



**Much Ado about Nothing?  
On the European Union's fight against  
corruption in developing countries under  
Articles 9(3) and 97 of the Cotonou Agreement**

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## **ABSTRACT**

The Cotonou Agreement is the European Union's most important legal measure in the field of development assistance covering 79 developing countries in Africa, the Caribbean and the Pacific (ACP countries). It empowers the European Union to sanction 'serious cases of corruption' where this corruption is related to economic and sectoral policies and programmes to which the European Union is a significant financial partner. During the negotiations leading to the adoption of the Cotonou Agreement the ACP countries strongly objected to the inclusion of the possibility of sanctioning corruption. In practice the European Union has only sanctioned one single case of corruption under the provision, however. Whereas this does not necessarily mean that the sanctioning clause is without an impact, the fact that sanctions have been imposed in only one situation is a strong indication that its impact is rather limited. It is suggested that more effective means of preventing corruption are considered.

## **I. GOOD GOVERNANCE OBLIGATIONS AND EUROPEAN UNION DEVELOPMENT ASSISTANCE**

The European Union is the world's largest provider of official development assistance. In general the provision of this development assistance is closely tied to the recipient countries complying with fundamental principles of human rights and democracy. The European Union's most important legal measure in the field of development assistance is the so-called Cotonou Agreement<sup>1</sup> which covers 79 developing countries in Africa, the Caribbean and the Pacific (the ACP-countries). The Cotonou Agreement in Articles 9(2) and 96 contains a so-called 'human rights clause' which lays down that if a party to the Agreement fails to duly respect human rights, democratic principles and the rule of law, a special procedure may be initiated which ultimately may lead to the introduction of sanctions against the party violating these principles.<sup>2</sup> Today there are several examples of the initiation of this procedure, and in a number of situations the procedure has resulted in the introduction of sanctions against parties that have been in breach of the principles underlying the human rights clause.<sup>3</sup>

<sup>1</sup> Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 - Protocols – Final Act – Declarations, OJ (2000) L317/3.

<sup>2</sup> See for example Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, Martinus Nijhoff, The Hague 2003, and Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford University Press, Oxford 2005.

<sup>3</sup> See for example Council decision 9633/10 of 28 May 2010 concerning the conclusion of consultations with the Republic of Madagascar under Article 96 of the ACP-EU Partnership Agreement.

In its external relations the European Union not only gives high priority to the promotion of human rights and democracy, but also to the promotion of good governance.<sup>4</sup> In this regard the Cotonou Agreement explicitly defines good governance as a 'fundamental element' and makes it clear that where infringement of this 'fundamental element' takes the form of serious corruption, it may give rise to the imposition of sanctions against the party that has not prevented this corruption.

The present working paper considers the Cotonou Agreement's linking between corruption and development. It provides a legal examination of how the obligation to observe 'good governance' (and thus the obligation not to engage in corruption) is laid down in the Agreement (section 2), and it analyses how sanctions may be introduced where a party has failed to comply with the obligation (section 3). The question of misappropriation of development assistance gives rise to the delicate question of whether the donors should trust or control the recipients' use of the means. This question is briefly considered (section 4). Finally, the paper's findings are summed up in the conclusion (section 5).

## **2. GOOD GOVERNANCE AS A FUNDAMENTAL ELEMENT OF THE COTONOU AGREEMENT**

On 28 November 1991 the Council of Ministers and the Member States adopted a resolution on human rights, democracy and development requiring that human rights clauses should be inserted in all future co-

<sup>4</sup> This is for example apparent from the European Consensus on Development, [2006] OJ C46/1 which on several points emphasizes the importance of good governance.

**Article 9(2), last subsection**

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.

operation agreements with third countries.<sup>5</sup> Therefore, today all general cooperation agreements between the European Union and developing countries include a human rights clause. In the Cotonou Agreement the human rights clause is laid down in the last subsection of Article 9(2).

As is often the case with legal texts, the devil is in the detail. Hence, perhaps the most important part of Article 9(2) is the statement that '[r]espect for human rights, democratic principles and the rule of law ... constitute the essential elements of this Agreement'.<sup>6</sup> The terms 'essential elements' refers to Article 60 of the Vienna Convention on the Law of Treaties<sup>7</sup> concerning the termination or suspension of the operation of a treaty as a consequence of its breach.

In other words, by qualifying the provision requiring respect for human rights, democratic principles and the rule of law as an 'essential element' of the Cotonou Agreement, a breach of this provision by a party to the Agreement will constitute a 'material breach'

<sup>5</sup> Communication from the Commission to the Council and the European Parliament – Report on the implementation of the Resolution of the Council and of the Member States meeting in the Council on Human Rights, Democracy and Development, adopted on 28 November 1991, SEC(92) 1915 final, Brussels, 21 October 1992.

<sup>6</sup> Emphasis added.

<sup>7</sup> Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

**Article 60 of the Vienna Convention**

A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

...

A material breach of a treaty, for the purposes of this article, consists in:

- (a) a repudiation of the treaty not sanctioned by the present Convention; or
- (b) the violation of *a provision essential* to the accomplishment of the object or purpose of the treaty. (Emphasis added)

empowering the other party to introduce sanctions through its full or partial termination or suspension.

During the negotiations leading up to the Cotonou Agreement the European Union made it clear that not only did it want a human rights clause to be an essential element of the Agreement. It also wanted to make the observance of good governance an essential element thereby, in effect, empowering the European Union to sanction, first of all, various kinds of corruption in the ACP countries. The latter countries were strongly opposed to this, however.<sup>8</sup> The outcome of

<sup>8</sup> Stephen R. Hurt, "Co-operation and coercion? The Cotonou Agreement between the European Union and ACP states and the end of the Lomé Convention", *Third World Quarterly*, vol. 24, no. 1, pp. 161-176, 2003, at p. 171-172, Hadewych Hazelet, "Suspension of Development Cooperation: An Instrument to Promote Human Rights and Democracy?" ECDPM Discussion Paper No. 64B August 2005, p. 2, William Brown, "An assessment of EU development aid policies" in *EU development cooperation – From model to symbol*, Karin Arts and Anna K. Dickinson, eds., Manchester University Press, 2004, pp. 17-41 at p. 35 and Karin Arts and Anna K. Dickinson, "EU development cooperation: from model to symbol?" in *EU development cooperation – From model to symbol*, Karin Arts and Anna K. Dickinson, eds., Manchester University Press, 2004, pp. 1-16 at pp. 9-11.

**Article 9(3)**

In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.

Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute *a fundamental element of this Agreement*. The Parties agree that only serious cases of corruption, including acts of bribery leading to such corruption, as defined in Article 97 constitute a violation of that element. (Emphasis added)

the negotiations was the compromise text which we find in Articles 9(3) and 97 of the Cotonou Agreement.<sup>9</sup>

Thus, on the one hand, Article 9(3) of the Cotonou Agreement gives a broad definition of ‘good governance’ which must be observed by the parties.<sup>10</sup> On the other

<sup>9</sup> See also Communication from the Commission to the Council and the European Parliament - Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States, COM(98)146 final.

<sup>10</sup> Stephen Kingah, The Revised Cotonou Agreement between the European Community and the African, Caribbean and Pacific States: Innovations on Security, Political Dialogue, Transparency, Money and Social Responsibility, *Journal of African Law*, 50, 1 (2006), 59–71 at p. 65 argues that the good governance provision lacks precision. At the same time this author arguably confuses those measures that may be taken in response to cases of corruption with cases of corruption themselves.

**Article 97 (following 2005 revision of Cotonou Agreement)**

*Consultation procedure and appropriate measures as regards corruption*

1. The Parties consider that when the Community is a significant partner in terms of financial support to economic and sectoral policies and programmes, serious cases of corruption should give rise to consultations between the Parties.

2. In such cases either Party may invite the other to enter into consultations. Such consultations shall begin no later than 30 days after the invitation and dialogue under the consultation procedure shall last no longer than 120 days.

3. If the consultations do not lead to a solution acceptable to both Parties or if consultation is refused, the Parties shall take the appropriate measures. In all cases, it is above all incumbent on the Party where the serious cases of corruption have occurred to take the measures necessary to remedy the situation immediately. The measures taken by either Party must be proportional to the seriousness of the situation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of last resort.

4. Within the meaning of this Article, the term “Party” refers to the Community and the Member States of the European Union, of the one part, and each ACP State, of the other part.

hand, the possibilities of sanctioning failure to duly observe the good governance requirement are rather limited. There are three reasons to this:

Firstly, the provision refers to good governance as ‘*a fundamental element*’ and not as ‘*an essential element*’. The consequence is that

failure to observe good governance will not automatically constitute a material breach of the Cotonou Agreement within the meaning of the Vienna Convention. Indeed, it is hard to see how the European Union would be able to put forward a convincing argument that the good governance provision constitutes an ‘essential element’ of the Agreement.

Secondly, the provision lays down that ‘only serious cases of corruption ... constitute a violation’ of the fundamental element of the Cotonou Agreement. In other words, infringements of the good governance obligation which do not qualify as ‘serious cases of corruption’ appear not to be sanctionable under the Cotonou Agreement.<sup>11</sup>

Thirdly, it follows from the Cotonou Agreement’s Article 97(1) that sanctions are only possible with regard to corruption related to economic and sectoral policies and programmes to which the European Union is a significant partner in terms of financial support.<sup>12</sup> Where this condition is not met, it is difficult to see that the provision gives the European Union a legal basis for imposing sanctions.

As noted above, following the adoption of the Cotonou Agreement the ACP countries showed very clearly that they considered the negotiations with the European Union relating to the good governance clause to be problematic. Thus, in a press release issued shortly after the completion of the

negotiations, the ACP General Secretariat remarked:

...

More sparks threatened when the texts agreed in December on ‘fundamental principles’ were distributed with amendments which in effect placed corruption under the Essential Principles umbrella whilst omitting bribery from the text altogether. ...

The ACP after reviewing the texts agreed during the December negotiations attempted to amend them because they found them to be imbalanced as a result of the overemphasis given to EU objectives, particularly political objectives, while those of the ACP – such as development – were often ignored. Some attempt was made to remedy this criticism but the text still is unbalanced with EU objectives not only repeated ad nauseam but often elaborated whilst those of the ACP, such as the arms trade and the EU’s role in this, do not merit a mention.<sup>13</sup>

The European Commission, on the other hand, hailed the provision as ‘a real innovation’ that was ‘sending a clear and positive signal ...’.<sup>14</sup>

<sup>11</sup> Contrast with Justice C. Nwobike, “The Application of Human Rights in African Caribbean and Pacific-European Union Development and Trade Partnership”, *German Law Journal*, 2005, Vol. 6, No. 10, pp. 1381-1406 at pp. 1382 and 1385.

<sup>12</sup> Contrast with Tenu Avafia and Dirk Hansohm, “Political conditions in the Cotonou Agreement: Economic and Legal Implications”, *NEPRU Working Paper No. 93*, p. 11; available at <http://www.nepru.org.na/index.php?id=140> (accessed 19 October 2010).

<sup>13</sup> Press Release by the ACP General Secretariat on the Conclusion of the Successor Agreement to the Lomé Convention, 14 February 2000, accessible at [http://www.acpsec.org/en/press\\_releases/037900\\_e.htm](http://www.acpsec.org/en/press_releases/037900_e.htm) (accessed 19 October 2010).

<sup>14</sup> Karin Arts and Anna K. Dickinson, “EU development cooperation: from model to symbol?” in *EU development cooperation – From model to symbol*, Karin Arts and Anna K. Dickinson, eds., Manchester University Press, 2004, pp. 1-16 at pp. 10-11. See also Klaus Schilder, Background Paper on the ACP-EU Negotiations on the Future of the Lomé Convention, May 2000, p. 22, available at [http://www2.weed-online.org/eu/texte/lome\\_negotiations.pdf](http://www2.weed-online.org/eu/texte/lome_negotiations.pdf) (accessed 19 October 2010).



### 3. APPLYING THE COTONOU AGREEMENT'S GOOD GOVERNANCE PROVISION

Even though the Cotonou Agreement's good governance provision in Article 9(3) has been formulated so as to oblige the European Union and the ACP countries in exactly the same way, in practice it appears rather hypothetical that an ACP country should invoke the good governance clause against the European Union or one of the EU Member States.<sup>15</sup> Thus, to the extent that the provision is going to be put into practice, it is only likely that it will be against ACP countries. This is also reflected in the fact that Article 97(1) explicitly refers to cases where the European Union 'is a significant partner in terms of financial support ...' thereby only allowing for the sanctioning of breaches of the good governance clause where the European Union is a significant donor to an ACP country.

Article 97(1) lays down that in order for it to apply, the case must concern corruption related to economic and sectoral policies and programmes to which the European Union is a significant partner in terms of financial support. It is not clear what is meant by 'significant partner in terms of financial support'; does it refer to relative size (either *vis-à-vis* other ODA donors or *vis-à-vis* the full costs of the policy or programme in question), or does it refer to the absolute amount donated by the European Union – or perhaps both? On the other hand it appears that it is not a condition for the Article 97(1) procedure to apply that EU funds have been misappropriated – it suffices that

the misappropriation is related to a policy or programme which (also) receives support from the European Union. The European Commission itself appears to go even further in its construction of Article 97(1). Hence in Commission Communication on Governance and Development, it observes that '[t]he consultations procedure defined in Article 97 is to be applied not only in cases of corruption involving Community funds but also more widely, in any country where the Community is financially involved and where corruption constitutes a serious obstacle to result-oriented development strategies. It is thus not confined to cases of corruption directly affecting EC financial co-operation activities.'<sup>16</sup> It is not clear on what basis the Commission reaches this wide reaching interpretation.

Where the European Union considers that the conditions for invoking the good governance provision have been met, it may initiate the procedure provided in the Cotonou Agreement's Article 97. This means that the European Union must invite the ACP country in question to enter into consultations on the issue. Article 97(2) establishes that these consultations shall last no longer than 60 days. If the consultations do not lead to a solution acceptable to both Parties or if consultation is refused, the European Union may 'take the appropriate measures'. These measures must be proportional to the se-

<sup>15</sup> Tenu Avafia and Dirk Hansohm, "Political conditions in the Cotonou Agreement: Economic and Legal Implications, NE-PRU Working Paper No. 93, p.11; available at <http://www.nep-ru.org/na/index.php?id=140> (accessed 19 October 2010).

<sup>16</sup> COM(2003) 615 final. Perhaps this also finds support in the – so far only – Article 97-decision regarding Liberia. Here it is merely observed that: "The European Union has also been deeply preoccupied by the lack of transparency in the public accounting system and by the risks of serious corruption in particular in the management of natural resources and the exploitation of monopolies" cf. Annex to Council Decision concluding consultations with Liberia under Articles 96 and 97 of the ACP-EC Partnership Agreement, 11<sup>th</sup> March 2002, 6885/02. Hence, the application of Article 97 appears to have been founded on general problems relating to good governance.

riousness of the situation. When choosing what measures to impose on the ACP country, the European Union must give priority to those which least disrupt the application of the Cotonou Agreement. In this connection Article 97(3) emphasises that suspension of the Cotonou Agreement must be a measure of last resort.

Until now breach of the Cotonou Agreement's good governance obligation has only led to the imposition of measures in one situation, namely against Liberia in 2002.<sup>17</sup> The decision by the Council of Ministers of the European Union to impose measures was based jointly upon Articles 96 (the human rights clause) and 97 (the good governance clause), and the decision does not distinguish between, on the one hand, measures imposed due to breach of the human rights conditionality clause (Article 9(2)) and, on the other hand, measures imposed due to breach of the good governance clause (Article 9(3)).<sup>18</sup> The measures which were introduced primarily consisted in making the

continued provision of development assistance from the European Union conditional upon Liberia improving its approach to human rights and good governance. The decision was valid for two years, i.e. until March 2004, and whilst new decisions were subsequently taken against Liberia imposing new measures, these decisions exclusively referred to Article 96 of the Cotonou Agreement and not to Article 97 thereof. In other words, these subsequent decisions were only based upon the human rights conditionality clause in Article 9(2).

#### 4. TRUST VERSUS CONTROL

The Cotonou Agreement's provision on good governance illustrates the donors' dilemma between trusting or controlling the recipients' use of the funds which are donated. Corruption related to development assistance funds is particularly problematic for two reasons. Firstly because the funds do not reach the intended recipients so that the alleviation which the funds were intended to produce is diminished. Secondly because it becomes difficult to justify spending tax payers' money on development assistance if the funds do not help those in need but instead end up in Swiss bank accounts.

In recent years corruption has become a focal point for a number of donors, including some of the most important thereof. Nevertheless, based on the view that development assistance is a question of partnership where the recipients must take ownership to the extent possible, the donors generally focus their attention upon the uncovering of the misappropriation of funding whereas they leave it to the recipient countries to sanction the actual perpetrators. In practice this often means that the perpetrators in reality go free. The

<sup>17</sup> Council Decision of 25 March 2002 concluding consultations with Liberia under Articles 96 and 97 of the ACP-EC Partnership Agreement; Council decision 2002/274, OJ (2002) L96/23. See also the House of Commons European Scrutiny Committee, Thirty-first Report of Session 2005-06, pp. 133-136, available at [www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xxxi/34-xxxi.pdf](http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xxxi/34-xxxi.pdf) (accessed 19 October 2010).

<sup>18</sup> Andrew Bradley, 'An ACP Perspective and Overview of Article 96 Cases', ECDPM Discussion Paper No. 64D, August 2005, at p. 3 observes '[n]o State has been called by the EU for consultations under Article 97 of the Cotonou Agreement'. With particular regard to the Liberia case he explains that "[c]orruption was one of reasons for Liberia/EU consultations, but consultations were conducted under Article 96.' This does not appear to be in conformity with the view of the Commission as reflected in Commission Communication on a Comprehensive EU Policy against Corruption, (COM(2003)317 final where it is stated that 'Consultations have taken place in one case, when the European Union were deeply preoccupied by the lack of transparency in the public accounting system and by the risks of serious corruption in particular in the management of natural resources and the exploitation of monopolies in a partner country.'

primary sanctioning instrument left to the donors is to decrease future funding – which, presumably, first of all will harm those whom the development assistance was intended to help rather than the perpetrators.

In this regard the system created under the Cotonou Agreement does not appear to constitute a material improvement. Rather, the main innovation appears to be that the European Union may react to corruption that does not directly concern Union funds. However, there is no obligation on the recipient country to effectively investigate and deterringly sanction those who have benefited from the misappropriation together with those who have failed from effectively preventing it.

Within the European Union the Member States are required to effectively investigate and sanction misappropriation of European Union funds – and if a Member State fails to do this, the European Commission may take legal action against it before the European Court of Justice for Treaty infringement. It may therefore justifiably be asked why European Union funds given to a Member State such as Finland are subject to apparently much tighter control requirements than are the European Union's funds given as development assistance to ACP countries?

Arguably, the idea that development assistance must be viewed as cooperation between equal partners has been brought to extremes that would not have been applied if it had been a true partnership. Ironically, the intentional refusal of applying an efficient control and sanctioning system thus seems to be a reflection of the fact that, by definition, development assistance is not cooperation between equal partners.

It is respectfully submitted that in order to better secure that development assistance funds do not end up in Swiss bank vaults, but instead are used as envisaged to the benefit

of those in need, much more stringent control and effective sanctioning requirements should be considered as part of any agreement between the European Union and a recipient country.

## 5. CONCLUSION

That good governance and fight against corruption has come to play an important role in the European Union is clearly reflected in the Cotonou Agreement. During the negotiations of the Agreement, the ACP countries were however strongly opposed to the inclusion of a 'good governance clause'. In the light of this it appears somewhat surprising that the clause on the matter that eventually was adopted has only led to the imposition of sanctions in one single situation. If this were due to the fact that there was no such corruption it would of course be excellent news. But there are no indications that this is the case. It is however unclear why the clause has been used so little. Is the cause to be found in the fact that the system created by Articles 9(3) and 97 is problematic to put into practice, is the cause due to the European Union's unwillingness to make use of the system, or is the reason rather that the European Union prefers to use other less dramatic means to combat corruption? Irrespective of what the reason may be, the fact that the clause has only been put into actual application in one case strongly indicates that its impact has been rather limited.

On the basis of the above finding, and taking the view that misappropriation of development means primarily harms those whom the means were intended to help, it is argued that it is time to consider the possibilities of creating appreciably more effective control and sanctioning systems.

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