

## **Flexibility in the EU external relations with other regions: The cases of MERCOSUR, CAN, EFTA, ENP, Western Balkans and ACP<sup>1</sup>**

### **Abstract**

The concept of flexibility has been usually employed to explain the development of the regional integration process within the European Union. Some of the main cases where flexibility has been used as a tool for the European integration are: the Schengen area, the EMU, the WEU, the harmonization directives in the internal market and, the harmonization of the EU sector of electricity and gas. The specialized literature has developed several sub-categories of flexibility to explain each specific type of differentiation in terms of time, members and policy. These sub-categories can be re-grouped (for its ultimate application to EU external relations with other regions) into three main types: multi-speed; variable geometry; and *à la carte*. Thus, the objective of this paper is twofold: first, to elaborate an analysis on the concept of flexibility and secondly, on the basis of such analysis, to apply it to the EU external relations with other regions such as MERCOSUR, CAN, EFTA; ENP; Western Balkans; and ACP. In order to cope with this objective, it has been stated the following research question: Under which conditions does the EU allow for flexibility in its external relations with other regions? To reply to this research question the following hypotheses have been developed: 1) the higher the EU economic interests, the less likely to allow flexibility in negotiations; 2) the more important the development objectives, the more flexibility allowed; 3) the more important political goals (e.g. stabilization and enlargement), the more flexibility allowed; and 4) the more integrated the region (or joint cooperation), the less flexibility allowed (specially neighbours to prepare for accession).

### **Introduction<sup>2</sup>**

The concept of flexibility has been usually employed to explain the development of the regional integration process within the European Union (EU). Some of the examples where there was a differentiation among EU member states are: the Schengen area; the Western European

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<sup>1</sup> This paper is based on the author's MA Thesis submitted to College of Europe in May 2009.

<sup>2</sup> This paper addresses the reasons behind allowing for flexibility on the EU relations with other regions. Therefore, it focuses on the EU side of its external relations and not on the implications for the partner regions.

Union (WEU); the European Monetary Union (EMU); the harmonization directives in the internal market; and the EU electricity and gas sectors.

At the same time, flexibility is also present in the EU external relation with other regions such as its relations with: the Common Market of the South (MERCOSUR), the Andean Community of Nations (CAN), the European Free Trade Association (EFTA), the European Neighbourhood Policy (ENP), the Western Balkans and the Africa, Caribbean and Pacific (ACP) region.

Thus, the objective of this paper is twofold: first, to elaborate an analysis on the concept of flexibility within Europe and secondly, on the basis of such analysis, to apply it to the EU external relations with other regions such as MERCOSUR, CAN, EFTA; ENP; Western Balkans; and ACP.

In order to cope with this objective, it has been stated the following research question: *Under which conditions does the EU allow for flexibility in its external relations with other regions?* To reply to this research question, the following hypotheses have been developed: 1) the higher the EU economic interests, the less likely to allow flexibility in negotiations; 2) the more important the development objectives, the more flexibility allowed; 3) the more important political goals (e.g. stabilization and enlargement), the more flexibility allowed; and 4) the more integrated the region (or joint cooperation), the less flexibility allowed (specially neighbours to prepare for accession).

As it was stated in these hypotheses, the main concepts used for this research are “flexibility”, “external relations”, and “regions”. The following definitions are considered for the purpose of making these concepts more operational. “Flexibility” is the differentiated (instead of uniform) treatment among members of the same region, in terms of time, issue areas and members (also depending on the level of political will and capacity to implement measures).<sup>3</sup> “External relations” it is not only referring to the EU economic or trade relations, but also to the relations with partners outside the EU conducted because of political interest or development objectives. Finally “region” is defined as a group of countries that are integrated in a regional basis.<sup>4</sup> Concerning the hypotheses, the term “economic interests” is referred to market share or

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<sup>3</sup> This definition was taken on the basis Stubb (1996).

<sup>4</sup> The definitions of “external relations” and “region” were elaborated by the author.

market potential; “political goals” mainly have to do with stabilization or enlargement; “development objectives”, has to do with helping a region to develop and integrate itself into the world market by providing financial assistance; and “regional integration” is considered here as a form of regional economic integration or as a cooperation initiative set up in a region.<sup>5</sup>

In order to reflect the different hypotheses, several cases were considered for this research. The case selection was done to: cover the different continents in the world and the diversity of regions going global; take into account different levels of development of the countries that compose the regions (developing, transitional, emerging, and industrial countries); to include not just EU economic external relations but also other reasons like stabilization, development, etc.; and take into account regions with different degrees of integration. In this research, the Asian region was not considered as such because, although the case of the Association of South East Asian Nations (ASEAN), the EU is treating the region bilaterally instead of a single region (Page 2008). This research does not consider either the EU bilateral negotiations with single countries that are not in the framework of broader regional integration process.

The paper is structured as follows. First, the theoretical framework is presented by discussing the concept of flexibility and applying it to the EU external relations with other regions. Second a case-by-case analysis is developed by discussing the reasons behind allowing for flexibility on the EU relations with MERCOSUR, CAN, EFTA; ENP; Western Balkans; and ACP. Finally, a comparative conclusion of the research is presented.

## **1-Theoretical framework: flexibility within the EU and its application to the EU external relations**

Flexibility has been used as a tool for the European integration. There are various cases where this concept was applied within member states that did not agree on a certain policy or they adopted a differentiated approach to cope with the compromises. Some of the examples where

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<sup>5</sup> These definitions were also elaborated by the author.

there was a differentiation among EU member states are (Dehousse, Coussens and Grevi, 2004): the Schengen area (while other member states supported the complete removal of internal border checks, there are three member states that are not involved in this area: the UK, Ireland and Denmark); the WEU (some countries did not take part of this initiative related to the cooperation on different security matters: Denmark, Ireland, Austria, Finland and Sweden); the EMU (the member states that were unable to fulfil the criteria set by the Maastricht Treaty would be given a derogation; moreover, an opt-out was given to the UK and Denmark); and the harmonization directives in the internal market on provisions related to common customs tariffs, freedom of establishment and the free movement of persons, transport policy and indirect taxation that expressly exempt a named member state or states for a specified period but sometimes more open-endedly (De Búrca and Scott, 2000).

These examples of flexibility between member states within the EU were established through specific provisions in the Maastricht, Amsterdam and Nice treaties (Stubb, 2002; Dehousse, Coussens and Grevi, 2004). However, there are other cases where flexibility is not institutionalized in the treaties, that according to a directive, member states have different ways of implementing them (or sometimes they do not do it because they have obtained an opt-out). Some of these situations can be found in the electricity and gas sectors that were not liberalized in the 1990s because the majority of member states (excepting the UK) were sceptical to the initiative supported by the Commission and some member states progressed faster and others more slowly towards liberalization (Andersen and Sitter, 2006).

In sum, flexibility was introduced in the Treaty provisions (primary legislation), as the case of the EMU, the WEU, or the Schengen area, but also, as the case of the internal market harmonisation suggests, was adopted through directives of the Council (secondary legislation). Also the cases of the electricity and gas sectors show the possibility to differentiate among member states without a specific treaty provision for this case.

### *1.1-The concept of flexibility*

It is worth to mention, that a huge amount of papers on flexibility has been elaborated at the end of the 1990s and beginning of 2000s, when the signature of Maastricht, Amsterdam and Nice treaties had incorporated (institutionalized) provisions allowing member states for

flexibility in the European integration process. This was the so-called “fourth wave of the flexibility debate”.<sup>6</sup>

All the above-mentioned examples of flexibility were treated and analyzed by the specialized literature from different perspectives. Some authors have developed sub-categories for the flexibility allowed in each specific case, resulting in specific types of flexibility.<sup>7</sup> These sub-categories involve, from their diverse perspectives, different forms of differentiation in terms of time (different periods to apply a policy), members (not inclusion of all the members in a policy), and policy areas (some member participating in some areas, but not all the areas). For the purpose of the analysis (and the ultimate application to the EU external relations with other regions), all these sub-categories of flexibility could be re-grouped into three main types: multi-speed; variable geometry; and *à la carte*.<sup>8</sup>

Multi-speed flexibility conceptualizes the implementation of policies, initially, by those member states immediately capable to doing so, and the subsequent implementation by the member states without that initial capacity as soon as they have it; thus, differentiation among member states is considered a temporary and unfortunate necessity (Warleight, 2002). Variable geometry assumes that certain member states are incapable of adopting certain policies for long periods of time (and maybe forever), thus the integration should be reorganized into divisions (Warleight, 2002). Finally, *à la carte* is a mixture of the first two. However, while the former two take capacity to implement policies as the basis for differentiation, this model is predicted on political will, meaning, to express choices to not to participate (Warleight, 2002). This type can accept patterns of differentiation as permanent, for instance, in the case of an opt-out.

Furthermore, in each of the three types of flexibility prevails a factor that helps to explain the essence of differentiation (Stubb, 2002). Thus, multi-speed is concerned mainly with time

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<sup>6</sup> See Stubb (2002). As the author points out, the first wave of the debate started in the mid 1970s, where commentators have taken a very narrow approach to their analyses that was later expanded to other areas and issues.

<sup>7</sup> Regarding the flexibility incorporated in treaty provisions Stubb (2002) refers to “enabling clause”; “case-by-case flexibility”; and “pre-defined flexibility”. Dehousse Coussens and Grevi (2004) have also classified flexibility in three different general categories enclosing specific types: “casual approach”; “treaty-based approach”; and “multi-paced approach”. From a legal perspective, De Búrca and Scott (2000) refer to “micro-flexibility”. On the other hand, regarding the less formal differentiation among member states without a specific treaty provision, Andersen and Sitter (2006) have denominated the differentiation among member states on a specific sector as “homogeneous integration” and “autonomous integration”, adding also the categories of “aligned integration” and “deviant integration”.

<sup>8</sup> These definitions were elaborated by the author on the basis of Stubb (2002) and Warleight (2002).

and as such, it is put in practice in the form of an opt-in, a transition period, or the above-mentioned *avantgarde*. Variable geometry is focused mainly with the members that take part of the initiative, though, a way of put this in practice is by enhanced cooperation in a core group, or by concentric circles. And finally, *à la carte* is mainly linked to policy areas, whereas its achievement is done through an opt-out of an issue area, by picking-and-choosing a certain policy, or by partial membership.

Last but not least, it is necessary to add to these three categories (time, members and policy areas), the political will of the member states to participate (or not) in a policy and their capacity to implement it (where a lack of capacity can lead to a transitional period to allow a later implementation). As it will be analyzed later, this is the case for many examples in the EU external relations with other regions. Thus, although there is an overlapping in the concepts, the following are the most important types of differentiations among member states:

TABLE1: Differentiations among member states

<b>Multi-speed</b>	<b>Variable geometry</b>	<b>À la carte</b>
<i>Differentiation according to time</i>	<i>Differentiation according to members</i>	<i>Differentiation according to policy areas</i>
Members share same <i>goals</i> but temporary differences due to lack of capacity (others will follow)	Members do not share same goals due to lack of capacity and/or political will (enduring differences)	Members pick and choose due to lack of political will
Also: <i>avantgarde</i> , transition periods, opt-in	Also: core group, concentric circles	Also: opt-out, opt-in
Example: European Monetary Union; electricity and gas sectors	Example: Schengen area	Example: Denmark’s opt-out in defence

Source: own elaboration on the basis of Stubb (2002); Warleight (2002) and Dehousse, Coussens and Grevi (2004).

### *1.2-Application of the concept of flexibility to the EU external relations with other regions*

In order to apply the three types of flexibility to the EU external relations with other regions, it is necessary to identify first, “where” is the differentiation in the EU relations with the selected regions and secondly, whether if that differentiation is among members, issues, or time.

The EU-MERCOSUR relation is the only case that (for the moment) there was no differentiation at all.

In UE-CAN negotiations, on 2008 there were negotiations with Colombia and Peru that went “faster” than Bolivia and Ecuador in terms of trade issues, while there was a region-to-region negotiation in political cooperation, where the Andean countries had developed a common position. On 2009, the negotiations were restored but Bolivia is not taking part on them. (European Commission website, Directorate General Trade, Bilateral Trade Relations, Andean Community)

In the EEA, the EU and EFTA countries have followed the “internal market-minus”: there is a single internal market with Iceland, Liechtenstein and Norway, but Switzerland does not participate in this agreement because it has a bilateral agreement with the EU. (European Commission website, Directorate General External Relations, European Economic Area) Moreover, the EEA agreement does not cover certain issue areas like: Common Agriculture and Fisheries Policies (although the Agreement contains provisions on various aspects of trade in agricultural and fish products); customs union; common trade policy; Common Foreign and Security Policy; Justice and Home Affairs (even though the EFTA countries are part of the Schengen area); and European Monetary Union. (EFTA Secretariat website, EEA Agreement)

In the EU-Western Balkans relation, differentiation is mainly done in terms of candidate countries (Croatia, Turkey and Former Yugoslav Republic of Macedonia) and potential candidate countries (Albania, Bosnia and Herzegovina, Montenegro, Serbia as well as Kosovo). (European Commission website, Directorate General Enlargement)

In the ENP, there are three baskets of issues that include Political and Security Partnership; Economic and Financial Partnership; and Cultural and Human Partnership. These issues are negotiated in a bilateral basis with the ENP countries according to their different situations and performances. (European Commission website, Directorate General External Relations, European Neighbourhood Policy)

Finally, in the EU-ACP relation, the EU is negotiating EPAs with six regional groupings to replace the Cotonou trade chapters in 2008. There is a differentiated treatment on ACPs countries according to their level of development and performance (longer transition periods, exceptions for sensitive products). (European Commission website, Directorate General Trade, Bilateral Trade Relations, ACP)

Taking into account that in some cases could be more than one type of flexibility, for the purpose of this analysis, it is necessary to establish the type of flexibility that prevails in each case.

In EU-CAN and EU-EFTA, it is possible to identify an *à la carte* type of flexibility because there is an express choice of a member of a region to not to participate (an opt-out) in certain policy areas. In the first case, there was a differentiation between “bilateral” negotiations between Colombia, Peru and Ecuador (without the participation of Bolivia) on trade issues while there was a region-to-region approach towards the political and cooperation pillars. In the second case, Switzerland has an opt-out in the EEA Agreement. Moreover, although there are some references to agriculture and fisheries in the EEA Agreement, these policy areas, as well as those related to the EU customs union, were left aside.

In the ENP and EU-ACP negotiations it is possible to identify a variable geometry type of flexibility because some member states are incapable of adopting certain policies for long periods of time (and maybe forever), thus it is necessary to reorganize the negotiations on a sub-regional (and also bilateral) basis (mainly, differentiation among members). In the first case, bilateral negotiations are conducted with each individual country in the frame of a multilateral EMP; while in the second case, the principles of regionalization and differentiation among six sub-regions are conducting the relation.

Finally, in UE-Western Balkans relation it is possible to identify a multi-speed type of flexibility because, initially, some member states of a region are not immediately capable of implementing a policy though, consequently, it is necessary to differentiate among them, mainly, in terms of time. In this case there is a differentiation among candidate countries and potential candidates where the members of the CEFTA region share the final the goal of becoming EU member states, but in different length of time.

Having identified “where” and “what type” of flexibility is applied in the EU external with other regions, it necessary to analyze in each case what is (are) the main motive(s) that that make EU to allow for flexibility. Normally, there is not one single motive but a variety of them that determine the presence of differentiation. However, for the purpose of analysis, it will be outlined the most prevailing motive in each case.



## 2- Flexibility in the EU external relations

### 2.1-EU-MERCOSUR

The EU and MERCOSUR<sup>9</sup> started a region-to-region dialogue since 1995 with the aim of concluding a “Cooperation Agreement” that in 2000 was replaced by an “Association Agreement”. (Filadoro 2008A) While the second covered the pillars of political dialogue, cooperation and trade, the first only included political dialogue (that was less developed than the one covered by the “Association Agreement”) and cooperation. The political dialogue and cooperation pillars tried to get closer the positions of both regions in different subjects as well as to instrument the financial and technical assistance. And the trade pillar, envisaged the creation of an intra-regional free trade area between both regions that goes beyond the WTO obligations for both sides, no sector is excluded from liberalization, and covers not just goods, but services, investment and government procurement markets for goods and services.

Since the beginning, no differentiation among MERCOSUR member states was applied to the negotiations. Moreover, they negotiated in bloc on the basis of their Common External Tariff that entered into force on January 1995, according to the Asunción Treaty (signed in 1991) that created MERCOSUR. Until 2008 there were conducted sixteen negotiating rounds between EU and MERCOSUR (European Commission website, Directorate General Trade, Bilateral Trade Relations, MERCOSUR). Both parties have reached consensus on the first and second pillar. Until today they did not reach an agreement in the third pillar and the negotiations were suspended. Even though this blockage, on the MERCOSUR side there was never a demand to ask the EU for flexibility in the negotiations.<sup>10</sup>

The concept of flexibility was not either contemplated by the legal basis for this negotiation on the EU side (as it was, in other cases) (Filadoro, 2008A). The negotiating directive established by the mandate of the Council in 1999 did not set any deadline to conclude negotiations with MERCOSUR: the strategy defined was to negotiate a “WTO plus” agreement with this region. However, the fact that each MERCOSUR member state have a list of

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<sup>9</sup> MERCOSUR is integrated by the Argentina, Brazil, Paraguay and Uruguay. Venezuela has requested to join it but it as to wait for the approval of its Protocol of Accession by the Paraguayan Parliament.

<sup>10</sup> Interview with an official, European Commission, Directorate General External Relations, EU-MERCOSUR Relations, Brussels, 28 November 2008.

exceptions to the Common External Tariff on sensible sectors, could allow a very small and reduced differentiation in terms of time on these sectors.

Even though flexibility was not applied in this case to continue with the negotiations, MERCOSUR remains a region of economic importance for the EU (Filadoro, 2008A). Although it represents the 3 per cent of its trade, MERCOSUR is an important partner to the EU, mainly, because its member states are producers of some EU sensible products (agricultural goods). MERCOSUR is also important because of the political and economic weight of its member states, as well as it is seen as an ambitious project from the EU side. Furthermore, the trade between the EU and MERCOSUR represents a big part of the total EU with Latin America. The EU “is Mercosur's second largest trading partner after the US, representing 19,6% of total Mercosur trade” (European Commission website, Directorate General Trade, Bilateral Trade Relations, MERCOSUR) and also the largest investor in that region. On the other side, MERCOSUR “ranks 8th among EU trading partners, accounting for 3% of total EU trade in 2007. The EU is Mercosur's first market for its agricultural exports, accounting for 21,27% of total EU agricultural imports in 2007. EU goods exports to Mercosur focus largely on industrial products including machinery, transport equipment and chemicals.” (European Commission website, Directorate General Trade, Bilateral Trade Relations, MERCOSUR)

Finally, the level of integration of the MERCOSUR region (as a customs union) has pushed for a region-to-region negotiation by diminishing the possibility to allow for flexibility. Although there are some demands from the MERCOSUR smaller member states (Peña, 2009) (that cannot enjoy the benefits of a MERCOSUR single market because it is still in construction) there was no differentiation for the moment on the basis of its Common External Tariff.

## 2.2-EU-CAN

The EU and the CAN<sup>11</sup> began the negotiations to conclude an Inter-regional Association Agreement on June 2007 that includes three pillars: political dialogue, cooperation and trade. The Declaration of Rome in 1996 (on political dialogue) and the Political Dialogue and Cooperation Agreement signed in 2003 are at the background to this negotiation (European

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<sup>11</sup> The Andean Community is integrated by Bolivia, Colombia, Ecuador and Peru. Venezuela left this integration process on 2006.

Commission website, Directorate General External Relations, Latin America, Andean Community) Thus, differentiation in the EU external relations with CAN started on 2007 when the Andean countries asked for a differentiated treatment between them with the argument that they have different development policies among them. The EU has accepted to apply differentiation (but as less as possible, in order not to go against of the spirit of the region-to-region negotiations).<sup>12</sup>

Until today, after three negotiation rounds, the negotiations were suspended and re-launched at the beginning of 2009 on a bilateral basis (European Commission website, Directorate General External Relations, Latin America, Andean Community). Both parties have reached a consensus on the political dialogue and cooperation pillars, but not in the trade pillar, which remains unsolved. Regarding the pillars of political dialogue and cooperation the CAN was able to present a common position making the UE-CAN negotiations more dynamic and “easy” to get agreements, except in some issues like terrorism and migration where both regions need some extra time to get closer (Filadoro, 2008B). However, the member states’ preferences were much more heterogeneous in what concerns to the trade pillar.

In fact, the differences among Andean members on trade were so important (mainly, Bolivia and, Colombia and Peru), that differed substantially in their respective visions on the economy and policy)<sup>13</sup>. The EU decided to “give to Bolivia a differentiated treatment in some trade issues and, at the same time, has accepted to negotiate with the CAN with some degree of flexibility in order to maintain the process as a region-to-region negotiation (because otherwise, the negotiation with each member state by separate would have implied the dissolution of the CAN as a negotiating partner) (Filadoro, 2008B). In spite of the efforts to continue negotiating, the heterogeneity in the Andean member states’ positions on the trade pillar generated a blockage in negotiation.

Negotiations on the trade pillar were restored at the beginning of 2009 on a bilateral basis with three of the four Andean members: Colombia, Ecuador and Peru (Bolivia is not taking part in the negotiations). It was said that the negotiation would not be conducted bilaterally, but

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<sup>12</sup> Interview with an official, European Commission, Directorate General Trade, Trade Relations with the Americas, Brussels, 23 April 2009.

<sup>13</sup> Interview with an official, European Commission, Directorate General External Relations, Andean Community, Brussels, 30 April 2009.

regionally. Thus, it was introduced a *sui generis* “Multiparties Agreement”<sup>14</sup> that looks to establish commitments for liberalization between the EU and each one of the three Andean member countries participating in the negotiation.<sup>15</sup>

In reference to the legal basis for differentiation, in this case it is possible to find some sources both in the EU and CAN sides. In the EU, the “negotiating directive” of the Council on April 2007 states the possibility to take into account the asymmetries between the EU and the CAN, and also differentiate within the Andean member countries. This document is not public.<sup>16</sup> Concerning the restoring of negotiations on 2009, a decision taken on January 19<sup>th</sup> 2009 authorises the Commission to negotiate the “Multiparties Agreement”, and also to re-negotiate an update of the previous Political and Cooperation Agreement (only if the Andean member states agree so).<sup>17</sup> In the CAN, there is also a legal basis that allows for flexibility in negotiations: the Decision 598 of the Andean Council of Ministers of Foreign Affairs and the Andean Community Commission that allows Andean countries to conduct exceptionally individual negotiations for trade agreements with third countries preserving the Andean legal system<sup>18</sup>; and the Decision 667 that recognizes the existence of different levels of development and economic approaches among member states (and also between the CAN and the EU) and ensures Bolivia and Ecuador a special differentiated treatment in the EU-CAN negotiations.

In the EU-CAN negotiations, the EU seems to be more centred on the development objectives of this agreement, meaning, the cooperation and political dialogue pillars. The UE through a region-to-region approach within the framework of multilateralism envisages guaranteeing a legal framework to assure predictability and security for its investments (Adiwasito, De Lombaerde and Pietrangeli, 2006). Colombia and Peru are the countries that have attracted the majority of the EU investment in this region, though it was a preoccupation of not

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<sup>14</sup> According to an official of the European Commission from the Directorate General Trade, Relations with Andean Community, this “Multiparties Agreement” is not much different from what the United States has negotiated with Central America *plus* Dominican Republic: a single agreement that allows different schedules. (Interview 23 April 2009)

<sup>15</sup> Interview with an official, European Commission, Directorate General Trade, Trade Relations with the Americas, *op. cit.*

<sup>16</sup> Interview with an official, European Commission, Directorate General Trade, Trade Relations with the Americas, *op. cit.*

<sup>17</sup> *Ibid.*

<sup>18</sup> This provision, that regulates the general framework of Andean external negotiations, was created in the framework of the FTA negotiations with the United States.

punishing them without an agreement<sup>19</sup>. However, the trade pillar is not, probably the EU's main priority in the region, since CAN is positioned very low in the EU "Pyramid of preferences" representing only 1 per cent of the EU total trade (European Commission website, Directorate General External Relations, Latin America, Andean Community). Indeed, on the EU side, it seems to be a stronger commitment to issues like the promotion of human rights, democracy, stability and prosperity, and regional integration than those related to trade and investment. Furthermore, as regards to cooperation, the EU has supported the CAN through donor funding in order to foster the Andean regional integration<sup>20</sup>: the EU Regional Strategy Paper 2007-2013 demonstrates that, by providing to the Andean region with €713 million, the EU is the leading donor of official development aid in that region (European Commission website, Directorate General External Relations, Latin America, Andean Community). Last but not least, the EU has benefited the CAN with the SGP Plus mechanism guaranteeing a preferential treatment for Andean goods until entry into force the Association Agreement.

In sum, it is possible to identify in the EU-CAN relations an à la carte type of flexibility because there was a differentiation between policy issues: while the trade issues are being conducted on a "bilateral" basis through the "Multiparties Agreement" with Colombia, Peru and Ecuador, there was a region-to-region approach towards the political and cooperation pillars.

### 2.3-EU-EFTA

The EU and the EFTA members signed an agreement establishing a common EEA between both parties in 1992 and entered into force in 1994. Almost all EFTA members participated in the agreement excepting Switzerland, where a negative referendum on the EEA left the country aside of that agreement (Maurer and Haerder, 2007) (although remains a member of EFTA and cooperates with the EU via bilateral agreements on a very specific basis: since its "no" to the EEA, Switzerland has concluded 16 bilateral agreements with the EU)<sup>21</sup>.

The EEA is a comprehensive agreement because it covers most of the substance of the relations between the EU and the EEA EFTA members, allowing their participation (albeit with

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<sup>19</sup> Interview with an official, European Commission, Directorate General External Relations, Andean Community, op. cit.

<sup>20</sup> Interview with an official, Andean Community General Secretariat, op. cit.

<sup>21</sup> Interview with an official, European Commission, Directorate General External Relations, EEA, EFTA, San Marino, Andorra, Monaco, Brussels, 30 April 2009.

no right to vote) in Community programmes and agencies related to the EU internal market, and requiring them to make financial contributions towards the reduction of economic and social disparities in the EEA. (European Commission website, Directorate General External Relations, European Economic Area)

Even though its comprehensive character, the EU-EFTA relations on the base of the EEA present some level of flexibility. Some sectors were left aside the agreement: the main exceptions consist of EFTA individual states' participation in the Common Agricultural Policy or in arrangements for fish products (although the Agreement contains provisions on various aspects of trade in agricultural and fish products) (Maurer and Haerder, 2007). Particularly, the EU is negotiating bilaterally with some EEA EFTA members on agriculture and fisheries. The EEA Agreement does not cover either: the Customs Union; Common Trade Policy; Common Foreign and Security Policy; Justice and Home Affairs (even though the EFTA countries are part of the Schengen area) and; Monetary Union" (EFTA Secretariat website). At the moment, negotiations on a bilateral basis are being conducted on agriculture and fisheries, but they are very limited.

Another example of flexibility, as it was mentioned above, is the opt-out of one EFTA members from the EEA (Switzerland). The agreement between Switzerland and the EU contains a package of bilateral treaties, including harmonization on the taxation of savings and on the fight against fraud, and the Schengen *acquis* (Kolliker, 2006). Furthermore, more forms of differentiation were introduced such as Lichtenstein's special position regarding the free movement of persons while joining the EEA, and Norway's and Sweden's exception for *snus* tobacco or a number of transitions periods.<sup>22</sup>

The flexibility concerning the differentiation in policy areas like agriculture and fisheries was introduced in the EEA Agreement through: Article 19, where the parties agree that will work towards liberalization in those areas; Article 115 stating that legislation in the market fisheries shall be adjusted so as not to distort competition; Protocol 3 on processed agricultural products; and Protocol 9 on trade in fish and other marine products.<sup>23</sup>

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<sup>22</sup> Interview with an official, European Commission, Directorate General External Relations, EEA, EFTA, San Marino, Andorra, Monaco, op. cit.

<sup>23</sup> Ibid.

One of the main motives behind the flexibility allowed by the EU in its relation with EFTA members (including also the case of Switzerland) seems to be the economic interests. Norway and the rest of the EFTA countries are very integrated and have a lot of expertise and resources.<sup>24</sup> On the other side, the “flux of history” also contributed to the application for differentiation: while the former EFTA member left it to join the EU, and Switzerland stayed aside, then there was no other option than negotiate with the EFTA.<sup>25</sup>

Finally, regarding the level of regional integration between EFTA members, they constituted a free trade area among them (Switzerland and Liechtenstein have a customs union), so they did not speak with one voice (Gstohl, 1994) However, the fact that the countries joined the EU internal market through the EEA has increased its level of integration with the EU. Thus, the dynamism and comprehensiveness of the EEA Agreement did not require a huge level of differentiation among policy areas other than those related to customs union and agriculture and fisheries.

In sum, it is possible to identify an à la carte type of flexibility in the EU-EFTA relations because some policy areas were left aside of the EEA Agreement like agriculture and fisheries. Another element of differentiation in this case is the express choice of Switzerland (also EFTA member) to not to participate in the EEA (an opt-out). Compared to other cases, the differentiation introduced in the EU-EFTA countries is not that critical because of the dynamism and comprehensiveness of the EEA Agreement did not require a huge level of differentiation among policy areas other than those related to customs union and agriculture and fisheries.

#### *2.4-ENP*

In this case, there are three baskets of issues that include: Political and Security Partnership; Economic and Financial Partnership; and Cultural and Human Partnership. These issues are negotiated in a bilateral basis with the ENP countries according to their different situations and performances. The ENP is a policy developed to increase the prosperity and stability of countries that share borders with the EU (land or sea borders). Thus, the EU is involved with sixteen ENP partners in this region: Algeria, Armenia, Azerbaijan, Belarus, Egypt,

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine (the relation with Russia is developed through a different approach, a Strategic Partnership). (European Commission website, Directorate General External Relations, European Neighbourhood Policy) This is an initiative developed in the framework of the “Barcelona Process” initiated in 1995 that originated the EMP to give to this region a comprehensive approach through a bi and multilateral basis.

Two central elements in the ENP are the principles of positive conditionality and differentiation among ENP partners. Both elements introduce flexibility in the relations with the EU. The principle of positive conditionality is based on the idea that progress is rewarded. Thus, the incentives offered in return of relevant reform progress are greater integration into European programmes and networks, increased assistance and enhanced market access. Those countries that advance further in economic and legal reforms will get funds and better market access to the EU (Sasse, 2008). Another element of flexibility in the very basic logic of the ENP is differentiation among partners (European Commission website, Directorate General External Relations, European Neighbourhood Policy). Although there is a multilateral framework given by the EMP, the ENP is conducted bilaterally on the basis of “ENP Action Plans” agreed between the EU and each partner. These Action Plans establish the agenda for political and economic reforms with short and medium-term priorities (3 to 5 years) in each particular country based on their needs and capacities (as well as their and the EU interests) and the implementation is promoted and monitored through joint sub-Committees.

Currently, there are twelve ENP Action Plans under implementation: since 2005, with Israel, Jordan, Moldova, Morocco, Occupied Palestinian Territory, Tunisia and Ukraine; since end 2006/beginning 2007 with Armenia, Azerbaijan, Georgia, Lebanon and Egypt. For the cases of Belarus, Libya and Syria the ENP is not yet functioning since it is built upon the previous agreements signed in the framework of the EMP, and for these countries, those agreements did not enter into force yet.

Concerning the legal basis for flexibility, it is possible to identify the following elements: the bilateral agreements with the countries; the ENP Action Plans and their respective Country Reports; the European Security Strategy of December 2003 that sets the stability of the neighbourhood as a strategic objective; the Commission Communication on Wider European



from March 2003, followed by a more developed Strategy Paper on the European Neighbourhood Policy published in May 2004; the December 2007 Communication the Commission that sets out the objectives and identifies areas where additional efforts are required on the part of the EU to bring the ENP further in 2008 and beyond.

The main motive on the EU for the application of flexibility in this case is political: the stabilization of the neighbourhood. In this sense, the ENP is an initiative that looks to reinforce the existing forms of regional and sub-regional cooperation and provide them a framework for further development. Differentiation was applied to reward those countries that made a better progress. If it had done on a region-to-region basis, then the standard would be the one of the slowest country (thus, the progress would be less than that on a bilateral basis).<sup>26</sup> On the ENP partners' side, the implications of involving in this initiative are an expectation on trade and financial benefits of membership, and eventually, the power to join in the future the decision-making.

Finally, the scarce level integration of the region (and the clear differences among ENP partners) also seems to have contributed to the application of flexibility on the EU side. Excepting Tunisia, which is the first country of the Mediterranean region that established a FTA with the EU in 2008 (European Commission, Directorate General Trade, Bilateral Trade Relations, Tunisia), the region does not present a high degree of integration. The ENP is essentially bilateral; although, conditionality is applied to reinforce integration.<sup>27</sup>

In sum, it is possible to identify a variable geometry type of flexibility in the case of the ENP because the differentiation between ENP partners is an essential element of this policy. Thus, the principles of positive conditionality and differentiation among ENP partners introduce flexibility in the relations with the EU. As some member states are incapable of adopting certain policies for long periods of time (and maybe forever), it is necessary to reorganize the negotiations on a sub-regional (and also bilateral) basis.

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<sup>26</sup> Interview with an official, European Commission, Directorate General External Relations, European Neighbourhood Policy General Coordination, *op. cit.*

<sup>27</sup> Interview with an official, European Commission, Directorate General External Relations, European Neighbourhood Policy General Coordination, *op. cit.*

## 2.5-EU-Western Balkans

The EU-Western Balkans relation is developed in the framework of the enlargement policy towards Albania, Bosnia and Herzegovina, Croatia, Kosovo (under UN Security Council Resolution 1244/99), Montenegro, Serbia, Turkey and the former Yugoslav Republic of Macedonia. As future enlargements will concern the countries of South-Eastern Europe, the EU is dividing this region into two groups of countries according their stages on their road towards the EU perspective: “candidates” and “potential candidates” (European Commission website, Directorate General Enlargement). Croatia and Turkey are included in the category of candidate countries, starting the accession negotiations on 3 October 2005. In the case of the Former Yugoslav Republic of Macedonia, the Council granted the status of a candidate country in December 2005, but the accession negotiations have not started yet. Conversely, Albania, Bosnia and Herzegovina, Montenegro, Serbia and Kosovo are included in the category of potential candidate countries.

The policy towards the Western Balkans is conducted in the framework of the so-called process of Stabilisation and Association that has the objective of progressively bringing the countries closer to the EU, by offering them free access to the single market (for almost all their exports) and by giving them financial support for the reforms needed. This is implemented through Stabilization and Association Agreements (SAA) signed with each Western Balkan country. These agreements (Stabilisation and Association Process and the Stability Pact for South Eastern Europe) were developed after the Kosovo crisis indicating the EU commitment to find political lasting solutions for the region (Kavalski, 2003).

In order to join the EU these countries are required to fulfil some criteria for accession; thus, the enlargement creates a gradual process of fulfilment between the countries concerned. This implies that the fulfilment of the criteria depends on the specific features of each country (while the candidate countries are more advanced, the potential candidates are less advanced). The European Council in Copenhagen of December 1993 established the criteria that the applicant country must meet before starting the negotiations: stable institutions, democracy, rule of law, human rights and minorities, and market economy. In particular, the countries need to have the ability to cope with the pressure of competition and the market forces at work inside the EU, and assume the obligations of membership. In addition, it is also evaluated the capacity of

the country to implement and enforce EU legislation effectively (European Commission website, Directorate General Enlargement).

Thus, each country is in a different stage of relations with the EU at the same time that all the countries are drawn together in the regional approach with explicit political and economic conditionality to implement reforms (Cremona 2000). Furthermore, differentiation helps to be more precise while helping the countries: it takes into account the key priorities and problems of each individual country instead of treating them as a whole.<sup>28</sup> It is also possible to identify flexibility on the EU side in its position towards the previous sub-regional initiative established at the beginning of the 1990s, the CEFTA: the EU instead of negotiating with the region as a whole, decided to negotiate bilaterally with each member state (Bjelic, 2005).

The general legal basis for EU-Western Balkans relation are established in the EU in the Article 310 and Article 300(2) of the TEC, and in the “Copenhagen criteria” for candidate countries set out in December 1993 by the European Council in Copenhagen. Regarding the relations between the EU and each individual country, the SAA provide a specific legal basis for each case. Furthermore, since the Commission has informed the Council several times that it was needed differentiation, an extra legal basis would be the Commission’s Communications to the Council and Parliament.<sup>29</sup>

The main motive behind the EU policy in the Western Balkans is future enlargement. It is on this base that the EU influences the region through its emphasis on conditionality. In this scheme each country has each own speed and moves through different stages of progress, depending on their ability to implement the EU obligations as well as their capacity to comply with the conditionality policy (Kavalski, 2003). Hence, differentiation was an option to deal with countries whose realities are very different. On the other side, the Western Balkans countries have a perspective on the EU membership on the medium to long term.

Finally, regarding the level of integration of the region, it is necessary to mention that all the regional initiatives in South-East Europe have been instigated by and external actor, the EU. This fact suggests that in the region, there was not a genuine interest to establish a regional trade

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<sup>28</sup> Interview with an official, European Commission, Directorate General Trade, Europe (non-EU) and Central Asia, op. cit.

<sup>29</sup> Interview with an official, European Commission, Directorate General Trade, Europe (non-EU) and Central Asia, op. cit.

bloc among the countries. The approach ended up by generating less interest in the countries in integrating among themselves and much more interest in becoming EU members. (Bjelic, 2005)

In sum, it is possible to identify a multi-speed type of flexibility because, initially, some member states of a region are not immediately capable of implementing the reforms according the enlargement criteria; consequently, it is necessary to differentiate among them according time. Thus, there is a differentiation among candidate countries and potential candidates where the members of the CEFTA region share the final goal of becoming EU member states, but in different lengths of time.

## 2.6-EU-ACP

In the EU-ACP relation, the EU is negotiating Economic Partnership Agreements (EPAs) with six regional groupings to replace Cotonou trade chapters in 2008. Though, regional agreements are being negotiated with the aim of enhancing the economic partnership, but taking into account each partner's level of development, constraints and capacities. Moreover, there is a different treatment on ACPs countries according to their level of development and performance (longer transition periods, exceptions for sensitive products). (ACP Secretariat webpage) The regional groupings are the following: Central Africa CEMAC (Communauté Economique et Monétaire de l'Afrique Centrale) plus Sao Tome; West Africa ECOWAS (Economic Community of West African States) plus Mauritania; East and Southern Africa COMESA (Common Market for Eastern and Southern Africa) minus Egypt and South Africa; Caribbean CARIFORUM (Caribbean Forum of ACP States); Southern Africa SADC (Southern African Development Community); and Pacific ACP states. It is worth to mention, that this "regional approach" was not an initiative from the EU; the ACP countries themselves have chosen their regional structures to negotiate with the EU (Cremona 2000).

The EU and the ACP countries signed in 2000 the Cotonou Agreement, establishing a framework trade, aid and political cooperation treaty between both parties, with the objective to facilitate the economic and political integration of the ACP countries into a liberalised world market over the next 20 years. The EU and ACP countries, agreed under this treaty, to negotiate a separate set of individual bilateral treaties, the EPAs. The Cotonou Agreement constituted also the framework that defined the EPAs fundamental principles as: instruments of development;

promoters of regional integration; elements to maintain the *acquis*; and its compatibility with the WTO rules. Last but not least, the EU should give a special and differential treatment to ACP countries, especially the most vulnerable, the small landlocked and the island countries.

There were different stages of negotiations with the countries depending on the ACP region: most of the six regions were unable to sign them, excepting the Caribbean region that concluded a full or “comprehensive” EPA that covers trade in goods and services and other trade-related areas such as competition policy and intellectual property rights (Onguglo and Ito, 2003). The motive behind this lack of progress was that many regions remained insufficiently prepared due to lack of capacity and political attention. Moreover, the EU was also heavily criticised at that point and was “itself accused of adopting a too aggressive stance, trying to divide ACP regions and presenting EPAs as a *fait accompli*.” (Lui and Bilal, 2009: 1)

However, the EU continued pushing for the initiative and approximately more than thirty five ACP countries initialled “interim EPAs” in order to avoid tariff increases on their exports. The countries that presented more resistance against the EPAs were offered market access preferences through the EU initiative, Everything But Arms. On the ACP countries’ side, the motive for signing these agreements was more the preservation of the market access established for export industries that relied on preferences, than related to trade development or regional integration (Lui and Bilal, 2009). Last but not least, the non-LDCs that did not sign an EPA or an interim EPA receive some preferential treatment under the GSP.

Among the legal basis for differentiation it is possible to mention: the Cotonou Agreement (Article 35 paragraph 3 and Article 37 paragraph 7 about flexibility); the Negotiating Directives on EPAs (allowing differentiation between regions; and within regions, taking into account a specific situation of the countries); and the October 2007 Commission Communication to WTO on EPAs, are the main legal instruments that support the idea of flexibility in the EU-ACP relations.<sup>30</sup>

A second group of provisions supporting flexibility in this case is at the multilateral level: the idea of differentiation based on special provisions for developing countries found in the WTO. These provisions are the following: Part IV of GATT including specific provisions on

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<sup>30</sup> Interview with an official, European Commission, Directorate General Trade, Economic partnership agreements, op. cit.

trade and development like Article 36 (8) allowing for less than full reciprocity in trade negotiations between developed and less-developed contracting parties; the Multilateral Agreements on Trade in Goods in Annex 1A include Article 4 of the Agreement on Trade-Related Investment Measures (TRIMS), and Article 12 of the Agreement on Technical Barriers to Trade, on special and differentiated treatment of developing country members which includes time-limited exceptions; and the Article 4 of the General Agreement on Trade in Services (GATS) containing a specific provision with the aim of increase the developing country participation in trade in services (Cremona, 2000). It is important to mention that these legal provisions are not clear enough to cover the flexibility needed in the EU-ACP relation because they do not contain explicit or adequate special and differential treatment for developing countries (especially concerning Article 24 of the GATT) (Onguglo and Ito, 2003).

The main motive for the EU to allow for flexibility in the EU-ACP relation seems to be a development objective, mainly, helping small countries to engage in FTA (some of them for the first time).<sup>31</sup> The ideas of regionalization and differentiation were the main elements to help the ACP countries to develop. On the EU side, the EPAs were necessary to make the trade regime with this region fully compatible with the WTO, especially because of the expiration of the waiver on the existing preferential trading arrangements (Lui and Bilal, 2009). Furthermore, this development goal was ideally conceived on a regional basis: the agreements were defined as tools for development that would foster the economic growth and integration of ACP countries, particularly at regional level, but considering the specific circumstances of the ACP countries.

Finally, the scarce level of integration of the region was also a motive for the EU to differentiate among ACP countries but at the same time to take into account its situations in order to promote a policy to help them to develop. Furthermore, for most of the ACP countries, the main motive behind the negotiations was to preserve the duty-free market access that they had benefited from previously under the expiring Cotonou preferences (Lui and Bilal, 2009).

In sum, it is possible to identify a variable geometry type of flexibility in the EU-ACP relation because there is, mainly, a differentiation among member states that are incapable of adopting certain policies for long periods of time due to different internal capacities of

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<sup>31</sup> Interview with an official, European Commission, Directorate General Trade, Economic partnership agreements, op. cit.

implementation. The principles of regionalization and differentiation among six sub-regions are conducting the relation, thus there is reorganization on a sub-regional and bilateral basis.

### **3-Comparative conclusion**

Flexibility is a tool used by the EU to deal with regions composed by heterogeneous countries with very different sensibilities and / or interests. The main motives that help to explain the presence (or not) of flexibility in the EU external relations with other regions are: economic interests, development objectives, political goals and level of integration of the region.

In the case of EU-MERCOSUR, due to the fact that MERCOSUR is a customs union, until now, flexibility was never used in the negotiations. In the EU-CAN negotiations, the main reason behind the acceptance of flexibility was the development objective of not punishing countries like Colombia and Peru that want to open their economies without an agreement with the EU. In the case of the EU-EFTA, comparing to other cases, the differentiation introduced is not that critical because of the EEA ensures a certain degree of homogeneity between EU and EFTA members (the higher the EU economic interests, the less flexibility allowed). In the case of ENP, the EU applied flexibility in order to promote the stabilization of the neighbourhood through the re-enforcement of the existing forms of regional and sub-regional cooperation that provides them a framework for further development. In Western Balkans, there was a similar objective but with the possibility of EU membership; thus the idea of the EU is to progressively bring the countries closer by offering them free access to the single market and by giving them financial support for the reforms needed, depending on their capacity to comply with the conditionality policy. Finally, in the EU-ACP the main motive for the EU to allow for flexibility was the development objective of helping them to engage through FTAs into the world economy.

The cases analyzed show that when there was a development objective of helping the partner region, or a political goal to promote the stability of the neighbour region and to prepare some countries for EU membership, the EU has chosen a regional approach but focusing in the concrete and specific situations of each country within the region concerned. Thus, there was a

regional approach embedded in differentiation among members (in the case of ENP), according to time (in the case of enlargement, in Western Balkans) and policy issues (in the case of development goals, in the case of CAN or ACP).

Concerning the three types of flexibility identified at the beginning of the research, the analysis of the cases shows that the variable geometry and *à la carte* types prevail over the multi-speed type. While the first two are present in four of the cases studied (ENP, ACP, CAN, EFTA), the third was present only in one case (Western Balkans). All in all, a multi-speed type of flexibility in the EU external relations with other regions seems to be more associated to its external trade relations than to its interests on enlargement, stabilization or development.

In addition to these motives for allowing for flexibility, the level of integration of the partner region has also helped to foster flexibility. In the case of MERCOSUR, which is a customs union that negotiates externally with a Common External Tariff, there was not even (until now) an attempt to apply flexibility in the negotiations. Conversely, in the rest of the regions flexibility was a tool to deal with the different levels of development between member states and their different capacities of implementation at the internal level.

TABLE 2: Differentiation in the EU external relations with other regions

<b>Multi-speed</b>	<b>Variable geometry</b>	<b>À la carte</b>	<b>No differentiation</b>
<b>EU-Western Balkans SAP</b> (but no direct negotiations with CEFTA): candidates - potential candidates; SAAs	<b>ENP</b> (bilateral negotiations but multilateral EMP, new Union for Mediterranean and Eastern Partnership): principles of differentiation and conditionality  <b>EU-ACP EPAs</b> (principles of regionalization and differentiation)	Opt-out of Switzerland in <b>EU-EFTA</b> EEA Agreement  <b>EU-CAN</b> (“Multiparties Agreement”, instead of region-to-region association agreement)	<b>EU-MERCOSUR</b> (No country-specific transition periods/derogations for the moment)

Source: Own elaboration on the basis of A. Stubb (2002) and Dehousse, Coussens and Grevi (2004).

Almost all the cases reviewed present an element of flexibility. In some of them, differentiation was a deliberate option on the EU side. This is the case for ENP, Western Balkans



and ACP. But in some other cases, this element arose because of the “flux of history”, being “unconsciously” chosen by the EU like in the cases of CAN and EFTA.

Flexibility was not only introduced *de facto* in the EU external relations, but it was also supported by a legal basis on both the EU and its counterpart region’s side. In almost all the cases the idea of flexibility was introduced into Treaties, secondary legislation or even Commission Communications. This was not only done in the EU side but also in the partner regions like CAN, where there was established an internal legislation allowing their member states for flexibility in the negotiations with the EU. Furthermore, in all the cases that flexibility was allowed, there was a broader legal framework to do it: the WTO multilateral rules. In particular, below this broad umbrella, the cases presented two sub-levels, namely, one multilateral (or regional) and one bilateral concerning the specificities of each country.

Regarding the implications for the countries in the regions involved in negotiations with the EU, flexibility seems to be an element to allow them to implement reforms (because of enlargement, stabilization or development) in different speeds according to their real capacities of implementation. Regarding the implications for the partner regions, it seems necessary to examine how has the EU approached its relations to them (in terms of strong/weak EU economic interests, high/low EU development objectives, high/low importance of EU political goals, and high/low level of integration of the region) in order to see how much flexibility would be allowed.

All in all, there must be a balance in the allowance of flexibility on the EU side: a high level of flexibility could erode an ambitious regio-to-region relation by degenerating in a bilateral relation between the EU and the members of the partner region (as it was the risk in the EU-CAN negotiations). Conversely, the lack of flexibility could also provoke a blockage in the negotiations as it is the case for the EU-MERCOSUR relations, where the introduction of a minimum level of flexibility could help to overcome the current situation.

Last but not least, some issues related to flexibility in the EU external relations with other regions that need further research are related to the case-by-case analysis of all the treaty provisions (including also the Lisbon Treaty) and secondary law of the EU and the partner region in order to assess the whole legal basis for flexibility. It is necessary to understand the strengths

and weaknesses of this legal basis in order to get a better understanding of the implications of the application of flexibility for the EU partner regions.

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