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European Union as a human rights advocate: human rights clauses in agreements with third countries and a comparative application analysis

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HUMAN RIGHTS THESIS
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Abstract

Human rights clauses constitute a crucial and integral element of the EU's external policy goal to promote human rights in third countries. Although this concept was conceived well before the zenith of including such clauses in the EU's concluded agreements or reaching their full legal potential through an evolutive process, it is doubtlessly the hallmark of the EU to extend this systematic approach to a considerable geographic coverage which currently encompasses more than 120 partner states.

In this thesis I touch upon the concept that these clauses represent a different mindset towards the promotion of human rights by the mean of motivating for adherence by incentives instead of an imposed alteration of value by compelling a country to sign a human rights convention. I analyze in depth the possible legal justifications which enable the suspension of an agreement as a last resort, the framework which grants the EU a mandate to conclude agreements embedding such clauses and the procedural remit to resort to them. In addition to this, I clarify the EU's relation to third countries and establish a linkage between the different categories of clauses, devoting due respect to the differences stemming from historical, political, diplomatic or evolutive circumstances.

I argue that the low level of asymmetrical interdependence and high level of development can influence the negotiation procedure and lead to a compromise in the wording of the clause, whereas there is a divergent set of other factors which influences the content and complexity of the particular clause. I explore the possible sanctions in case of non-compliance and demonstrate why it was used so far almost exclusively vis-à-vis countries from the African, Caribbean, and Pacific Group of States. I demonstrate the procedure and the consultation mechanism by describing a few cases in detail in which I reach the conclusion that having a developing country on the other side does not guarantee an effective usage of the clause. Finally I do not omit to mention flagrant human rights violations in countries outside the abovementioned region where I identify explanations for the non-initiation of serious sanctions or agreement suspension.

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"It is important to reclaim for humanity the ground that has been taken from it by various arbitrarily narrow formulations of the demands of rationality."
– Amartya Sen[1]

1. Introduction

The EU is undoubtedly one of the most vocal proponents of democracy and human rights around the world. Even though this particular area had some connection to the *sui generis* integration's main subject matters before its inception (*Comité d'études pour la constitution européenne* – CECE in 1952 and draft treaty on European Political Community – EPC in 1952-53 called for a role of the European integration in human rights protection[2]), the Rome Treaty in 1957 finally left the external aspect of human rights intact and it only emerged and became more important in recent decades. The EU – along with the United States – provides the most significant part of the world's economic output and contributes the most to world trade by always being one of the biggest importers and exporters. It can be traced back to the EU's diverse and extensive internal market and consumption, but a crucial element was that the integration focused on a common external trade policy (trade is an exclusive EU competence) and similarly regulated economic relations between the EU member states and other countries. Without this background and powerful tool, the EU would presumably face serious challenges to advocate (and most importantly enforce) its human rights and democracy values around the world, not to mention that even by possessing this means does not guarantee a success – as will be demonstrated in the paper.

The topic is indeed relevant in the 21st century, since the EU is still on seeking ways to make use of its external relations potential. Nevertheless the concept of marriage

[1] Amartya Sen: *Rationality and Freedom*. Harvard University Press, 2004, p. 51.
[2] Gráinne de Búrca: *The Evolution of EU Human Rights Law*. In: Paul Craig; Gráinne de Búrca (ed.): The Evolution of EU Law, 2nd ed., Oxford University Press, 2011, pp. 467-475.

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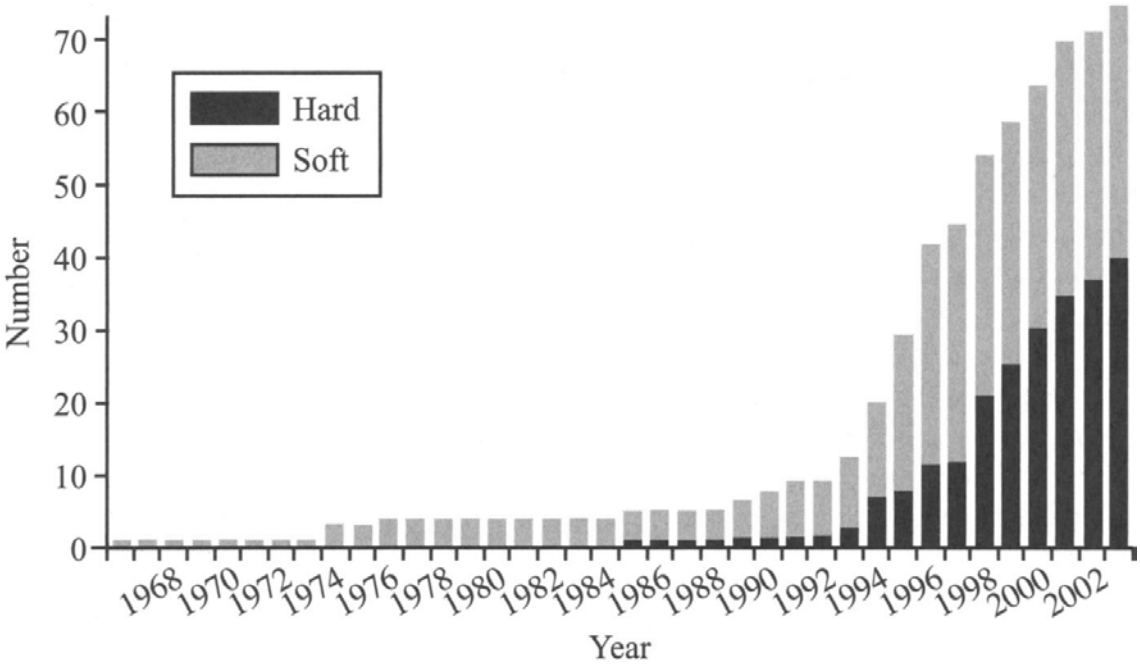
between trade and human rights incepted well before the conception of the European integrations: the roots can be traced back to the abolition of slavery in the United Kingdom in the 19th century when trade agreements with Portugal, Denmark and Sweden stimulated these countries to legislate similarly.[3] Nowadays the topic is more important than ever in a wider context as well: large-scale trade sanctions (partly or entirely) for human rights violations include Myanmar, Belarus, North Korea, Zimbabwe and Iran, as well as the recent and on-going case of Syria. Moreover, currently more than 70% of the states are part of a preferential trade agreement with human rights clauses.[4]



Tendencies of increase in the volume of preferential trade agreements containing requirements for human rights standards[5]

In this thesis I review and critically assess the inclusion and use of human rights clauses as prescribed and effective tools in the EU's external policy. In order to achieve this, I seek to identify factors which contribute or undermine their effectiveness, such as

[3] Susan Arial Aaronson: *Should We Celebrate the Wedding of Trade and Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 14.
[4] Susan Arial Aaronson: *Should We Celebrate the Wedding of Trade and Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 14.
[5] Emilie M. Hafner-Burton: *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*. International Organization, Vol. 59, No. 3 (Summer, 2005), p. 605.

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the legal and formulation basis or other factors (proximity, economic and political dependency or power). I will investigate whether they are often resorted to and if the country or region specific differences of applicability/efficiency depend on the aforementioned factors.

It is essential to outline the third-party agreements regime placed into the wider context of the EU's external relations (including various types of association and other agreements), as it is a complex and multi-dimensional system. These agreements or treaties contain suspension human rights clauses, which are the main focus of this work. There is an important legal aspect: comparing the wording and paraphrasing of these clauses might result in finding a pattern that suggests the EU's overwhelming bargaining power or even compromises when some elements are missing that might suggest a lack of internal consensus within the EU.

The title of the thesis refers to the EU only; hence I do not intend to include any other European regional human rights protection mechanisms aiming to promote human rights in non-EU states. Other types of comparison are thereby not part of the analysis, although a brief introduction to the EU's Generalised Scheme of Preferences and the United States' Generalized System of Preferences will be carried out. The focus of this paper lies on human rights clauses, however, other types of instruments which have the same purpose – such as preferential trade agreements in the last subchapter – are not entirely excluded. Even though the mean differs, the end is analogous.

The "third countries" refer to non-EU countries around the world. Even though it is not a pool of homogenous countries, groups can be identified which is crucial to understanding treaties with suspension clauses *vis-à-vis* the EU and African-Caribbean-Pacific countries. Given the historic outlook, it is inevitable to mention that before the Treaty of Maastricht in 1992, the proper terminology for the EU is European

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Communities (EC), which will be reflected in the text, but the two abbreviations serve as interchangeable.

The core of the thesis is divided into two main parts: theory and practice. A lengthy theoretical part is needed to put the reader in context and as for many other EU-related topics clarify the relevant historical, legal and conceptual background.

In the theoretical part, I explain briefly the recent developments that enabled the EU to raise its voice in human rights (and rule of law) issues, touching on the way it acquired legal personality with the Maastricht and Lisbon Treaty. However, it should not be forgotten that the human rights clauses have a longer history since they are derived from trade policies (which always belonged to the exclusive competences of the EU).

As for the basis of comparison, I chose the main categories of the EU's relation with third countries. Given that association agreements are significantly similar within one well-defined group of third countries, I want to give a broad overview by demonstrating these categories or generations. In the case of the ACP (Africa-Caribbean-Pacific) countries, the Cotonou Agreement (an outcome of the evolution process after its predecessor, the Lomé IV Convention) signed at the millennium creates a flexible and at the same time simplified framework that was highly compatible for the inclusion of a comprehensive human rights clause. In the case of these countries (usually ex-colonies), the EU has a significant interest in the prosperous multilateral and multidimensional relations, whereas the partner countries are interested in the uninterrupted trade and economic relations. Because of this asymmetric interdependence, my first phase of research shows that the EU has resorted to the means of the clause and it had an effect in many of the cases. Other similar categories would be the two distinct European Neighbourhood Policy groups of countries, the East European and the Mediterranean, or South American regional integrations (Andean Community and Mercosur).

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In addition to comparing the different phrasing, content and enforcement of the blocks altogether, I seek examine some examples in depth. Unfortunately I have not found enough resources available to make the practical comparison only on the basis of a selected set of countries; hence I decided to focus on the comparison between regions (or agreement types) and bring in countries as supporting examples. Finally there are numerous countries with which the EU has an (association) agreement, but they do not belong to the abovementioned categories. These include individual countries of various size and economic weight – stretching from Cambodia through Kazakhstan to India and Russia.

An important methodological approach is to present a wide array of states, preferably in a balanced manner to achieve a complex overview. In order to do this, I discuss cases of smaller countries in which the EU's soft power role prevails, small countries in which the enforcing mechanism does not sufficiently work because of the lack of dependency, and finally large and less dependent countries. I did not intend to give an exhaustive analysis, especially with the uncategorized countries; I chose a sketch analysis instead of an in-depth one. One of my main aims is to discover the main patterns and tendencies between the chosen jurisdictions. Nevertheless, it needs to be mentioned that the limitations of this research includes the possible selectiveness due to choosing the country only if there is enough relevant information available, which might distort the outcome. I seek to address this empirical bias and methodological pitfall by carefully selecting a wide array of countries with an appropriate geographic, historical and political dispersion of choice.

Finally, it is necessary to emphasize that the EU and other human right advocates do not have only human rights clauses as an incentive for third countries to promote respect for human rights. All other human rights instruments were created to the same end,

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spanning from the UN-fostered framework of the Bill of Rights and other conventions to the establishment and operation of regional and national human rights protection regimes. The EU also possesses new capabilities through the legal personality endowed by the Treaty of Lisbon, as well as the creation of the position of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of the European External Action Service. A recent initiative, the European Instrument for Democracy & Human Rights was launched to provide an increasing sum of EU funds available for development cooperation, which can be a powerful tool to enforce human rights in the recipient countries. Therefore a standalone analysis of human rights clauses is unrealistic: other promotion and protection mechanisms need to be given due regard and a systemic/contextual approach is essential.

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2. Framework for human rights clauses within the European Union

An underlying reason for the development of human rights clauses was that trade agreements from the Lomé I Convention of 1976 proved to be dissatisfactory when grave violations of human rights occurred. The STABEX funds – which served as an export compensation package for ACP countries – could not be halted due to the absence of legal basis in the notorious cases of Uganda and Equatorial Guinea.[6]

Historically first in its communication on human rights, democracy and development cooperation policy of 1991, the European Commission confirmed the need for the inclusion of human rights aspects in development cooperation policy and thus gave the green light to using an internal mandate to act upon this principle.[7] Since the Commission's communication COM (95)216 on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries, the human rights clause is to be included in all general (non-specific) bilateral agreements with third countries. Within three years' time the EU had concluded 20 new agreements on the basis of the new framework, added to the 30 preceding ones which already contained a clause.[8]

It is nevertheless true that a human rights advocate, such as the EU, has a diverse toolbox, as well as a divergent view on the set of rights which is prioritized over another. Whereas the human rights clauses of the United States in trade agreements with other countries are centered on economic rights such as labor rights and transparency (seemingly included to protect mostly the interests of American businesses, see section

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[6] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, p. 723.
[7] European Commission: *Communication SEC (91)61 to the Council and Parliament – Human rights, democracy and development cooperation policy*. March 25, 1991, pp. 5-7.
[8] Barbara Brandtner; Allan Rosas: *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*. European Journal of International Law 9 (1998), pp. 473-474.

3.3), the EU aspires to encompass the universally recognized human rights in addition to the thematic group of labor and privacy rights, due process and political participation.[9]

Human rights treaties and human rights clauses represent a different mindset towards promoting human rights. While human rights treaties tend to punish violations in an *ex post factum* manner, human rights clauses in trade agreements can address the root of the crime. Ultimately, they can serve as incentives or deterrents element before the breach is actually committed. Hafner-Burton also argues that more UN-fostered treaties presumably will not improve the human rights records of persistent violators such as the Central African Republic; neither will the promotion of universality of human rights advance the cause.[10] Contrary to this, trade agreements fit into the concept of sticks and carrots: they were designed to alter and create incentives, not to modify values.[11]

A 2009 Amnesty International report on the EU's and human rights claims that EIDHR and the human rights clauses are the most important and noticeable elements of the EU's current external human rights policy. However, the policy is largely disconnected and fragmented, hence inefficient. The report also argues that the inefficiency could be counterbalanced by having a system in which the EU could be held accountable based on the convergence of desired and actual impact made.[12]

Responding to such criticisms, the European Parliament made a ground-breaking step to implement the promising EU Strategic Framework on Human Rights and Democracy by adopting the EU Action Plan on Human Rights and Democracy in 2012. For the first time it produces such a unified document action plan on both the EU's internal and

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[9] Susan Arial Aaronson: *Should We Celebrate the Wedding of Trade and Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 14.
[10] Emilie M. Hafner-Burton: *Trade and Development Agreements for Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 2.
[11] Emilie M. Hafner-Burton: *Trade and Development Agreements for Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 2.
[12] Amnesty International: *The EU and Human Rights: Making the Impact on People Count*. 2009, pp. 47-48.

external human rights policy, with due regard to the future of human rights clauses. The action plan included policy principles, objectives and priorities for the next 10 years in the form of 97 enlisted actions under 36 headings; as well as laying down an obligation to produce an annual report on human rights and democracy to supervise compliance. The inclusion of civil society and NGOs in the process is a key element; and the main aspiration is to enable the EU to fulfill its mandate given by Article 21 of the Lisbon Treaty.

Human rights clauses form an essential element of the action plan, having been mentioned under Chapter VI: "working with bilateral partners". Under Action 33 (Effective use and interplay of EU external policy instruments), the EEAS, European Commission and the member states are tasked with "[developing] criteria for application of the human rights clause."[13] This task means that the performing organs are mandated to establish a clear-cut set of rules on easing the deliberation process whether to resort to the means of the clause or not. As following subchapter argues, not only the decision but the legal basis for the human rights clauses have undergone an evolution and surrounding uncertainties call for a rigorous analysis of the EU's margin of action.

2.1. Legal mandate and margin of action

As agreements with third countries fall under the broad category of international treaties, it is necessary to begin the analysis by possibilities of termination or suspension of treaty under public international law. Neither were the European Communities, nor is the European Union a signatory party to the Vienna Convention on the Law of Treaties of 1969 or the Vienna Convention on the Law of Treaties between states and International Organizations or between International Organizations of 1986. However, provisions of

[13] Council of the European Union: *EU Strategic Framework and Action Plan on Human Rights and Democracy*. June 25, 2012, p. 23.

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these documents have reached the level of customary norms; therefore the EU is also bound by them.[14]

The 1969 Convention's Articles 54 and 57 contain provisions for suspending and terminating an international agreement with the consent of the parties (it is rarely the case in this analysis) or upon a treaty provision. Article 57(a) reads as "[t]he operation of a treaty in regard to all the parties or to a particular party may be suspended [i]n conformity with the provisions of the treaty".[15] Under the interpretation of Article 60(3)(b), the breach has to be "[t]he violation of a provision essential to the accomplishment of the object or purpose of the treaty."[16] This means that the treaty provision upon which one party decides to suspend the treaty shall be an essential element, a central idea without which the main objectives of the treaty cannot be fulfilled. To ensure that action triggered by a violation is always in conformity with this provision of general international law, human rights clause used by the EU always clarifies that human rights form essential element for the purposes of the agreement[17] (see in details in section 3.2).

A different legal approach to the unilateral termination of an agreement is the customary principle of *clausula rebus sic stantibus* (fundamental change of circumstances).[18] Article 62 of the Vienna Convention codifies the norm: "fundamental change of circumstances which has occurred […] and was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty"[19], extending to the case of inability to perform by one party elaborated in Article 61. The

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[14] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, pp. 723-724.
[15] Vienna Convention on the Law of Treaties, 1969, para. 57.
[16] Vienna Convention on the Law of Treaties, 1969, para. 60.
[17] Hanne Cuyckens: *Human Rights Clauses in Agreements between the Community and Third Countries The Case of the Cotonou Agreement*. Institute for International Law Working Paper No 147 – March 2010, p. 3.
[18] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, pp. 724-725.
[19] Vienna Convention on the Law of Treaties, 1969, para. 62.

International Court of Justice has an extensive jurisprudence related to which circumstances can trigger the suspension or termination of an agreement unilaterally, but it is nevertheless obvious from Gabčíkovo-Nagymaros and the Iceland Fisheries Jurisdiction cases that the Court tries to strictly restrict the application of this principle.[20] As a prominent example for invoking this provision, the EC suspended the co-operation treaty of 1991 with Yugoslavia due to the escalating war.[21] The Yugoslav example is hence not application of a specific clause but an international legal principle, it will not be further explored for this reason in the second part of the thesis.

Riedel and Will refer to a third justification for resorting to suspension or termination, namely using it as reprisal or retorsion. These are measures which aim to countervail a violation of an international norm; to which extent the application is legitimate. The issue is whether it can be triggered by breaching human rights. As the EU is not a signatory of human rights treaties (at the time of writing the accession to the European Convention on Human Rights is under negotiation) only acts which violate the minimum standards of human rights protection and hence are part of customary international law can be retorted, while respecting the principle of proportionality.[22]

The EU has a well-defined mandate for external action, in which it is essential to identify the place of human rights clauses. Article 21 of the Treaty on European Union includes human rights among the norms and objectives of the EU external relations: "[t]he Union's action on the international scene shall be guided by the principles […][of] democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and

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[20] Gábor Kardos – Tamás Lattmann (ed.): *Nemzetközi jog*. ELTE Eötvös Kiadó, Budapest, 2010, pp. 96-97.
[21] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, p. 725.
[22] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, pp. 724-725.

solidarity, and respect for the principles of the United Nations Charter and international law."[23]

Article 207 of the Treaty on the Functioning of the European Union confers the task of concluding commercial agreements with third countries as an EU competence. Common commercial policy should be carried out in accordance with the abovementioned principles.[24] As an extended competence, Article 217 consigns the right to the EU to conclude agreements with third countries "involving reciprocal rights and obligations, common action and special procedure".[25] Indeed, this article made it possible to negotiate and sign agreements such as the Lomé treaty with human rights clauses by enabling the inclusion of Community law principles, EU case law and *acquis communautaire* framework.[26] The procedure of negotiating an agreement is laid down by Article 218, involving the participation of Commission, External Actions Service and Parliament, whereas the Council remains the key institution.[27] In addition to this, Treaty of Lisbon prescribes the EU to strive for cooperation with third countries in regards of shared competences (most relevantly development cooperation and humanitarian aid).[28] Article 208 reassures the external actions in the realm of development to be compliant with the general principles and objectives stated in Article 21, whereas the main goal is to reduce poverty.[29]

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[23] *Treaty of Lisbon (Treaty on European Union and Treaty on the Function of the European Union)*, consolidated version, 2010, Art. 21.
[24] *Treaty of Lisbon (Treaty on European Union and Treaty on the Function of the European Union)*, consolidated version, 2010, Art. 207.
[25] *Treaty of Lisbon (Treaty on European Union and Treaty on the Function of the European Union)*, consolidated version, 2010, Art. 217.
[26] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, p. 737.
[27] *Treaty of Lisbon (Treaty on European Union and Treaty on the Function of the European Union)*, consolidated version, 2010, Art. 218.
[28] *Treaty of Lisbon (Treaty on European Union and Treaty on the Function of the European Union)*, consolidated version, 2010, Art. 211.
[29] *Treaty of Lisbon (Treaty on European Union and Treaty on the Function of the European Union)*, consolidated version, 2010, Art. 208.

An agreement which the EU may negotiate with a third country or group of countries involves rights and obligations *vis-à-vis* the other party, as well as special procedure and action.[30] Suspension or termination of an agreement legally falls within special procedure; therefore the EU is mandated by its founding treaty to include such a clause. This article also implies that human rights obligations are not unilateral, the respect of human rights shall apply equally to the EU. Consequently, in a theoretical case of violation within the EU, a partner country can also suspend or terminate the agreement.

The procedure of adopting appropriate measures to respond to human rights violations are regulated by Article 352 of the Treaty on the Functioning of the European Union, often cited as the flexibility clause. First, the policy in question should be regulated by the Treaty of Lisbon – in this case both external action and trade fulfills this prerequisite. Measures then can be adopted either unanimously by the Council (upon the proposal of the Commission with the consent of the European Parliament) or through a special legislative procedure of the Council. It is important that Commission's proposal shall be communicated to national parliaments as well. Paragraph 4 however, includes a very ambiguous statement: "[t]his Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy […]".[31] This *prima facie* exclusion of applicability of human rights clauses by the abovementioned procedures were tested in the case of Kadi v Council and Commission (2005). This case included restrictive measures against individuals, but the adjudication is *mutadis mutandis* applicable to human rights clauses. The judgment was nevertheless far from unanimous due to the diverging interpretations, but ultimately the reasoning centered on the idea that legislative foreign policy act can be initiated only if other articles of the Treaty of Lisbon cannot be

[30] *Treaty of Lisbon (Treaty on European Union and Treaty on the Function of the European Union)*, consolidated version, 2010, Art. 217.
[31] *Treaty of Lisbon (Treaty on European Union and Treaty on the Function of the European Union)*, consolidated version, 2010, Art. 352.

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invoked.[32] Interpreting an action based on a human rights clause in line with Articles 21, 207, 208, 218 therefore suffices the criteria related to the applicability of Article 352.

Consequently, all three principal EU institutions are vested with power to issue statements on the human rights situation in a third country – as they had done in many cases up until today. In addition to this, it is within their remit to raise objections against the conclusion of a human rights treaty with any of them.[33] Nonetheless it is only the Council which has the authority to allow the application of the suspension of a treaty, and it requires to have a unanimous decision of the members, with the obligatory involvement of the Parliament and the Commission.

2.2. EU's relations to third countries

It might not come as a surprise that the currently 28 member states of the European Union provide such a powerful pool of countries with which every third country has an interest in seeking cooperation and vice-versa. The EU has an exclusive competence in trade-related matters, therefore the agreements in which human rights clauses can appear are concluded by the European Commission. The relationship for the purpose of this analysis can be divided into two categories: interregional agreements and functionally bilateral agreements (where the EU is considered as one legal entity and thus can be deliberated as one party).

African, Caribbean and Pacific (ACP) Group of states is of key importance for the European Union given the economic and trade ties which can be traced back to the colonial era. On the other hand these countries provide examples of notorious human rights violations, including Rwanda in 1994 and recently the Central African Republic.

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[32] *Case T-315/01 Kadi v Council and Commission*. Judgment of the Court of First Instance (Second Chamber, extended composition), September 21, 2005.
[33] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, p. 738.

The ACP Group is not only an informal grouping but it has an institutionalized framework: it was created in 1975 with the participation of 48 countries from Sub-Saharan Africa, 16 from the Caribbean and 15 from the Pacific. It has a Secretariat, a decision-making body (Council of Ministers) and sectorial cooperation (trade and culture), as well as European representation and a regular session with EU leaders (ACP-EU Joint Parliamentary Assembly).[34] The EC's/EU's relation to this region is regulated by the legal framework of the Lomé Convention (since 2000 the Cotonou Agreement), which first included a mechanism for human rights protection in 1989 (see section 2.3).

Besides this interregional agreement that cover a large percentage of EU-third country relations, there are three other blocs with which the EU negotiated a "package deal". Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela) and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama (no regional integration, only an ad hoc grouping) concluded two unique Political dialogue and Cooperation Agreements (not to be confused with Partnership & Cooperation Agreement – PCA) on the same day in 2003.[35] Mercosur (Southern Common Market) consisting of Argentina, Brazil, Paraguay, Uruguay and Venezuela signed an also unmatched Interregional Framework Cooperation Agreement in the mid-1990s.

In relation to other countries, the European Commission is vested with the power to negotiate EU-third country agreements since trade policy is an exclusive competence of the integration. Although it seems that some other groupings of the EU external policy can be identified, due to divergence in political and economic ties the Commission concludes agreements one by one with these third countries. Such pool could be the European Neighbourhood Policy (ENP) which is a group of the EU's closest 16

[34] African, Caribbean, and Pacific Group of States: *About us*.
[35] European Commission: *Agreements containing a suspension-human rights clause*. External Relations Treaties Office, July 7, 2011, p. 13.

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neighbors, including the post-Soviet countries of Eastern Europe and South Caucasus and the Mediterranean region: Algeria, Armenia, Azerbaijan, Egypt, Georgia, Israel, Jordan, Lebanon, Moldova, Morocco, Palestine, Tunisia and Ukraine are fully participating partners while Algeria is under negotiation and Belarus, Libya and Syria is not yet part of the system.[36] For these countries the so-called "more for more" approach is applied: the more reform a neighboring country commits itself to, the more political and financial support the EU provides.[37] The criteria applied to appreciate democratic reform are "free and fair elections, freedom of expression, of assembly and of association, judicial independence, fight against corruption and democratic control over the armed forces".[38] As reiterated in the EU Strategic Framework and Action Plan on Human Rights and Democracy in 2012, "[t]he EU will step up its effort to make best use of the human rights clause in political framework agreements with third countries. In the European Neighbourhood Policy countries, the EU has firmly committed itself to supporting a comprehensive agenda of locally-led political reform, with democracy and human rights at its centre, including through the policy of "more for more"."[39] The framework that regulates the relation of ENP states and the EU is twofold: Mediterranean partners signed Euro-Mediterranean Association Agreements, while former Soviet states the applicable terminology is Partnership & Cooperation Agreement.

Generally speaking, concluding "bilateral agreements" by default implies the negotiation and signature of Partnership & Cooperation Agreements (PCAs) or Association Agreements (AAs). The European External Action Service evaluates the countries whether they are eligible for a more beneficial Deep and Comprehensive Free

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[36] European External Action Service: *European Neighbourhood Policy (ENP) Overview*.
[37] Niccolò Rinaldi: *Trade for change: EU trade and investment strategy for the Southern Mediterranean following the Arab spring revolutions*. GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 6.
[38] European External Action Service: *European Neighbourhood Policy (ENP) Overview*.
[39] Council of the European Union: *EU Strategic Framework and Action Plan on Human Rights and Democracy*. June 25, 2012, p. 3.

Trade Agreement (DCFTA).[40] Conditions include bilateral market opening, political and social commitments to be fulfilled and ensuring that everyone benefits from the new economy.[41] The latter requirement came to the fore because of the reform processes of the Arab Spring. Finally individual countries with which the EU does not nurture a deep and intensive economic tie still aspire for binding treaty to settle basic principles of cooperation: these states conclude Cooperation Agreements (CAs) with the Union, implying a rather loose connection (where the clause can be elaborate and extensive).

A memorable moment which indicates the highest level pledge of the EU and it's member states that human rights clauses will form an essential component in relation to third countries by including it in each and every upcoming agreement marked in 1995. It originates from the Council of Ministers at a session dedicated to development co-operation: "the Community and its Member States will explicitly introduce the consideration of human rights as an element of the relations with developing countries; human rights clauses will be inserted in future co-operation agreements."[42] Needless to mention, the EU later aspired to do so, mostly to avoid fiascos such as the agreement with Mexico (see section 3.2). In order to achieve a stable practice to embed legally binding and enforceable human rights clauses into agreements with third countries, the EC/EU's policy needed to undergo a long historical evolution process.

2.3. History and categorization of the EU's human rights clauses

Human rights clauses are present in bilateral trade and cooperation agreements since the beginning of the 1990s. Early examples include the Lomé IV Convention and

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[40] Niccolò Rinaldi: *Trade for change: EU trade and investment strategy for the Southern Mediterranean following the Arab spring revolutions*. GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 6.
[41] Niccolò Rinaldi: *Trade for change: EU trade and investment strategy for the Southern Mediterranean following the Arab spring revolutions*. GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 6.
[42] Council of the European Union: *1538th Council meeting, Development Co-operation*. Brussels, December 28, 1991.

Mediterranean and Europe Agreements.[43] Article 5 of Lomé IV Convention is indeed a human rights clause: it reaffirms the principles of respect for human rights as the crucial element of development and the protection of dignity with the wording as follows:

> "Cooperation shall be directed towards development centered on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights. Cooperation operations shall thus be conceived in accordance with the positive approach, where respect for human rights is recognized as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights."[44]

This legal description, however, clearly lacks any suspension or termination provision and to classify human rights as an essential element of the convention as defined in section 2.1. Riedel's and Will's conclusion is that Article 5 could not provide for a substantial legal basis for suspension upon grave human rights violations.[45] Nonetheless it can be stated that after unsuccessful attempts to include provisions of human rights, signing Lomé IV Convention 1989 was a milestone for setting a precedent and made ACP countries commit themselves to human rights principles.[46]

Human rights clauses were embedded in agreements with non-ACP countries from 1990 because of difficulties in generalization (which was possible with ACP countries). The knot was untied by the so-called "democratic basis for co-operation clause" or "basic clause", which followed this formulation in relation to Argentina, Chile, Paraguay and Uruguay:

> "Cooperation ties between the Community and [the country or group of countries concerned] and this Agreement in its entirety are based on respect for the

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[43] Barbara Brandtner; Allan Rosas: *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*. European Journal of International Law 9 (1998), p. 473.
[44] *Fourth ACP-EEC Convention signed in Lomé*, December 15, 1989, Art. 5.
[45] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, p. 727.
[46] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, p. 215.

democratic principles and human rights, which inspire the domestic and external policies of the Community and [the country or group of countries concerned]."[47]

The clause essentially does not significantly differ from Article 5 of Lomé IV because neither does it bring human rights under the objects and purposes of the agreement, nor does it specify any mechanisms to be triggered following breaches. Even though the "basic clause" used was not sufficient phrasing for resorting to sanctions, it indeed provided a precedent for the future of these clauses. An important event of the collapse of the Eastern bloc brought up the need for more precise formulation, particularly because of the geographic proximity and underlying interest of the EU to foster a democratic and human rights sensitive transition in the region.

Subsequently, the model of including human rights in the agreements became rather consistent: it consists of an essential element and a non-execution or suspension clause. The essential element clause ensures that the respect of human rights is a central point of each agreement.[48] This aims to exclude the legal loophole of claiming that the suspension of the agreement is not in conformity with international legal norms because human rights do not belong to the main objectives of the treaty. In addition, this clause sets the scope of protected rights, usually as enlisted in the Universal Declaration of Human Rights.[49] In respect of Europe, Helsinki Final Act (1975) and Charter of Paris for a New Europe (1990) are also added to agreements with signatory countries of these documents.[50]

The original text of the Lomé IV Convention of 1989 did not provide solid legal basis for suspending or termination in the case of human rights violations, thereby agreements

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[47] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, p. 753.
[48] Lorand Bartels: *A Legal Analysis of the Human Rights Dimension of the Euro-Mediterranean Agreements*. GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 7.
[49] Lorand Bartels: *A Legal Analysis of the Human Rights Dimension of the Euro-Mediterranean Agreements*. GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 7.
[50] Barbara Brandtner; Allan Rosas: *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*. European Journal of International Law 9 (1998), p. 473.

with Brazil, Andean Pact countries, Baltic States and Albania of 1992 serve as the first clear-cut examples for containing an essential element clause.[51] In 1995, the European Commission issued a communication on the unified format of the essential elements clause to be inserted into agreements:

> "Respect for the democratic principles and fundamental human rights established by [the Universal Declaration of Human Rights]/[the Helsinki Final Act and the Charter of Paris for a New Europe] inspires the domestic and external policies of the Community and of [the country or group of countries concerned] and constitutes an essential element of this agreement."[52]

A similar clause can be found in agreements with Bolivia, Colombia, Ecuador, Peru, Venezuela, Tunisia, South Africa, Nepal, Sri Lanka, India, Vietnam and Israel.[53] The regional pattern is also visible and the conclusion of these agreements dates to the mid and late 1990s.

The non-compliance clause (suspension and non-execution clause) – as described by Bartels – ordains the appropriate measures to be taken in the case of failure to comply with human right norms. Such a measure always has to be proportionate and could be the suspension of benefits (i.e. trade preferences); however, priority shall always be given to methods that disturb the agreement's functioning the least in order to ensure that it remains in force. Another reason for this is not to have a negative impact on the population of the country.[54] However, it happened in many cases that a suspension mechanism was not yet incorporated in the agreement while the essential elements clause was part of it

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[51] European Commission: *Communication COM (95)216 on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries*. May 23, 1995, p. 2.
[52] European Commission: *Communication COM (95)216 on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries*. May 23, 1995, p. 6.
[53] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, p. 232.
[54] Lorand Bartels: *A Legal Analysis of the Human Rights Dimension of the Euro-Mediterranean Agreements*. GREAT Insights, Volume 1, Issue 2. March-April 2012, pp. 7-8.

(e.g. Latin-American countries, India, Vietnam and Sri Lanka)[55], which created a great ambiguity and uncertainty of applicable legal means subject to be solved in the further evolution process.

Explicit suspension or the "Baltic clause" is the first step in the evolution of this concept. Agreements with Albania, Baltic countries and Slovenia (in effect preceding the EU accession in the case of all countries but Albania) share this paraphrasing:

> "The parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious breach of its essential provisions occurs."[56]

As it necessarily follows an essential elements clause, human rights violation can promptly trigger the suspension of the agreement, however, not necessarily entirely. Riedel and Will describe this formulation as a "sharp word with a limited range": while the timeliness is ensured, the violation needs to be unambiguously put as serious, leaving a margin for deliberation what is considered to be serious.[57] On account of this, such clause was last used in October 1992. From 1993 the explicit suspension clause was replaced by the non-execution of the "Bulgarian clause":

> "If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.
>
> In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests."[58]

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[55] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, p. 232.
[56] European Commission: *Communication COM (95)216 on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries*. May 23, 1995, p. 8.
[57] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, p. 729.
[58] European Commission: *Communication COM (95)216 on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries*. May 23, 1995, p. 8.

By adding the second section, a proportionality factor was included, requiring the parties to seek a solution which is the most appropriate. It is clear that the obligatory consultation process also diluted the promptness which was present in the previous concept. However, the exception of "cases of special urgency" leaves open the possibility for an immediate reaction without deliberation. In the consecutive years, Romania, Bulgaria, the Russian Federation, Ukraine, Kyrgyzstan, Moldova, Czech Republic, Slovakia, Kazakhstan and Belarus signed an agreement containing the non-execution clause.[59]

The ACP framework did not possess this tool of suspension of the agreement in the case of breaching respect for human rights guaranteed by the essential element clause until the adoption of amendment of the Lomé IV Convention, signed in 1995 in Mauritius. Article 366 of the amending agreement generally draws upon the phrasing of the "Bulgarian clause":

> "[In case the settlement mechanism did not show any results within the timeframe set], the appropriate the Party which invoked the failure to fulfil an obligation may take appropriate steps, including, where necessary, the partial or full suspension of application of this Convention to the Party concerned. It is understood that suspension would be a measure of last resort."[60]

It can be seen that the legal effect of the clause is analogous to one included in the "Bulgarian clause", and the rules of procedure for the conciliation mechanism of Lomé IV/Cotonou context will be demonstrated later in section 3.2.

The Cotonou Agreement was signed at the millennium in Cotonou, Benin with the intention to generally revise and clarify the Lomé IV framework. The number of the Articles containing human rights provisions was modified to 9 from 5 and a mayor

[59] European Commission: *Communication COM (95)216 on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries*. May 23, 1995, p. 3.
[60] *Agreement Amending the Fourth ACP-EC Convention of Lomé signed in Mauritius,* November 4, 1995.

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accomplishment was to replace the basic clause with an essential elements clause, which was worded upon a compromise as follows:

> "Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement."[61]

It is also noteworthy that Article 9 of the Cotonou Agreement is entitled "Essential elements regarding human rights, democratic principles and the rule of law, and fundamental element regarding good governance", including good governance among the list of elements which if violated might serve as a basis for suspension of the agreement. Even though it seems that good governance is entitled a different treatment because considering it as fundamental element, this is only a phrasing distinction and does not have legal standards.[62]

Bradtner reiterates that the inclusion of any of the clauses does not change the basic nature of the agreements: it is simply interpreted as a mutual reaffirmation of commonly shared values. The purpose it serves is to reinforce previous human rights commitments of general international law. Consequently, it does not imply the enactment of any new human rights regulation.[63] Third countries therefore are legally not stipulated to ratify human rights instruments (such as UN treaties) which they were not signatories of at the time when the agreement came into force; however, they are bound by existing international obligations. In section 3.3, I will briefly introduce an EU mechanism that provides an incentive and once ratified a legal obligation to enter universal instruments and mechanisms of human rights protection.

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[61] *Partnership Agreement between ACP and EC signed in Cotonou*, 23 June 23, 2000, Art. 9.
[62] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, p. 314.
[63] Brandtner, Barbara; Rosas, Allan: *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*. European Journal of International Law 9 (1998), pp. 474-475.

3. Application of EU's human rights clauses

The mandate given by international law and EU treaties has been discussed with a conclusion that appropriate legal basis exists for enacting a clause, resorting to sanctions or agreement suspension. However, the scope of applicability can be read from the jurisprudence of the Court of Justice of the EU. Fierro analyzes in depth what the limits are of applicability of the human rights clauses. The Court's decision on Portugal v Council (Opinion 2/94) guides the interpretation of the scope of human rights clauses. It states that the EU has treaty-conferred powers to enact human rights regulations which comes hand in hand with applying existing commitments. The same judgment renders that the EU legally refers to other obligations, such as OSCE Charter of Paris for a New Europe or UN Bill of Rights. Finally the decision identified the suspension mechanism as the central element of enacting such clauses, whereas it is clearly not defined as the sole aim and means.[64]

The European Parliament in its resolution on the subject of human rights in the world called for a clear set of benchmarks to be created in order to clarify for third countries what actions may trigger consequences based on the clauses.[65] Needless to say, the European Parliament possesses a unique role among the EU organs given that it is the only directly and democratically elected institution. Since 1983, this role began to intensify by issuing more and more resolutions on the topic – as Fierro notes – and declarations affirmed that co-operation serves the purpose to guarantee human rights. The Parliament also remarked the reference to human rights in the first (and subsequent two) Lomé Conventions for not being firmly phrased enough and emphasized that civil and

[64] Elena Fierro: *Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?* European Law Journal, Volume 7, Issue 1, March 2001, pp. 55.57.
[65] European Parliament: *Resolution on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter*. December 16, 2010, para. 108.

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political rights as prerequisites to allow economic, cultural and social rights to prevail.[66] Although the concept of – to some extent – hierarchy of the two generation of rights has been punctuated and amended by a Commission communication in 1998 by highlighting the universality, indivisibility and interdependence of both generation rights,[67] it is undoubtedly a Parliament success that a well-phrased clause was incorporated in the Lomé IV Convention.

By 2010, agreements with more than 120 countries included a human rights clause; however, the Parliament claims that the follow-up of compliance in regards to the signatories of the Cotonou Agreement is not sufficient.[68] In the upcoming two subchapters I seek to analyze not only the narrow ACP context, but an overview of consequences of legal formulation and actual cases when the clause was used or almost used.

3.1. Difference in phrasing: reasons and consequences

In the recent years many studies confirmed the beneficial effects of these clauses on the prevalence of human rights. The correlation between trade agreements with human rights clauses and prevalence of human rights were statistically confirmed.[69] Moreover, the Parliament adopted political pledges in 2010 which codify that the aim of these clauses should clearly be to enable another organ – namely the Commission – to promptly initiate at least the suspension of trade benefits upon the request of a member state or the Parliament when there is evidence for a significant human rights or labor law breach.[70]

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[66] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 59-60.
[67] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 122-123.
[68] European Parliament: *Resolution on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter*. December 16, 2010, para. L.
[69] Emilie M. Hafner-Burton: *Trade and Development Agreements for Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 3.
[70] European Parliament: *Resolution on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter*. December 16, 2010, para. 110.

Contrary to this, when the concept underwent a tedious evolution and the identification of the aims were not this clear in the 1990s, there were no such studies available or unequivocal political will present from the EU institutions and member states to back an imminent development of this concept. In this section, I attempt to demonstrate how the different evolutionary steps and political compromises left their mark on the agreement *vis-à-vis* a third country (or a group of them).

As a first step, the Baltic and the Bulgarian clause was used in the agreements with former socialist countries in the 1990s which provided an appropriate framework for suspension in the case of human rights breach. Even though the clauses could have been applied – as elaborated in section 3.2 –, there was no formal and clear-cut treaty suspension in relation to these countries.[71] It could be noted that these countries stepped on the path of the European integration in the early 1990s, therefore after the development of the clauses there was no longer any longer need to re-negotiate these agreements.

Although it can be observed that a concluded agreement with human rights often set a soon-to-be-followed precedent in the region (see the case of Argentina in the next section), it was not always the case due to different negotiation interests. Fierro brings up the example of Mexico: the agreement with the EC was concluded in 1991 – well after Lomé IV -, however, it did not contain a clause. Mexico vigorously rejected the inclusion of a clause, and did the same on the renewal negotiation rounds in 1997. Finally Mexico consented to the inclusion, nevertheless by making a reservation in the form of a unilateral declaration that seriously limited the applicability of the clause.[72]

Slightly after the internal EU consensus on the necessity of the incorporation of such clauses in agreements with third countries in 1995 the Commission initiated the

[71] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, pp. 723-754.
[72] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 215-216.

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conclusion of a trade and co-operation agreement with Australia in April 1996. During the negotiation process – as Fierro notes – Australia raised concerns about the standardly worded human rights clause (reference to UDHR and non-execution). New Zealand joined this debate by stressing the same objections with its own agreement. The main arguments of the two countries were the following: (1) human rights does not form a part of bilateral level since it is regulated by multilateral conventions for its universal nature, (2) trade and human rights should be dealt separately, as does the division between the WTO and the institutions of the human rights regime, (3) human rights obligations are misplaced *vis-à-vis* developed countries (argument refuted by the EU under the aegis of tearing down discrimination between donor and recipient countries).[73]

The example of Australia and New Zealand brought the concern to the surface that the intent of including human rights clauses so far encompassed only developing and former socialist countries, such as ACP, Baltic three and Central Eastern Europe. These states were in a rather weak economic position (e.g. the former socialist countries suffered from significant GDP loss after the system change) and trade agreement in force with the EU was a key concern for their potential future development. Compared to this, Australia and New Zealand were not exposed to the EU-bound trade to a determining extent and had closer bonds with other trade partners in the Pacific region. Needless to say, the bargaining power of well off countries is generally considered to be higher. In this case, Australia's initial position not to accept any inclusion of human rights in the agreement was a defendable and rational negotiation position.

In the light of this, Australia provided numerous technical legal explanations for its objection. Fierro lists it as questioning the content of the essential elements clause on the basis of the lack of EU's competence, deficiency of definitions for "material breach",

[73] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 287-294.

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"appropriate measures" and scope of "cases of special urgency", idea incompatible with a federal state like Australia and misuse of pressure of suspension by NGOs. In one and a half year, no compromise could be reached. The European Parliament said that it would withdraw its consent to the agreement if no human rights clause is part of it, although this step raised no legal obstacle. Finally a proposal to abandon the clause and sign a non-binding, additional Joint Declaration instead was agreed on, later the same happened in the case of New Zealand.[74] In my view, even though the legal arguments of Australia were not convincing, it rather served as support for a political objection and disapproval by principle. It also showed that this new role of EU as the main human rights advocate is supported by developed and human rights respecting countries till the point it concerns them. Another assumption might be that the set of human rights standards which are at stake is also has an effect of the outcome of the negotiations and in fact could explain a possible scenario all the way around: Australia and New Zealand could have insisted on including greater protection of national and ethnic minority or collective rights protection, which numerous EU countries such as France would be unlikely to comply with. On the other hand, it demonstrates that even flawless political and economic links between the EU and a third country is not a guarantee for success in negotiations of human rights clauses.

Including a human rights clause with Mexico, as mentioned above was first a failed attempt in 1991, then success in 1997. The objections of Mexico were based on referring to the abstention from interfering in domestic matters (it interpreted the clause as a form of new colonialism while OSCE countries explicitly rejected such reference and considered human rights and the rule of law as international concerns) and received it as

[74] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 294-301.

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a criticism while Mexico was among the few stable democracies in the region.[75] The EU firmly opposed any Mexican suggestions, claiming that they would endanger the aim and purpose of the clause. Ultimately Mexico consented to the original wording because EU was the second most important commercial partner after the United States, giving the agreement itself priority over the clause. However, Mexico has made a unilateral declaration (which the EU did not allow to attach as an annex to the agreement, stating that the country's foreign policy must respect the principles of non-intervention and self-determination.[76] Consequently the agreement with Mexico can be considered as a success for the EU, because the unilateral declaration does not alter the effects of the properly phrased clause in a binding manner, therefore all measures can be applied in case.

Based on the list communicated by the EU's Treaties Office, as of 2011 around 40 different agreements with third countries or group of third countries are in force which includes a suspension or non-execution clause.[77] Framework cooperation concluded with Mercosur countries (Argentina, Brazil, Paraguay, Uruguay and Venezuela) in 1996 has a clause with almost identical content to the Bulgarian clause[78], while the Euro-Mediterranean Interim Association Agreement concluded with Palestine Liberation Organization has the explanatory paragraph on "cases of special urgency" in the joint declaration only and similar agreement with Tunisia of 1998 does not this explanation all.[79] Euro-Mediterranean Association Agreements were ratified by several of other

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[75] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 302-306.
[76] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 302-308.
[77] European Commission: *Agreements containing a suspension-human rights clause*. External Relations Treaties Office, July 7, 2011.
[78] *Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part - Joint Declaration on political dialogue between the European Union and Mercosur*, March 19, 1996, Art. 35.
[79] *Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part*, March 30, 1998, Art. 90.

countries, such as Morocco (2000), Israel (2000), Jordan (2002), Algeria (2005), Lebanon (2006) and Egypt (2004).[80] The clause in the agreement stands as follows:

> "If either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. In the selection of measures, priority shall be given to those which least disturb the functioning of the Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests."[81]

It can be noted that a similar consultation mechanism is prescribed as in the "Bulgarian clause", however, specificities of the Euro-Mediterranean cooperation mention a *sui generis* institution (Association Council) as the debate-setting forum. This consultation mechanism first came into the fore in the Economic Partnership, Political Coordination and Cooperation Agreement with Mexico (1997) and in the Agreement on Trade, Development and Cooperation with South Africa (1999), although these two agreements did not specify any institutional arrangements.[82] The most detailed manifestation of the consultation mechanism manifested in the Lomé IV Convention (as modified in 1995) and Cotonou Agreement *vis-à-vis* ACP states, where a strict timeframe for consultation was given (see section 3.2). Compared to this, having a concrete timeframe did not belong to the main negotiation aims of the EU in the Euro-Mediterranean Agreements, therefore it is clearly missing – same as in the Framework Agreement for Trade and Cooperation with Korea of 2001.[83]

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[80] European Commission: *Agreements containing a suspension-human rights clause*. External Relations Treaties Office, July 7, 2011.
[81] European Commission: *Agreements containing a suspension-human rights clause*. External Relations Treaties Office, July 7, 2011.
[82] European Commission: *Agreements containing a suspension-human rights clause*. External Relations Treaties Office, July 7, 2011, pp. 7-8.
[83] *Framework Agreement for Trade and Cooperation between the European Community and its Member States, on the one hand, and the Republic of Korea, on the other hand,* March 30, 2001, Art. 23.

Country	Reason	Year
Togo	flawed electoral process	1998
Togo	democracy, respect for human rights and fundamental freedoms	2004
Niger	coup d'état	1999
Guinea-Bissau	coup d'état	1999, 2004
Comoros	coup d'état	1999
Cote d'Ivoire	coup d'état	2000
Cote d'Ivoire	democratic failures	2001
Haiti	flawed electoral process	2000
Fiji	coup d'état	2000
Liberia	violations of human rights, democratic principles, rule of law and serious corruption	2001
Zimbabwe	violations of human rights, democratic principles, rule of law	2002
Central African Republic	coup d'état	2003
Guinea	deterioration of democracy and the rule of law, failure to respect human rights and fundamental freedoms and the lack of good economic governance	2004

Consulatations held until 2005[84]

The Cotonou Agreement in 2000 was a milestone in many aspects. Not only the body of the agreement contained provisions to ensure human rights, but associated financial protocols of the also have human rights requirements,[85] providing a broad basis for economic implications of a possible human rights violation. Moreover, the Cotonou Agreement was the first to include an International Criminal Court-related clause,[86] thus providing a legally binding intention for parties to ratify the Rome Statute:

> "The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments."[87]

In 2000, the Rome Statute had already been signed for two years but for the lack of ratifications, it had not come into force yet. Although it might seem to serve the EU's

[84] European Parliament: *Human Rights and Democracy Clauses in the EU's International Agreements (Long version)*. September 29, 2005, Directorate-General for External policies of the Union, p. 36.
[85] Emilie M. Hafner-Burton: *Trade and Development Agreements for Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 3.
[86] Council of the European Union: *EU Annual Report on Human Rights and Democracy in the World in 2010*. September 26, 2011, p. 58.
[87] Partnership Agreement between ACP and EC signed in Cotonou, 23 June 23, 2000, Art. 10.

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intention mostly, this provision was welcomed and encouraged by African countries where military coups were a real threat and criminals were often at large. The willingness of ACP countries to include a provision on the International Criminal Court can be supported by the fact as of today, majority of them has ratified the Statute and majority of the pending cases were initiated upon state party referral (Uganda, Democratic Republic of the Congo, Central African Republic and Mali).

In relation to the former Soviet states such as Russia, the Ukraine, Moldova, Kazakhstan, Kyrgyzstan, Georgia, Uzbekistan and Azerbaijan, the Partnership and Cooperation Agreements were concluded in 1997-1999. The clauses are largely similar: all possess the element of possible suspension while most does not have the explanatory note on what the "cases of special urgency" can entail.[88] Flexibility of the wording enabled the EU to add "respect […] of principles of international law" to the agreements with Georgia, Armenia and Azerbaijan due to the still ongoing conflicts of Nagorno-Karabakh[89] and Abkhazia. It also serves as an example for incorporating not necessarily the rule of law and human rights issues in the same concept.

Stabilisation and Association Agreements were negotiated with the states of the former Yugoslavia and Albania in the period between 2005 and 2010 which have a common feature that the essential elements clause and the non-execution clause were combined in a very concise, unequivocal and to the point text, such as the one signed with Bosnia and Herzegovina:

> "This Agreement is concluded for an unlimited period. Either Party may denounce this Agreement by notifying the other Party. This Agreement shall terminate six months after the date of such notification. Either Party may suspend this

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[88] European Commission: *Agreements containing a suspension-human rights clause*. External Relations Treaties Office, July 7, 2011, pp. 5-7.
[89] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, p. 743.

Agreement, with immediate effect, in the event of non-compliance by the other party with one of the essential elements of this Agreement."[90]

In the case of these countries, it needs to be taken into consideration that most of them are on an advanced step of EU accession (as the Baltic and Central Eastern European countries in the early 1990s): some of them being potential or official candidate countries or the membership is under negotiation. This agreement is often viewed as an interim step in the accession process, therefore it should be interpreted in the light that it is not expected to be the legal document that will serve as a basis for regulating the relations in the long term.

Consequently it can be stated that wording differences between the clauses is a result of the difference between the type of the agreement and an inherent evolutionary process, while minor differences could be explained by the uniqueness of each negotiations.

3.2. Application history

The European Commission provided a summary in 1995 as an annex for the Communication COM (95)216 on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries. It enumerates the measures applicable in the case of breaching human rights obligations by a third country with a trade agreement including human rights clause. This list is still a relevant point of reference and a concise collection of the various instruments for enforcement. Possible sanctions are the following:

- "alteration of the contents of cooperation programmes or the channels used
- reduction of cultural, scientific, and technical cooperation programmes
- postponement of a Joint Committee meeting
- suspension of high-level bilateral contacts
- postponement of new projects
- refusal to follow up partner's initiatives

[90] *Stabilisation and Association Agreement (SAA) between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part,* June 16, 2008.

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- trade embargoes
- suspension of arms sales, suspension of military cooperation
- suspension of cooperation"[91]

As of 2012, there was no other application of a human rights clause other than in relation to the Cotonou Agreement, with the sole exception of the suspension of technical meetings with Uzbekistan in 2005.[92] It is not difficult to observe that there have been such serious human rights violations in other countries than the ACP region which amounted for a need to trigger the clause, however, this supports the view that the activation is intertwined with a political will. Fierro highlights that this could be interpreted as a *prima facie* double standard in the EU's Common Foreign and Security Policy, but also notes that in other cases diplomatic channels often provided viable alternatives. Other justifications for why only ACP countries were sanctioned this way vary from ideological and normative. Ideological means that application of the clause were usually followed by military coup or another spectacular breach of human rights, which at the time of the clauses being in effect happened almost exclusively in the ACP realm, and the EU could not leave it without a response for demonstrating its non-cooperativeness with antidemocratic regimes. The normative justification is that the evolution of the Lomé Agreement served as an etalon for later human rights clauses, the well-defined procedural rules made it evident that clauses are applicable in this context.[93]

Act	Country	Year
Appropriate measures	Togo	1993
	Haiti	2001
	Liberia	2001
	Zimbabwe	2002
	Guinea	2005

[91] European Commission: *Communication COM (95)216 on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries*. May 23, 1995, p. 10.
[92] Lorand Bartels: *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*. Legal Studies Research Paper Series, Paper No. 24/2012, September 2012, p. 9.
[93] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 309- 313.

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Suspension of development aid	Burundi	1993, 1997
	Central African Republic	1991
	Congo	1997
	Djibouti	1991
	Equatorial Guinea	1992, 1994
	Gambia	1994
	Guinea-Bissau	1998
	Haiti	1991
	Kenya	1991
	Liberia	1990
	Niger	1996
	Rwanda	1994
	Sudan	1990
	Togo	1992

Cases when appropriate measures were taken or suspension mechanism was triggered until 2005[94]

In the early 1990s, several suspensions *vis-à-vis* ACP states occurred, including the cases of Liberia, Rwanda, Somalia and Sudan. However – as Riedel and Will emphasize – it is doubtful whether the action was triggered by human rights violation and the application Article 5 of the Lomé IV Convention, or simply the unwillingness and inability to perform the Convention's obligations by and large.[95]

The case of Rwanda following the April-June 1994 events serves as a representative example for a serious human rights violation and how the EU responded to the situation. Firstly, the European Commission suspended the transfers informally. Subsequently, it halted the development aid guaranteed by Lomé IV Convention which amounted for 22 million euros. Whereas the follow-up events provided many turns in paying or not paying until the normalization in July 1995, restoration of human violations led to another suspension of reconstruction aid, while humanitarian aid remained to ameliorate the conditions of the population.[96]

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[94] European Parliament: *Human Rights and Democracy Clauses in the EU's International Agreements (Long version)*. September 29, 2005, Directorate-General for External policies of the Union, pp. 36-37.
[95] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, p. 740.
[96] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, pp. 740-741.

The Lomé IV Convention, later replaced by the Cotonou Agreement, lays down procedural rules for peaceful settlement of the human rights issue. Since the procedure of the two instrument does not differ significantly, it is enough to analyze the one set down by Article 96 of the Cotonou Agreement (ex Article 366a in Lomé IV Convention). First of all, parties undergo an obligation that they exhaust all consultation possibilities (unless it is a case of special urgency, see the legal interpretation under "Bulgarian clause" in section 2.3). The party which finds the other in violation of its human rights obligations shall notify the other, and consultation on the appropriate level shall initiate no later than in 30 days (replacing 15 days of Lomé IV Convention), and shall last for no longer than 60 days (replacing 30 days of Lomé IV Convention, in 2005 amended to 120 days).[97] Finally if the parties do not find a solution acceptable for both sides, "appropriate measures" can be instituted, which may amount to the suspension of the agreement. However, these measures can only be in force while the human rights issue is not resolved – as amended in Cotonou.[98] The approval of the EU on easing the consultation timeframe restraints suggests that it is within the interest of both parties that a solution is accomplished within the consultation period. Nonetheless the 30 and 120 days limit it only an absolutely maximum, less is more expedient – not to mention the possible reference to special urgency at any point if the magnitude of the events require so. I will demonstrate this mechanism and its efficiency through cases of Togo under Lomé IV Convention framework and Fiji under Cotonou Agreement framework.

The very first case in which Article 366a was used is Togo in 1998. The underlying reason for the application of the clause – as observed by Fierro – was the perception of EU observers that election results were published before counting the ballots at all on a large scale. The Commission initiated action upon the release of the Council

[97] *Partnership Agreement between ACP and EC signed in Cotonou*, 23 June 23, 2000, Art. 96.
[98] *Partnership Agreement between ACP and EC signed in Cotonou*, 23 June 23, 2000, Art. 96.

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condemnation of the events, and partial suspension of the agreement took place after a majority decision (unanimity was not reached). The Commission contacted the ACP Council and the Togolese government, but the consultations resulted in an utter failure (Togo did not respond to questions on how the situation would be remedied).[99] Cuyckens identifies an important factor for whether a consultation phase is successful or unsuccessful. The EU tends to take into consideration the opinion of a regional organization – in this case the African Union – because a better understanding arises if peers (i.e. neighbors) of the country in question are involved. In this case, no appropriate involvement of peers were guaranteed in the process and therefore the outcome was clearly not beneficial, while in a similar case of Guinea-Bissau in 2004, African Union played a key role and the efficiency of the consultations and the Article 96 procedure dramatically increased.[100]

For these reasons, the Council left the sanctions in force, although ACP representatives contested that conciliation procedures were not fully explored. The EU's immediate reaction can be explained by the fact that the electoral fraud was conducted while the election itself was EU-funded, whereas the decision did not count in long term aspects (i.e. how can the fairness of future elections be ensured by the suspension?).[101] In addition, the experience on the transparency of the consultation procedure led to the option to involve a third party (an arbitrator) by Article 98 of Cotonou Agreement.[102] Because of the negative economic outcomes of the withdrawal of funds under the 1998 sanctions, it was the Togolese government that initiated consultations under the Cotonou

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[99] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 321-325.
[100] Hanne Cuyckens: *Human Rights Clauses in Agreements between the Community and Third Countries The Case of the Cotonou Agreement*. Institute for International Law Working Paper No 147 – March 2010, p. 58.
[101] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 325-327.
[102] Partnership Agreement between ACP and EC signed in Cotonou, 23 June 23, 2000, Art. 98.

framework in 2004 – with diplomatic incentives from the African Union. A willingness from the government to address the shortcomings of the elections led the European institutions decide on a gradual lifting of sanctions and fully resuming the cooperation by 2006.[103] The case of Togo demonstrates that the clause indeed has an educational factor when there are economic and diplomatic incentives supporting the respect of human rights.

Fiji was also an early case of the Cotonou Agreement's history since the *coup d'état* that triggered the EU's reactions was carried out in May 2000. Although Fiji was barely dependent on EU funds,[104] its ties with the former colonizer, the United Kingdom, put a pressure on the country to fulfill its obligations. Firstly, the Council presidency released a condemnation with a reference to the Lomé Convention at this time – noticed by Fierro – and proposing a wide set of sanctions for the breach of rule of law and civil and political rights. Consultations started on the basis of Article 96 of the Cotonou Agreement, in a constructive but a rather distant manner. This phase was ended by the Commission emphasizing that the new government had no intentions whatsoever to restore free and fair elections and proposed appropriate measures to be adopted.[105] Upon a proposal of the Commission, the Council opted for suspending the transfer of allocated sums under the European Development Fund until democratic elections were held in specific domains, and not to vote for a distribution of a new round of resources until it was carried out. The cooperation was resumed in 2003 when politicians of the opposition were nominated as ministers.[106]

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[103] European Parliament: *Political Dialogue and Human Rights in the Framework of the Cotonou Agreement*. July 2007, Directorate-General for External policies of the Union, p. 10.
[104] European Parliament: *Political Dialogue and Human Rights in the Framework of the Cotonou Agreement*. July 2007, Directorate-General for External policies of the Union, p. 10.
[105] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 338-339.
[106] European Parliament: *Political Dialogue and Human Rights in the Framework of the Cotonou Agreement*. July 2007, Directorate-General for External policies of the Union, p. 10.

However, this case is often quoted as an example when two EU organs took part in the consultation phase but left with a different interpretation: the Council called out for appropriate measures in a rather mild manner than what the Commission suggested, which ultimately led to the fact that the sanctions were not severe enough (humanitarian aid, trade preferences and several other aspects were left intact) and only the announcement of the new allocation round was postponed.[107] In my view, it is quite doubtful whether the partial suspension of the Cotonou Agreement played a key role in changing the mindset of the perpetrators of the human rights breaches on matters of internal politics. Neither the volume of the EU aid suspended, nor was the strong ties with the EU a determining factor but the policy of adjacent countries (Australia, Japan) and a need for internal political reconciliation, therefore it can be stated that the level of dependency on EU relations is a key component of successful utilization of the human rights clause.

Not surprisingly, the system changes and the dissolution of the Soviet Union (and later Yugoslavia) led to a wide-scale trade boom between Eastern and Western Europe. The EC, and later on the EU (particularly the European Commission) did not hesitate to convey agreements with these countries, in which human rights clauses were incorporated – almost exclusively based on the samples of the "Baltic" and "Bulgarian clause". As mentioned before, never did the EC or the EU resort to suspension of the agreement with any of these countries, for which the explanation is manifold: (1) it was highly unlikely that countries in Central Eastern Europe which were on the path of acceding to the European integration as early as in 1991 be subject to any sanction on the basis of a clause but rather connected to the accession, (2) the treaties served the purpose of a political co-ordination between Eastern bloc countries and the EU, (3) the so-called "anticipatory

[107] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, p. 340.

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effect" (to persuade by not concluding the treaty at all if there were significant human rights issues ongoing in a Central Eastern European country) was a more manifest tool than suspension.[108]

Russia is nevertheless one of the closest trade partners for the EU with large-scale mutual interdependence, based on economic (e.g. exposure to Russian imported gas in Europe, trans-Siberian air routes between Europe and the Far East versus alimentation import dependency of Russia) and various other factors. Therefore it is not surprising that the EU – along with NATO and many other regional international organization – treats the relationship with Russia on a *sui generis* basis (not considering it in a "basket" with other CIS countries, unlike how ACP or ENP is set) with exceptional attention and having internal mechanisms/institutions/formations designated for the relationship with Russia.

Fierro identified three instruments on which the Russian-EU cooperation is based: the Partnership and Cooperation Agreement (PCA), the TACIS (Technical Aid to the Commonwealth of Independent States, which expired in 2006 and was replaced by European Neighbourhood and Partnership Instrument – ENPI) and a so-called "common strategy". The TACIS was not exclusively concluded with Russia but with the other former Soviet states as well, and it aimed to lay down a financial agreement that provided funds for transition to market economy and ensuring rule of law. Whereas PCA and TACIS both has conditionality elements (essential elements and non-execution clauses), the common strategy has human rights among its objectives.[109]

Riedel and Will summarize the initial challenges of the PCA between Russia and the EU. It was signed in June 1994, but some months later relations worsened because of the Chechen crisis of 1994-1995 and for this reason the interim agreement's adoption was

[108] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan: The EU and Human Rights. Oxford University Press, 1999, p. 741.
[109] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 343-345.

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put on hold by the Commission. The ratification was made dependent on halting military attacks on Chechen people and the establishment of an OSCE mission. Even though it was launched in March, soon it revealed ongoing massive breaches of OSCE principles along with Article 3 of the Geneva Conventions. Contrary to the published violations, the EU decided to sign the interim agreement with a reference to the positive progress made in Chechnya. The final PCA came into force on the last day of 1997 due to the respected ceasefire agreement.[110]

The partnership with Russia again gained attention in 1999 when the Chechen conflict flared, resulting in a Russian military intervention, considered as disproportionate e.g. by Fierro. First, the Council condemned the situation as it did in the case of Togo then it requested the partial disestablishment of some PCA provisions along with limiting TACIS payments to human rights and rule of law-related fields. Further steps of suspending the most-favored nation status of Russia in EU-bound trade and the 10% preference for its export was considered. Finally no suspension of the PCA was proposed by the Commission or the member states, leaving all sanctions diplomatic and symbolic.[111]

The PCA provides a similar possibility and procedure for suspension as of in the case of the Lomé IV Convention or the Cotonou Agreement, however, this was not triggered. Needless to say, not to act effectively was a result of foreign policy decision that included a balancing of EU interests and the need to promote human rights. The outcome was clearly that possible benefits of the sanctions do not outweigh the loss that the EU would sacrifice: the persuasiveness of the suspension would not be strong enough to make Russia change its mind while the energy resource (oil and gas) deprivation would affect

[110] Eibe Riedel; Martin Will: *Human Rights Clauses in External Agreements*. In: Philip Alston; Mara R. Bustelo; James Heenan:: The EU and Human Rights. Oxford University Press, 1999, pp. 741-742.
[111] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, pp. 343-348.

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the EU negatively. Timely and effective response was thereby sacrificed to a flagrant human rights violation, a scenario that repeats itself during the ongoing Ukrainian conflict: diplomatic measures, asset freezes, visa bans, restrictions for Crimea and measures targeting sectorial cooperation and economic cooperation were implemented since 2014 February, whereas full-scale suspension of the cooperation agreement was not effectuated (it is noteworthy though that this conflict centers on other issues of public international law, such as sovereignty and occupation, and not particularly human rights).

There were plenty of well-known post-system change human rights violations in which there was no agreement in force containing a human rights clause, thus it is worth exploring the legal possibilities of suspending trade relations or development fund payments. A perfect example is the Tiananmen Square protests of 1989 and the EC's reaction given to it. Since the agreement with China did not contain any mentioning of human rights (it would have obviously not been signed by the Chinese party), there was a legal vacuum and lack of any mean of response – as Fierro finds. However, the measures which were indeed adopted were of not *de iure*, but *de facto* and *ex post factum* nature. These sanctions were rather symbolic and did not affect the trade relations between the two sides, in particular withdrawing from military co-operation and arms selling and suspension of participation at high-level meetings and in cultural, social and technical common initiatives.[112] Even though these measures are seen as inapt, lack of inclusion of a clause or reference to human rights deprive the EU or its member states to well-grounded legal response. It is nevertheless true that any other measure, such as diplomatic, political or economic requires an asymmetric interdependence in which the advocate possesses significantly higher bargain power. With the economic and political magnitude and gravity of China, it is obviously hard to accomplish.

[112] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, p. 74.

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It was not always the EC or the EU that unilaterally demanded the reference to human rights in the form of human rights clauses, but often the other signatory (or signatories). During the years surrounding the signature of the Lomé IV Convention, Latin America underwent a wave of democratization and newly elected governments sought a guarantee for respect of human rights – as observed by Fierro. Argentina, for example, considered the inclusion of a human rights clause as a guarantee for its democratically elected government and the safeguard of the rule of law and in addition propagated it among its neighboring countries. The "external supervision" therefore served as a factor in forming new identity, as well as setting a regional precedent to be soon followed by Brazil, Chile and Uruguay.[113] This regional pattern, however, can work counterproductively if one county refuses the incorporation of a human rights clause, meaning that a neighboring country is also inclined not to accept a clause. Australia and New Zealand as presented above are good examples to explore all aspects of this phenomenon.

3.3. Conditionality in preferential trade agreements

In addition to the human rights clauses and other instruments which the EU has in its toolbox to promote human rights in third countries, there is a newly introduced mechanism. The EU's trade policy provides an example where conditionality is applied in trade relation with third countries, meaning that duty and trade benefits are only given on condition that "human and labour rights, environment and good governance"-related international conventions are ratified.[114] This system is the so-called Generalised Scheme of Preferences + (GSP+), which is the second evolutionary step of this trade policy (the GSP arrangements did not have human rights or good governance references). The reform of the GSP system was initiated in 2012 and the GSP+ arrangements are applied since

[113] Elena Fierro: *European Union's Approach to Human Rights Conditionality in Practice*. Martinus Nijhoff Publishers, 2003, p. 215.
[114] European Commission: *Generalised Scheme of Preferences (GSP).*

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January 1, 2014. GSP+ guarantees that the beneficiaries of generous tariff reductions for exporting two-third of all product categories to the EU have previously ratified international human rights conventions, including such basic documents as the International Bill of Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Prevention and Punishment of the Crime of Genocide.[115] As this trade conditionality scheme has just been launched, so far there are only 13 participating third countries: Armenia, Bolivia, Cape Verde, Costa Rica, Ecuador, Georgia, Mongolia, Pakistan, Paraguay, Peru,[116] El Salvador, Guatemala and Panama.[117]

Besides this trade policy, the thoroughly scrutinized Cotonou Agreement not only provided for a human rights clause, but for the first time mentions the observation of rule of law. Not only does Article 9 provide for the respect of rule of law but it also serves with a definition: "The structure of the government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law."[118] However, the notion of rule of law is indivisible from human rights as such, as this aspect scrutinized and concluded in section 3.2. In this section I seek to demonstrate some notable instances of conditionality mechanisms around the world which strive for ensuring the prevalence of human rights and good governance with the policy of sticks and carrots.

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[115] European Commission: *Generalised Scheme of Preferences (GSP).*
[116] European Commission: *Commission delegated regulation (EU) No 1/2014 establishing Annex III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences*. August 28, 2013, para. 3.
[117] European Commission: *Commission delegated regulation (EU) No 182/2014 amending Annex III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences*. December 17, 2013, Art. 1.
[118] *Partnership Agreement between ACP and EC signed in Cotonou*, 23 June 23, 2000, Art. 9(2).

It is worth putting the abovementioned instruments in contrast with the United States' human rights policy in order to identify similarities and differences. The United States has a twofold system for promoting human rights through trade agreements. The Generalized System of Preferences (GSP) was "designed to promote economic growth" by granting preferential, duty-free import for specific products from signatory partner countries.[119] Although the legal mandate of the program expired on July 31, 2013, it has numerous implications for the EU clauses and a substantial application history. The case of Mauritania in the 1990s is a descriptive example for the mechanism's operation. In 1993, the United States suspended benefits on the basis of intensifying human rights violations. The economic backlashes of the sanctions resulted in the amendment of the labor code, signing the UN treaty on banning forced labor and initiating the resettlement of refugees. As an acknowledgements for positive measures, the Clinton government restored benefits in 1999.[120] Doubtlessly this mechanism served as an inspiration for the EU to establish its own GSP (Generalised Scheme of Preferences, not to be equated with Generalized System of Preferences) and the GSP+.

The other dimension is the African Growth and Opportunity Act of May 18, 2000, which "offers tangible incentives for African countries to continue their efforts to open their economies and build free markets".[121] While the GSP focuses on requirements towards civil and political rights, the Act is mainly based on ensuring workers' rights and facilitating a market economy. Aaronson summarizes the scope of rights covered by these two methods as transparency, due process, access to affordable medicines and information, political participation and labor rights.[122] Since the United States tends to

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[119] Office of the United States Trade Representative: *Generalized System of Preferences (GSP).*
[120] Emilie M. Hafner-Burton: *Trade and Development Agreements for Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 3.
[121] International Trade Administration: *African Growth and Opportunity Act*.
[122] Susan Arial Aaronson: *Should We Celebrate the Wedding of Trade and Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 14.

interpret civil and political rights as the supreme and – at least on the level on its own constitutional protection of human rights – the only protected group of rights, it might seem ambiguous that rather economic rights form the basis of Act. A possible explanation lies in the principal nature of the agreements: they strive for establishing a nourishing and safe legal and political environment for investment and payments originating from the United States, therefore the economic aspect overrides auxiliary considerations (i.e. the internal subordination of second generation rights to the ones protected by the Bill of Rights). Finally it is notable that North America was ground-breaking in another aspect of clauses: the North American Free Trade Agreement signed in 1993 between Canada, Mexico and the United States is cited as the first preferential trade agreement to include human rights conditions.[123]

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[123] Susan Arial Aaronson: *Should We Celebrate the Wedding of Trade and Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 14.

4. Conclusion

As Hafner-Burton emphasized, the issue today does not lie on whether human rights should be respected and promoted, but rather their implementation. The importance of human rights clauses lie within the ambiguity that human rights treaties, such as the Covenant on Civil and Political Rights, were not created to provide an efficient framework to solve far-fetching political and societal malpractices.[124] Cultural relativist arguments will always provide grounds for widely phrased reservations and non-compliance. Nonetheless, ever since the Vienna Declaration and the Programme of Action on Human Rights of 1993, the EU made it commitment to the universality, indivisibility and interdependence of human rights,[125] repeating it in its treaty evolution and by adoption of the Charter of Fundamental Rights. Consequently the EU does not leave space in its human rights policy – regardless whether it is internal or external – to relativism.

An important benefit of the existence of human rights clauses between the EU and partner countries is that "[they make] human rights the subject of common interest, part of the dialogue between the parties and an instrument for the implementation of positive measures"[126]. Without them, the EU would be deprived of an important channel to keep human rights on the agenda *vis-à-vis* third countries. It is based on a positive approach which enables a flexibility of application in every situations and observes the principle that not the population but the government should be penalized for its misdemeanor; not to mention that having suspension as an *ultima ratio* seeks to keep the dialogue ongoing

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[124] Emilie M. Hafner-Burton: *Trade and Development Agreements for Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 2.
[125] Der-Chin Horng: *The Human Rights Clause in the European Union's External Trade and Development Agreements*. European Law Journal, Volume 9, Issue 5, December 2003, p. 694
[126] European Commission: *Communication COM (95)216 on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries*. May 23, 1995, p. 2.

to address and solve the issue.[127] In addition, this tool enabled the EU to keep and sometimes even strengthen partnerships with third countries which do not possess a spotless human rights record,[128] while a maintaining clear legal stipulation that no large-scale violation of human rights is tolerated. To support this notion, the educational and preemptive effects of human rights clauses was identified and demonstrated *inter alia* by the case of Togo in 2004.

Human rights clauses serve the goal to establish a link between the implementation of positive measures and other provisions of the agreement. By having the clause, a party has legal grounds for implementing measures in the case of persistent human rights violations.[129] However, the efficiency of the conditionality concept as such can largely be undermined when it is abused to accomplish political aims and economic interests,[130] as it was demonstrated in the case of China or Russia.

The EU besides imposing negative obligation by the human rights clauses in the agreements has other means to promote human rights. The European Instrument for Democracy and Human Rights provides financing for good governance and human rights-related projects, while the Generalised Scheme of Preferences + is a recent initiative to use the same principle as human rights clauses in preferential trade agreements. In addition to this, the Lisbon Treaty provided additional possibilities for the EU's human rights aspirations, including the establishment of the European External Action Service. I sought to mention these other mechanisms and instruments in my research to broaden the vision of the reader.

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[127] European Commission: *Communication COM (95)216 on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries*. May 23, 1995, p. 2.
[128] Der-Chin Horng: *The Human Rights Clause in the European Union's External Trade and Development Agreements*. European Law Journal, Volume 9, Issue 5, December 2003, p. 698.
[129] Council of the European Union: *EU Annual Report on Human Rights and Democracy in the World in 2010*. September 26, 2011, p. 22.
[130] Emilie M. Hafner-Burton: *Trade and Development Agreements for Human Rights?* GREAT Insights, Volume 1, Issue 2. March-April 2012, p. 3.

Besides the EU, not only powerful international organizations have a wide range of similar means applied. The Generalized System of Preferences in the United States also provides a comparable system to the GSP+ (and human rights clauses as such), with extensive case law available. I included the comparison between the preferential trade agreements of the United States and the EU as a transitional chapter to end the practical part of my analysis. However, it should also be mentioned that it is not the exclusive feature of the legal personalities of public international law (i.e. states) to promote human rights. Some non-state actors – especially companies – also tend have a policy related to the facilitation of human rights by means of conditionality. In such cases, the underlying reason is often economic interest (i.e. to avoid reputation loss as in the case of Nike's child labor controversy), but corporate social responsibility (CSR) policies have non-market-oriented human rights related goals as well.

The EU has areas of human rights that have a greater importance for advocacy, especially certain civil and political rights. The abolition of the death penalty is one of its key focuses, and my aim was to explore how effectively it is promoted by seeking examples when the EU had a soft power role – normative, civilian, ethical and civilizing as expanded by Sjursen[131] – in an independent decision of a third country. More importantly, I outlined an extensive list of cases and countries when the EU could successfully use its bargaining power to pressurize a country to withdraw a non-compliant regulation, cease a practice that is a violation of an international human rights treaty obligation or foster good governance.

It is essential to keep in mind a crucial characteristic of the EU external relations: the EU does not strive to exert its dominance by and in its external policy, therefore a larger

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[131] Helene Sjursen: *The EU as a 'normative' power: how can this be?* Journal of European Public Policy, Vol. 13, Iss. 2, 2006, p. 248.

space is left for cooperation and partnership.[132] The development of an elaborate and often used consultation mechanism is a good example of this, codifying a mandatory procedure to reestablish mutual trust while addressing the underlying human rights issue. This cooperative approach always grants possibilities not to resort to suspension, whilst it must be remarked that without the possible reference to cases of special urgency, slow reaction to massive violation of human rights – such as in the exception's inspirational cases of Rwanda or Yugoslavia – would hinder the efficiency of the clause.

A final aspect of cases in which actions based on a human rights clause were carried out cannot be left out of consideration: when it is used, it inevitably means that co-operation, soft forms of persuasion and political dialogue have failed. This can be traced back to findings of the nature and necessity of these clauses, namely the mean of last resort. Although its positive and flexible characteristic is emphasized in order to keep the dialogue ongoing and redress the human rights violation as soon as possible, other forms of persuasion nevertheless offer a more constructive solution supposing that the situation has not reached a point of no return. Consequently, when a clause is used, not only the EU needs to attract its attention and seek fast termination of the systemic breaches, but it should serve as a warning for all members of the international community to become involved.

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[132] Der-Chin Horng: *The Human Rights Clause in the European Union's External Trade and Development Agreements*. European Law Journal, Volume 9, Issue 5, December 2003, p. 698.

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