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 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. 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.

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. 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-
operation agreements with third countries. 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’. The terms ‘essential elements’ refers to Article 60 of the Vienna Convention on the Law of Treaties 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’ 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. The outcome of

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6 Emphasis added.

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

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.10 On the other 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.11

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.12 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.13

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

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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.¹⁵ 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.’¹⁶ 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-


¹⁶ 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, 11th 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. 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)). 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
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 deteriously 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.
REFERENCES


European Commission; 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.


Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and


