo studio dell'integrazione europea* (Cacucci, Bari, 2005).

¹⁴⁰ Even if statutory treaties of CEMAC, UEMOA and CAn provide for the majority, in the practice binding organic acts are generally adopted by unanimity or consensus.

¹⁴¹ The EAC Treaty provides that statutory objectives are pursued through the adoption of protocols as well as of binding organic acts (such as regulations, directives and decisions) whose definition is unclear. For an overview of the EAC normative production, consult http://www.eac.int/index.php?option=com_content&view=article&id=303-documents-and-publications&catid=34-body-text-area&Itemid=1.

their sovereignty in certain fields in favour of a *body* to achieve common objectives; evidently this does not combine very well with a principle which allows member states to choose - under no conditions - activities, programs, acts to be bound by. About this issue the EAC Court of Justice (hereinafter EACJ) rendered an advisory opinion.¹⁴² In particular the EACJ was asked to decide if the principle of variable geometry was in harmony with the rule of consensus in the decision-making procedure and if it could be applied to guide the integration process.¹⁴³ The EACJ explained that “consensus [...] is purely and simply a decision-making mechanism in Summit, Council and in other executive organs of the Community, while variable geometry as used therein is a strategy for implementation”.¹⁴⁴ So, based on this distinction between decision and implementation, the EACJ finds consistency between the principle of variable geometry and the rule of consensus, noting that they are different stages in a single process.¹⁴⁵ The reasoning of the EACJ is absolutely correct and sharable but incomplete because it forgets that variable geometry may operate not only in the implementation phase but also in the early phase of the decision-making procedure, when parties have to express their consent or their disinterest in the adoption of a specific act. In any case the principle geometry is consistent with any voting criteria in decision-making procedures, representing a legal remedy to unanimity, consensus or majority

CONCLUDING REMARKS

My analysis reveals the broad application of the variable geometry approach in regional and sub-regional organizations in developing countries. It is not surprising that it applies to conventional acts in organizations whose membership is wide. Indeed in such forms of association —where states of asymmetrical size and powers, with diverging economic and political interests co-exist— sometimes it is difficult to reach a fully shared opinion about the regulation of specific fields of cooperation. In this situation the application of variable geometry permits a group of member states to move forward, thus preventing the paralysis of the organization; in this sense, it can be considered a valid remedial tool for unanimity or majority and a key factor to prevent deadlock of the integration process and to allow some member states to explore new *roads* towards integration then feasible by all members.

However my investigation has shown that the application of variable geometry is not influenced by the subjective dimension of the organization; indeed it has revealed an almost systemic and unconditional application of variable geometry in most of regional organizations of developing countries independently from their membership. In these contexts the principle of variable geometry

¹⁴² EACJ Application n. 1/2008, *In the matter of a request by the Council of Ministers of the EAC for an advisory opinion on the relationship between the principle of variable geometry and the requirement of consensus in decision-making*, 24 April 2009.

¹⁴³ This advisory opinion originated from the lack of agreement among EAC member states during common market negotiations. This meant that the Council of Ministers and the Summit could delay the negotiation until consensus was created or they could agree to proceed in a manner that accommodated differences, thus applying the variable geometry approach.

¹⁴⁴ EACJ Application n.1/2008, *supra* n. 142, par. 30.

¹⁴⁵ In such advisory opinion the EACJ also argued that the principle of variable geometry “has been internationally applied to deepen integration” (par. 31) and cited the EU as a model, recommending the EAC to study and possibly to emulate its examples of application of this principle.

applies even in the early stage of interstate cooperation to any conventional act regulating substantive issues (even primary policies to the realization of statutory goal) or institutional ones or even establishing new agencies and organisms instrumental to the main organization. So even the *original* basic progress of interstate cooperation is dependent on the political willingness and/or economic ability of the slowest member states.

Far from being perceived as *extrema ratio* to be applied only when, on the one hand, an agreement on a specific issue cannot be reached by all members and, on the other hand, a progression of integration in that field is considered suitable, or even necessary, the variable geometry becomes a *rule*, applied whenever a member state thinks that a deepening of the cooperation in a specific field impairs its interests. In this sense it represents a weak point of the organization, reflecting member states' unwillingness and/or inability to agree upon a common regulation of specific fields to reach statutory objectives. Clearly, this attitude expresses the existence of weak political will among member states which are not animated by a strong and long-term *voluntas cooperandi*. All this explains also why, in the light of my investigation, the opting-out approach represents an element of relevant qualification of soft organizations as well as of intergovernmental organizations, particularly when they choose the international agreement as main normative instrument for interstate cooperation. In any event the variable geometry approach is absolutely consistent with the legal nature of such cooperation models, because it guarantees a flexible participation in the organization for the member states which are sure that their interests and sovereignty are respected.

Unlike in supranational organizations, where members are ready to limit the exercise of their sovereignty in favour of the organization to reach fully shared goals, thus proving a strong *voluntas cooperandi*, variable geometry usually does not operate or, as in the case of the European Union, its application —introduced after 30-years integration— is merely occasional and temporary, subjected to strict conditions and limited to the regulation of new policies and ancillary matters in respect to the original primary goals. And even in the perspective of a strong political and association will it is to be regarded the provision of majority rule in the adoption of secondary law, according to which even the state expressing its negative vote is bound by the adopted act.

It is evident that the generalized application of variable geometry —in relation to substantive as well as institutional matters— and the lack of its strict regulation in most soft and intergovernmental forms of association can lead to the fragmentation of the law of the organization. Precisely, the freedom of the member states to be parties to conventional institutional and/or substantive acts implies that the legal framework of the organization, common to all member states, is reduced to the original founding treaty and the eventual protocols (to be defined case by case) in effect for all the member states. In this sense, the systemic, generalized and unconditional application of variable geometry does little to foster the coherence of the organization's legal order¹⁴⁶ and seems to call the concept of international organization into question. Indeed it breaks up founding elements of

¹⁴⁶ In this sense, H. Schermers and N. Blokker, *supra* n. 1, at 1268 who explain that "A legislative process in which each act is based on a former legislation cannot be introduced when acts of the organization do not bind all members".

international organizations, that should be the *unity* and *uniformity* of the law of the organization which follows the fully joint exercise of common functions to achieve shared goals.