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Constraints of conditional aid: Analysis of malfunctions and partner perceptions of the EU's external aid conditionality: the consultation procedures of the Cotonou Agreement

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Abstract

Since the early 1990s the European Union uses systematically so called political conditionality in external agreements with its partners. While the number of such agreements multiplies dramatically, their dimensions in terms of implementation and real usage represents inconsistencies that can be identified also as part the EU's strategic acting. Such vagueness creates problems especially for small countries, where the Cotonou Agreement is the most comprehensive example to analyze. This work is interested in the perception of Cotonou's consultation procedure features, identifies and discusses various problems to argue finally that, despite being the most elaborated conditionality-tailored agreement, the Cotonou Agreement's clause presents several weaknesses. In regard to a more general view on applied or non-applied conditionality by the EU in the first part of this thesis we argument that incentive-based or less punitive approaches towards conditionality could be the more functional option for the European Union in the long run.

Key words:
Cotonou Agreement, European Union, Political Conditionality, Consultation Procedures, Sanctions, Non-Execution Clause, Development Aid, Ownership, Human Rights Clause, Partnership, Perception

List of abbreviations

ACP	African, Caribbean and Pacific States
ASEAN	Association of Southeast Asian Nations
AU	African Union
BRICS	State Group of Brazil, Russia, India, China and Sough Africa
CAP	European Common Agricultural Policy
CARIFORUM	Caribbean Subgroup of the ACP States
CFSP	European Common Foreign and Security Policy
EC	European Community
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EIDHR	European Instrument for Democracy and Human Rights
ENP	European Neighborhood Policy
EPA	Economic Partnership Agreement
IFI	International Financial Institution
IMF	International Monetary Fund
MAFF	Multi-Annual Financial Framework
MDG	United Nations Millennium Development Goals
MEDA	Mésures d'accompagnement financières et techniques (EU-Mediterranean Cooperation)
MFN	Most Favoured Nation ('s Clause)
NIS	New Independent States
NGO	Non-governmental Organizsation
OSCE	Organisation for Security and Co-operation in Europe
SADC	Southern African Development Community
TFEU	Treaty of the Functioning of the European Union
UEMAO	West-African Economic and Monetary Union
WTO	World Trade Organisation

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Introduction

Since its conclusion the European Union has refreshed its normative toolkit in upgrading the partnership with the ACP (African-Caribbean-Pacific) countries to an '*equality founded relation'* whereas political dialogue, civil society participation and economic provisions are established under one hat.[1] This paradigm shift is particularly interesting as it is using a participatory approach to interlink several dimensions of development policy to a comprehensive strategy that can simultaneously be regarded as highly institutionalized. Trade relations with the ACP countries have been normalized and introduced into the WTO framework and in the same time standards that allow countries to comply with this comprehensive character have been raised. The development approach has been centered on the human person, who shall be its main beneficiary and *"The Parties agree that respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development."*[2] The EU has therefore established a straighter approach to flagrant human rights and democratic principles violations in regard to the realization of development policy. As the non-execution clauses integrated in the Cotonou Agreement are considered to be the most elaborated of its nature, they are far from being alone in Europe's history of external relations where clauses are part of the EU's acting since the early 1990s. Such clauses, which are subsumed under an external conditionality strategy by the EU, present an ambivalent record in different dimensions which has above all repercussions on those who need to bear its costs. Thus it is interesting to interlink the pre-supposed distinctiveness of this clause with the perception of the ACP about its outcomes and applied procedures, especially at points where major difficulties can be identified. These difficulties will be spotted on various levels, showing disfigurements for a tool that is normally considered to be a rather successful one.

A) Research design and structure

The aim of this thesis is to (1) reflect the EU's partners' perception of applied political conditionality in mutually defined agreements (2) with a focus on development policy and the EU-ACP partnership agreement. To this end, the analysis is conducted on two different layers where political conditionality is eminent: on a legal and general theoretical stage that is set

[1] Keukeleire/Mac Naughtan: The Foreign Policy of the European Union; Palgrave Mac Millan: New York: 2008; p. 289

[2] Horng, Der-Chin: Human Rights Clauses in the European Union's External Trade and Development Agreements; European Law Journal, Vol. 9, 5/2003: p. 681

with the conclusion and negotiations of the agreements and on the operational level when it comes to (partial) exclusions after this conditionality has not been fulfilled/executed in practice. Given that perceptions are obviously subjective impressions, it is not the aim of this research (and therefore impossible) to formulate a general statement in the end in which aid conditionality will be evaluated to be entirely positive or negative, either punitive or demanding. The idea is rather to compensate a gap in literature by gaining new ideas and expressions from an, until now, neglected perspective. It is therefore foreseen to consult and dialogue with ACP-organizational officials and ACP-states' officials that are preoccupied by the question of political conditionality. The advantage of dialogues with experts, in this case political consultants, is the methodological openness, non-standardization and its adaptability to the research goal. The conducted dialogue is relational to the interest of the researcher. It is therefore an effective pre-requisite for index-linking dialogue and the immediate generation of knowledge.[3] The latter seems to be of high importance for the operational stage of conditionality implementation where such detailed knowledge is missing until today. The aim is therefore to create information at points were we identify lacunas in literature. Next to the creation and sharing of knowledge, experts and elites are in a powerful position by being able to take influence on political processes and decision making what increases its methodological interest for this research. As such interviews are not standardized there will be no aim to quantify results to any extent. Therefore, not the quantity of conducted interviews leads to meaningful results, but the depth and the detailed character of responses. Results should rather depend on the interaction that is created through this talk and finally a high challenge will be the *a postiori* re-introduction of the gained (subjective) knowledge into the analytical framework of what has been produced so far.[4]

At first, the legal perception and the perception in principal of aid conditionality are re-put into question in order to gain an idea of how or whether general sensitivity for this topic differs among the partners. To accompany this idea it is discussed in a first part the theoretical notion of external conditionality, important historical bullet points, its legal foundation in EU law and its use made by the EU. It is planned to bring out the diverging points of view from both sides and to reintroduce them to the paradoxes of partnership/equality and an apparent

[3] Littig, Beate: Interviews mit Eliten – Interviews mit ExpertInnen: Gibt es Unterschiede?; Forum Qualitative Sozialforschung; Article 16, Vol. 9, 3/2008; p.4, p. 9, see also: Pfadenhauer, Michaela: At Eye Level: An Expert Interview – A talk between Expert and Quasi-Expert in: Bogner, Alexander et al. (ed.): Interviewing Experts; Houndsmills, Bastingstoke; Plagrave MacMillan: 2009, p. 83

[4] Due to the denial of the partners, founded on delicate political situations, vocal interviews have not been recorded. Equally, Email correspondences have not been annexed to this work. Further explanations on citations and their context can be obtained by contact via mail (david.broghammer@gmail.com).

consensus on the need to apply more and more conditionality today. On one hand authors introduce only briefly the critical position of the ACP states during negotiations of new agreements or mid-term revisions, while on the other hand the fact of conditionality seems to be mutually agreed. We deem it therefore necessary to introduce first of all, after an explanation of the political dimension of the Cotonou agreement, a theoretical analysis of the notion of conditionality and its different explanatory models, where we categorize development aid conditionality in regard to other conditionality models. Hence, incoherency and contradictions are discussed and criticized. We finish by arguing that the EU approach regarding conditionality has obvious lacks, especially in regard to its application with different partners worldwide.

Secondly, on the operational level the consultation procedure within the Cotonou Agreement is analyzed deputizing for non-execution clauses. During this regard different procedural steps of the consultations are put into questions and the gain of additional information is pursued: how does each partner behave exactly during the phases and "*on table*"? How is power distributed? How do the mid-term revisions affect the power relationship among partners? How the ACP secretariat is exactly included into the process? The last question is also important in regard to the EU's commitments to multilateralism or international organisations. Finally it should be assessed, what are possible changes or modifications that could be undertaken and what are the outlooks for a better partnership after the actual agreement has expired?

B) Academic interest and literature breakdown

Prior to the formulation of the research direction a short overview about prior academic achievements on this topic should be given that limit the research frame.

On one hand work is progress about the Cotonou Agreement in general, its negotiation procedure, the analysis of the Lomé conventions[5] and the passage to reinforced political conditionality. Others pick up Cotonou's economic dimension, more precisely the conclusions of Economic Partnership Agreements (EPAs), as a field of research in arguing about the outcomes of neo-liberal canalization in the framework of development aid. The emergency of this economic dimension of Cotonou is probably the most controversial one but will be mainly overlooked in this work.

[5] Laakso, Lisa/Kivimäki, Timo/Seppänen, Maaria: Evaluation of Coordination and Coherence in the Application of Article 96 of the Cotonou Partnership Agreement; Studies in European Development Co-operation Evaluation 4/2007, Aksant Academic Publishers; Amsterdam: 2007, p. 28

Next to it, experts in the field are broadly focusing on consistency and inconsistency in the EU's development aid policy or give a more general overview of the Cotonou Agreement that does not go far beyond the analysis of the legality of *political conditionality*.[6] In contrary, the outcomes and the use of consultation procedures such as the Articles 96 and 97 under the Cotonou Agreement have hardly been subject to deepened interest by the academic community until now.[7] Generally sanctions are primarily analyzed in their function as a special tool for the European Union but scarcely as an integrated part of broad CFSP concepts[8] where EU development policy can also be located today. This nexus will be of special interest when we cross finally the line between CFSP sanctions and development aid suspensions in the course of this research.

Nevertheless, some prior workflow on Cotonou's consultations exists: until now we find several works, as provided majorly by authors from the *European Center for Development Policy Management (ECDPM)* who observe critically the use of the Cotonou's consultation procedure. Mackie and Zinke focus on a general analysis of the utilization of Article 96, Hazelzet discusses the procedural and intrinsic acting of the EU in cases between 1989 and 2000[9] and Bradley and Mbangu give an effective and clear overview of Article 96 cases. Also, and maybe in the most complete way, Laakso, Kivimäki and Seppänen conduct a study about coordination and coherence from a European perspective in the utilization of the consultation procedures by using qualitative and quantitative approaches. Finally – and beyond the mainstreaming literature – Broberg is taking the other way in analyzing the role of Article 97, and the difficulty to create a constant application of the good governance and corruption clause, and reflects that it *"[…] is however unclear why the clause has been used so little."*[10] yet. The non-utilization of the consultation procedures to potential abusing countries is also subject to Del Biondo's analysis, who stresses inconsistency in EU's action that are linked to other strategic interests. It is consequently becoming visible why it is not the

[6] Del Biondo, Karen: EU Aid Conditionality in ACP Countries: Explaining Inconsistency in EU Sanctions Practice; Journal of Contemporary European Research, Vol. 7, 3/2011, p. 380

[7] Mackie, James/Zinke, Julia: When Agreement breaks down what next? The Cotonou Agreement's Article 96 Consultation Procedure; European Centre for Development Policy Management Discussion Paper 64A; August 2005; p. 1; Laakso/Kivimäki/Seppänen: p. 28

[8] Portela, Clara: Where and why does the EU impose sanctions?; Politique Européenne, No. 17, 2005/2006, p. 86 [cited further as: Portela (2)]

[9] In this sense it is interesting to further look at the EU's normative approach in the cases following under the Cotonou Agreement.

[10] Broberg, Morten: 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; Danish Institute for International Studies Working Paper 29/2010; Copenhagen: 2010, p. 11

aim to produce another case study report on the utilization of consultations, but to look for their general shape and problematic perceptions of their outcomes. Other secondary sources consist mostly of working papers and articles, as well as notes from the European Council or Commission that can particularly serve us as in-depth case study analysis to confirm or deny assumptions. To this end the policy archive of the EU's Consilium serves as a good case study overview, at least until 2010. Recent consultation procedures (i.e. Guinea-Bissau 2011) have not been published by Consilium yet[11] and underlie the coverage of newspaper and online articles or further EU press releases.

The prior work shall be a good foundation to the upcoming analysis; however most of the ECPDM discussion papers have been published in 2005 in regard to the first revision procedure of the agreement.[12] It is therefore also important bear in mind the recent developments or rather the continuity of proceedings of the practical application of the consultation procedure. Also the evaluation of Article 96 and 97 cases so far is not giving a final clue about whether consultations have a clear positive or negative record: there is an disturbance in the use of Article 96 and 97 and consultations are a quite positive tool, too.[13] Re-transferred on the general debate about conditionality and clauses, *"For some, the human rights clause does not go far enough, while for others it goes too far."*[14]

The overall scarcity of literature is, of course, a major reason for paying deeper interest on the topic, what is especially valid for the second part of this thesis. Even more, if we do read political conditionality and the consultation procedures as a medal with two sides in this Agreement,[15] and EU international agreements generally as recent phenomena.
Secondly, from a more abstract perspective, conditionality and clauses seem to have a different impact once one is able to impose them unilaterally. The state of partnership characterizes normally itself through a balance of power[16], but when mutual obligations are

[11] http://www.acp.int/fr/content/consultations-under-article-96-cotonou-agreement-between-government-bissau-and-european-unio
The policy archive of the consultation procedures has been closed for public access since June-August 2013
[12] The work of Laakso et al has been published in 2007 but treats case studies until 2005.
[13] See both argumentative sides: Slocum-Bradley, Nikki/Bradley, Andrew: Is the EU's Governance good? An Assessment of EU Governance in its Partnership with ACP States; UNU-Cris Working Papers; W 2010/1, Bruges: 2010, p. 10; Portela, Clara: Aid suspensions as coercive tools? The European Union's Experience in the African Caribbean-Pacific (ACP) Context; Review of European and Russian Affairs, Vol 3, 2/2007: p. 49
[14] Miller, Vaughne: The Human Rights Clause in the EU's External Agreements; House of Commons Library Research Paper, RP 04/33, p. 30
[15] Zimelis, Andris: Conditionality and the EU-ACP Partnership: A misguided Approach to Development?; Australian Journal of Political Science, Vol. 46, 3/2011, p. 390
[16] Slocum-Bradley/Bradley: p. 9

not assigned equally, as it is de facto the case in this sort of development aid agreements, the notion of partnership is metamorphosed: This conceptual divergence shall be subject to this Master thesis where (1) I would like to point out the perception of conditionality, political dialogue and consultations from an ACP perspective in a distributed power relationship. With this reflection it is meant to (2) fill in a gap in literature because – with the exception of several mentions and statements – recent work about this perspective is missing.

I) Mutually recognized, growing and contested political conditionality in the EU-ACP relationship

"It is undeniable that, on a global level, the EU has not applied existing human rights and democracy clauses in an even-handed fashion, […] the degree of discrepancy of in the EU's implementation of human rights and democracy is still striking."[17]

The linking of democratization, human rights and good governance has become nowadays a basic feature for states, international and regional organizations. Europe and the ACP countries share long historical ties with each other which started with European colonial imperialism and having been formalized at first during the process of de-colonialisation with the conclusion of the Yaoundé convention that marked still the continuity of colonial development relations. In 1975 the Lomé convention was adapting the relations to new standards while former European colonies organized in a multilateral ACP forum.

The Cotonou Agreement was signed in 2000 after one and a half year of negotiations. The long phase of negotiation for such a multilateral agreement is logic, different opinions of budgetary very light and heavy weighted countries need to be taken into account until everyone has signed the agreement. Furthermore the country coalitions on both sides are structured in cleavages what does not facilitate the process.[18] The general objective of the Cotonou partnership is to deepen and modernize the EU-ACP relations and to take turns at the precedent Lomé I – IV conventions, whereas the conclusion of Lomé IV meant already a significant step towards the constructive character of the Cotonou Agreement. Nevertheless the Lomé partnership resulted in various disadvantageous developments for the ACP countries as their individual EDF-share decreased due to an increasing number of countries, their European market share decreased as well and the poverty rate remained unchangeably high.[19] It has then become common sense on the EU level that the establishment of Economic Partnership Agreements (EPAs) within a new comprehensive framework would be the only alternative to lift ACP countries out of this misery.[20]

[17] Bartels, Lorand: Human Rights and Democracy Clauses in the EU's International Agreements; European Parliament Directorate-General for External Policies of the Union Policy Study; DGExPo/B/PolDep/Study/2005/06; September 2005, p. 37

[18] Byron, Jessica: Singing from the same Hymn Sheet: Caribbean Democracy and the Cotonou Agreement; Revista Europea de Estudios Latinoamericanos y del Caribe Vol. 79, 10/2005, p. 4

[19] Hangen-Riad, Sylvia: Finding your way through the Cotonou Agreement; Friedrich Ebert Stiftung Publication; 08/2004, p. 3

[20] Hurt, Stephen R.: Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP states and the end of the Lomé Convention; Third World Quaterly, Vol. 24/1, 2010, p. 163

The new agreement's primary objectives are the eradication of poverty by matching the UN Millennium Development Goals (MDGs) and the incremental integration of the ACP countries into the world economy by ending preferential and reciprocal trade agreements between the partners and steering them towards new Inter-regional free trade agreements. The eradication of poverty as "*primary objective*" as well as in "*the long term*" matches with the general goals of European development policy grounded in Article 208 TFEU and the linkage between poverty reduction and democracy, human rights and the rule of law is manifested in the *European Consensus on Development* of 2006.[21]

Since its conclusion, the agreement has been revised twice (according to its Article 95 in a five-year period), in 2005 and 2010, while it will be revised again in 2015 and expire by 2020. To date, neither the 2010 version of the Agreement has been ratified by all ACP countries nor is a post-2020 concept on table: a clear thematic elaboration about the points to negotiate are about to come in the following months after this text for the 2015 revision. However, until now the Cotonou Agreement is described as the most "*modern concluded partnership*"[22] agreement between the North and the South since the EU has concluded its first so-called "*partnership agreement*" with the Mediterranean in 1995.[23]

Its framework is divided into three different but complementary pillars: development cooperation, economic and trade cooperation and the political dimension. Those pillars rely on four principles: partner equality, actor participation, continuous dialogue and regionalization.[24] It is expressively based on ownership and mutual confidence between the parties.[25] Simultaneously regional integration is also becoming more and more important, especially on the ACP side, when it comes to political dialogue and – eventually – to consultations.[26] In the following work we will focus our questions on the third pillar of this agreement, with a strong regard on the principles of continuous dialogue, participation and equality. For this reason, the phenomenon of political conditionality needs to be regarded in

[21] Article 208 TFEU; Del Biondo: p. 383

[22] Santiso, Carlos: Reforming European Union Development Cooperation: Good Governance, Political Conditionality and the Convention of Cotonou; American Consortium on European Union Studies Working Paper 2002.4, 8/2002, p. 17; Miller: p. 16; the character of being the "most modern" agreement is primarily defined by the new "essential elements" and "fundamental elements" standards introduced with the Cotonou human rights clause.

[23] Slocum-Bradley/Bradley: p. 8

[24] http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm

[25] Slocum-Bradley/Bradley: p. 8

[26] Cuyckens, Hanne: Human Rights Clauses in Agreements between the Community and Third Countries – The case of the Cotonou Agreement; Katholieke Universiteit Leuven, Institute for International Law, Working Paper 147/2010, p. 56 ff.

more detail. First, theoretically, then applied in practice by the EU in regard to development policy.

1) From Lomé to Cotonou: The extension of political demands

A) Influences and a new negotiation framework.

Since the 1970s the relations between the EU and the ACP have been influenced by exogenous changes (i.e. trade liberalization, end of communism) in the entire world and endogenous changes (i.e. EU enlargement, EU Commission reform, and integration deepening) within the partners that mark the shift between the Lomé I-III conventions, Lomé IV, Lomé IVbis, and the Cotonou Agreement. Next to significant changes in EU-ACP trade relations a re-evaluation of the agreement's political profile has taken place. Although economic growth has always been and remains a crucial part of the partnership's profile,[27] political circumstances are gaining now in magnitude for the overall assessment of the partnership.

While the *political dimension* was only a paragraph worth of importance in the Lomé convention, by being stated as the "*objectives and principles of cooperation"* in its first part, it has now evolved to a proper chapter in the Cotonou Agreement.[28] On the EU's side it was primarily the European Parliament that came off the fence to close up political conditionality with economic conditionality.[29] The Lomé III convention has introduced high priority to Human Rights after successful negotiations that were escorted by tumults around the South African apartheid regime, but before the 1995 revision of Lomé IV has taken place, Human Rights standards have only been mentioned in the Preamble of this convention with a reference to the Universal Declaration of Human Rights.[30] While the passage to Lomé IV introduced unspecified political and economical conditionality the 1995 revision (passage to Lomé IVbis) has introduced human rights and democracy as *essential elements* into Article 5.

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[27] Börzel, Tanja A./Risse, Thomas: One size fits all. EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law; Working Paper, Workshop on Democracy Promotion, Center for Development, Democracy and the Rule of Law, Stanford University, October 2004, p. 9; Babarinde, Olufemi/Faber, Gerrit: From Lomé to Cotonou: Business as usual?; Paper prepared for eight Biennal conference of the European Union Studies Association, 3/2003, p. 3 ff.; Börzel/Risse deliver a very clear and short overview table about the significant economic and political changes from Lomé I to Cotonou.

[28] Lomé IV Convention; Agreement Amending the Fourth ACP-EC Convention of Lomé, signed in Mauritius on 4th November 1995, Article 5 ; see Annex to this work; Cotonou Agreement, revised version of 2010; Art. 8-13; Title II of the Cotonou Agreement's first part is explicitly dedicated to the "Political Dimension" and detached from the General Objectives of the Agreement.

[29] Börzel/Risse: p. 10

[30] Hazelzet, Hadewych: Suspension of Development Cooperation. An instrument to promote Human Rights Democracy?; European Centre for Development Policy Management Discussion Paper 64B, 8/2005, p. 2; Zimelis: p. 392

[…] Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of this Convention.[…] [31] The so called "*mid-term*" review of the Lomé convention has also firstly introduced a suspension clause (Article 366a) and linked it to the necessity of these political elements of Article 5. Certain nuances that are later introduced to the Cotonou Agreement are made already, namely the possibility of a *partial suspension* or a differentiation in cases of potential *special urgency* situations.[32]

At this point the introduction of a political dimension to the mid-term revision of the Lomé Convention does not mark the shift from a merely non-political agreement to a sudden highly politicized issue: The emphasis on the importance of political processes in the agreement's wording has been realized but all EU-ACP relationships in history still remain characterized by highly political circumstances in practice.[33] New is only the contracted compendium of conditional performance.

Within this status upgrade after Lomé and the passage to Cotonou other developments should be evoked that sharp the political dimension of this new agreement: broad participation, dialogue, mutual obligations, differentiation and rationalization are new principles to the re-negotiated partnership.[34] In this way, the wording of the agreement has significantly changed: terms such as "*partnership*", "*ownership*" or "*dialogue*" enter into the contract in order to give the EU-ACP relations the new image of full equality. Quickly, the revolutionary innovations of the agreement are grounded in the extension to a larger number of stakeholders which are private actors on one hand and civil society actors on the other.[35] In contrary to this image, the ACP countries have been in a vulnerable bargaining position since the beginning of the negotiations to the new partnership: the ACP started with a relatively open and unfixed position on the trade agreements, but by being reluctant to engage with the EU's proposal. While the EC was in position of being a unique negotiator, the ACP countries had logically

[31] Lomé IV Convention; Agreement Amending the Fourth ACP-EC Convention of Lomé, signed in Maritius on 4th November 1995, Article 5 (1),3
[32] Lomé IV Convention; Agreement Amending the Fourth ACP-EC Convention of Lomé, signed in Maritius on 4th November 1995, Article 366a
[33] Hurt: p. 162; this argument is important to notice since according to Hurt, other authors point out that as long as the EU was in preferential trade agreements with the ACP, the political or systemic question had not to be posed. But truly, already the fact that these preferential agreements existed, a political binding of the countries to the EC cannot be neglected.
[34] Arts, Karin in: Babarinde, Olufemi/Faber, Gerrit [edit.]: The European Union and Developing Countries – The Cotonou Agreement; Martinus Nijhoff; Leiden/Boston: 2005, p. 160
[35] http://www.acp-eu-trade.org/index.php?loc=faq/ACP-Secretariat-FAQ.php

different preferences on trade issues what resulted in the flattering outcome of gaining three additional years of transition but leaving the negotiation table with more or less empty hands.[36] One of the best examples for the weak negotiation position was the introduction of *good governance* as an additional fundamental element to the Cotonou Agreement. The ACP did not wish the introduction of a complementary conditional element but couldn't succeed:[37] the argumentation behind was that essential elements, especially the principles of democracy and the rule of law, where more or less indirectly covering all provisions set out by good governance. Secondly, in connection with the upcoming debate about strategic ownership, the priorities of how to use funds are feared to diverge between the recipient government and the donor.[38] An additional clause was therefore regarded as a paternalistic undertaking and was only accepted by the ACP when it won't be added to the essential elements portfolio.[39] This failure of negotiation will interest us later in that study. The main challenge of the ACP remained thus by strengthening their internal coalition building when it comes to merge individual interests[40] and the high concentration on trade provisions has automatically repercussions on the insertion of political conditionality settings.

The newly placed political dimension of the Cotonou Agreement is to find in Title II, Articles 8-13 and covers political dialogue, the *essential* and *fundamental elements* to the agreement, peace building and conflict resolution, the fight against terrorism and the non-proliferation of weapons of mass-destruction and, since 2005, migration.[41] The integration of peace building and conflict resolution are two newly added parts of the agreement that affirm its comprehensive character: the EU made the experience that total government repression could lead to state failure that is an easy breeding ground for insecurity and terrorism.[42] Development aid and right political circumstances become more and more interrelated and in

[36] Lacombe, Henri-Bernard Solignac: Effectiveness of Developing Country Participation in ACP-EU negotiations; Working Paper, Overseas Development Institute London; 10/2001, p. 16 ff.; For example, small island states and states within the Caribbean are less dependent upon EU trade than Sub-Saharan African countries what results in different negotiation preferences.
[37] Arts: p. 162
[38] Telephone Interview with ACP Official, 15th August 2013, notes of the author
[39] Miller: p. 40
[40] Arts: p. 174 ff.
[41] Cotonou Agreement, revised version of 2010; Art. 8-13; see Annex of this work; in the original sense, the non-proliferation of weapons of mass destruction was meant to be covered by the essential elements. During the revision consultations the ACP were strongly opposed against the inclusion into the essential elements form. The main argument was the simultaneous non-interdiction of manufacturing and stockpiling of these weapons. For further reading and divergences on the International Criminal Court see: Cotonou Agreement Draft Joint Report, ACP-CE 2104/05, 15th February 2005.
[42] Laakso, Lisa: Politics and Partnership in the Cotonou Agreement in: Gould, Jeremy/Siitonen, Lauri: Anomalies of Aid; Interkont books No 15, University of Helsinki, Helsinki: 2007, p. 121

the same time difficult partnerships are meant to be maintained.[43] The 2005 Africa Strategy interlinks democracy promotion with EU safekeeping interests. While for the EU these security-related points were becoming more and more important, the ACP consent to these revision programs was lured by the further disclosure of the multi-annual financial framework (MAFF) in a sort of package-deal.[44] Slow-going negotiations about migration issues have topped this complex framework[45] and made it finally a lethargic achievement.

B) The novelty: introducing essential elements, fundamental elements and political dialogue

For this work in particular, the placement and team work of Articles 8 and 9 are of a significant importance as they are connected explicitly to the consultations of Articles 96 and 97 that have the potential to suspend parties from the agreement.[46] This shows a higher flexibility and compared to the previous conventions, the Cotonou Agreement introduces thus a higher responsibility for the partner state in its actions.[47]

Concretely, Article 9 defines the importance of several elements to the Agreement's political dimension in regulating *essential* and *fundamental* elements and is now strengthening the EU's commitment for putting political circumstances further to the heart of the agreement.[48]
The respect for Human Rights, democratic principles and the rule of law are essential elements.[49] The term *fundamental element*, which now contains *good governance* and *serious cases of corruption*, has received a textual upgrade in the Cotonou Agreement since it was only *"a particular aim"* within the Lomé framework.[50] Including also the prevention of bribery cases, it can be seen as the "*political and institutional environment that upholds human rights, democratic principles and the rule of law […]"*[51] and therefore guarantees their essential character. But the formulation remains vague: What is clearly understood under

[43] Laakso: p. 121
[44] Crawford, Gordon: The EU and Democracy Promotion in Africa: High on Rhetoric, Low on Delivery? in: Mold, Andrew: EU Development Policy in a changing world; Amsterdam University Press, Amsterdam: 2007, p. 173; Slocum-Bradley/Bradley: p. 21
[45] Arts: p. 165 ff.
[46] Cotonou Agreement, revised version of 2010; Art. 8 (2), Article 9 (3); While in the Lomé Convention Article 5 did not take references to Article 366a, the new Articles 8 and 9 under the Political Dimension integrate a textual relation to Articles 96 and 97.
[47] Jacquemin, Ode: La conditionnalité démocratique de l'Union européenne. Une voie pour l'universalisation des droits de l'Homme ? Mise en œuvre, critiques et bilan; CRIDHO Working Paper 2006/03, p. 8
[48] Mbadinga, Moussounga Itsouhou: The Non-Execution Clause in the Relationship between the European Union (EU) and the African, Caribbean and Pacific States (ACP), German Law Journal, 3/2002, [1]
[49] Cotonou Agreement, revised version of 2010; Art. 9 (2), (3)
[50] Arts: p. 163
[51] Cotonou Agreement, revised version of 2010: Art. 9 (3),1

democratic principles and the *rule of law* is not defined by Article 9,[52] what makes it sometimes difficult (as we will see below) to assign a breach's nature to either one or the other. In contrary, Hurt argues that the Article's elements are defined in sufficient detail for a good application,[53] what reflects the manifold discourse in literature. This might be true in regard to predeceasing agreements and keeps the toolbox large, but the question, whether or not the elements' elaboration is sufficient, remains highly discussed. It will be though necessary to reintroduce the questions to the affected countries, not only in regard to their evaluation of it, but also in terms of legal security in general.
With a regular evaluation of the country's situation, taking account of its special *social, cultural, economical and historical* context, it is emphasized since the 2010 revision that these elements are valid to ACP as well as to European countries,[54] while before the mutual character was limited to the term *'party'* that was meant to refer to both sides.

What has been mentioned beforehand about the role of Human Rights in prior revisions of the 1995 Lomé Convention is applicable to Political Dialogue in the passage to the Cotonou Agreement: The Lomé IVbis Convention mentions political dialogue only as a brief element in its preamble:[55] The Article 9 preceding Article 8 defines the necessity of steady political dialogue between the parties to foster the good application of these elements in order to strengthen the cooperation between parties. The dialogue between signatories should be *balanced* and *deep*, its objective is the *exchange of information* to better understand the partners' priorities.[56] For accomplishing that, no fixed timeframe is assigned to when and how long political dialogue should take place. Political dialogue is therefore permanent, taking place in Brussels, and, on a government or public opinion level, and it is practically established through delegations. The degree of effort and pressure the EU is putting into political dialogue is highly dependent on the debated subject and very flexible, so that no pre-defined formal frame is given. The confirmation of the 2005 mid-term review came late from the ACP side due to the use of Article 8: the ACP wished a full exploitation of this Article to prevent quick passage to consultations. Since the revision of 2010 more priority has been set on the inclusive establishment of ACP regional, sub-regional and national-parliament level,[57]

[52] See also: Arts: p.162; Zimelis: p. 390
[53] Horng: p. 171
[54] Cotonou Agreement, revised version of 2010: Art. 9 (4)
[55] Lome IV Convention, revised version of 1995; Preamble; modification as part of the 4th revision
[56] Cotonou Agreement, revised version of 2010: Art. 8 (1), (2)
[57] Cotonou Agreement: revised version of 2010: Art. 8 (5) – (7); ECDPM Policy Paper: p. 2; Telephone Interview with ACP official; 15th August 2013, notes of the author; one example of high debate intensity is

as well as to the already mentioned civil society organizations, what presents a novelty in the application of political dialogue that should be now adapted to realities of regional integration in the southern hemisphere.[58] In its concrete meaning the article shall prevent the request for Articles 96 and 97 on one hand[59] and to assess the under Article 9 contained essential and fundamental elements on the other.[60] This shall ideally happen in form of so called "*rolling programming"* which is in other words the constant monitoring of the goals set out for the eligibility of EDFs envelopes through political dialogue.[61] Also by distinguishing from political dialogue (Article 8) and the possibility to invoke a consultation procedure due to an agreement's breach (Articles 96 and 97), the Cotonou Agreement plays an exceptional role within the large scope of external agreements that the EU concluded. In other EU partnership agreements the distinction of political dialogue and consultations is not given and the Cotonou Agreement has a non-execution clause that is solely connected to the breach of essential elements.[62] This feature is one example for which the Cotonou Agreement is described of being probably the most modern external partnership agreement of the EU what automatically re-poses the question of consequences of a more "*sophisticated*" political conditionality. Naturally, the declaration of a *modern character* is conducted from a normative EU-position that sees in the introduction of this additional disposition a step to higher complexification and better individual treatment. We will show in the second part of this work, that this has problematic outcomes in the theoretical discussion and that a more complex article team play does not guarantee a more satisfying result. But before coming back entirely on the Cotonou Agreement in the second part of this work, the discussion should be abstracted more towards the principles that steer the construction of EU agreements' political dimensions.

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homosexuality with the state of Cameroun, but also as a form of continuous dispute with the ACP group. Other subjects are treated with lower intensity. In those cases the EU has a softer approach.

[58] Bartels: p. 52

[59] Cotonou Agreement: revised version of 2010: Art. 8 (2), (8)

[60] Hangen-Riad: p. 5

[61] Hurt: p. 172

[62] Bartels: p. 51, p. 35; Bartels provides a very consequent and detailed analysis of different human rights clauses that the EU concluded. His work, originally meant as a support to a European Parliament research, helps us later on to a) distinguish this "most modern" character of the Cotonou Agreement from other agreements and b) to introduce it into our legal discussion.

2) The EU's external political conditionality as a tool

A) The notion of political conditionality in EU policy fields.

"In using political conditionality, the EU sets the adoption of democratic rules and practices as conditions that the target countries have to fulfill in order to receive rewards such as financial assistance, some kind of contractual association, or – ultimately – membership."[63]

Since 1945 the concept of interior state sovereignty and the idea of not sub-ordering to the willingness of other states has become an essential and autonomy-guaranteeing concept for the conclusion of international conventions. In contrary to this trend one was not able to prevent the progressive development of various conditionality mechanisms that increased especially during the 1980s and 1990s.[64]

The EU uses political conditionality in several areas when it comes to external policy making. On one hand political conditionality plays a crucial role in EU enlargement process in the adaption of norms and governance capacities by future member states,[65] like it has found its peak for the EU in the Copenhagen Criteria from 1993. Between 1990 and 2000 the EU introduced new methods of screening, establishing guidelines and benchmarking towards the progress in the adaption of the *acquis communautaire* to exercise pressure on unclear pro-democratic developments in Central and Eastern Europe. Generally it is stated that conditionality paired with a potential EU accession leads to a better in-line with economic and political reform dynamics in the target country and presents the best incentives for complying with the promoted standards. The higher the self-identification of the target country and the identification of the government with the values and rules of the EU community, the better conditionality usually bears fruit.[66]

On the other hand the EU requires in political conditionality a feature for bi- and multilateral agreements in trade and aid, where accession perspectives to the EU are not given and the main preoccupation is democratic regression and mismanagement that could lead to

[63] Schimmelpfennig, Frank/Scholtz, Hanno: EU Democracy Promotion in the European Neighbourhood: Political Conditionality, Economic Development, and Transnational Exchange; National Centre for Competence in Research Working Paper No. 9; Zurich: 2007, p. 5

[64] Ethier, Diane: La conditionnalité démocratique des Agences d'aide et de l'Union européenne ; Etudes Internationales, Vol. 32, 3/2001, p. 495 f.

[65] Schimmelpfennig, Frank/Sedelmeier, Ulrich: Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe; Journal of European Public Policy, 11/4; p. 669; Schimmelpfennig/Scholtz: p. 20

[66] Balfour, Rosa: EU conditionality after the Arab spring; European Institute for the Mediterranean Publications, June 2012, p. 15; Vanheukelom, Jan: Political conditionality in the EU's development cooperation – pointers for a broader debate; GREAT Insights, Vol. 1, 2/2012, p. 11 ; Börzel/Risse: p. 27; Abusara, Adel: Fighting the Beast: Theory and History of Conditionality Policy of the EU; Western Balkans Security Observer, Carl Schmitt and Copenhagen School of Security Studies, No. 13, 2009, p. 56

inefficient partnership implementation.[67] These two types of political conditionality rely, of course, on different prerequisites, as for the latter examples the "*final carrot*" of becoming part of the community is missing. Also, literature feels consent that a difference in terms of application consistency is evident and that the EU acts rather incoherently towards its partners when it concludes agreements with distant countries.[68]

Seen from an abstract perspective, conditionality can be either interpreted as a voluntary adaption in a learning process, such as socialization or norm diffusion or as a process of imposition and pressure.[69] Transferred to the political layer, when it comes to a definition of *political conditionality*, opinions differ quickly about the purpose of the notion: On one hand *conditionality* can be seen from a rational point of view where the imposition of measures on another player are pursued because they are beneficial to the norm setter. They are therefore the product of power relations between rational choice-determined parties and follow a *logic of consequentialism.* On the other hand *political conditionality* is defined as the imposition of a measure by one actor who believes that this measure carries positive and fertile outcomes for the development of the other actor. Based on the belief in norms the imposing actor takes into account the situational identity of the other and gives orders.[70] The steps are considered as simply *appropriate* by the agenda setter who is therefore following a *logic of appropriateness.*[71]

While most authors push forward competing definitions of conditionality it should not be the aim to look for either coercion or voluntary nature because in reality both concepts work often complementarily. In a sender/recipient relation each side is has a different perception of the situation, from a norm-based point of view and from a rational choice perspective as well. Opinions how to tackle problems differ consequently automatically.[72]
For us it is therefore important to distinguish (as above) between conditionality with an accession perspective to the EU (a future equal status within the community) and conditionality that remains grounded on a donor/recipient relationship for an undefined or "*eternal*" period of time: In contrary to development aid, political dialogue and conditionality

[67] Santiso: p. 3
[68] Schimmelpfennig/Scholz: p. 3
[69] Agné, Hans: European Union Conditionality: Coercion or Voluntary Adaption? Turkish Journal of International Relations; Vol. 8, 1/2009, p. 4
[70] Saltnes, Johanne Dohlie: The EU's Human Rights Policy – Unpacking the literature on the EU's implementation of aid conditionality; ARENA working paper, No. 2, March 2013, p. 13
[71] Agné: p. 2
[72] Ibid.: p. 5 ff, p. 11

are of vital importance in terms of membership perspectives[73] as the above stated legislation and capacity building have absolutely to be aligned with EU standards through these modules. Schimmelpfennig and Sedelmeier identify the dominating character of their *external incentives model* that presupposes rational bargaining of the actors for coherence and variation in rule transfer and governance adoption, where the EU is following a strategy of reinforcement by reward.[74] Here the point of departure is crucial: Supplementary EU enlargement funds are made available once conditions are met. But the direct influence on policy and governance adaption through reward distinguishes the conditionality character that is adopted towards candidates or potential candidates from development policy. In this logic, the direct influence of *rule transfer* that marks visibly the models presented by Sedelmeier and Schimmelpfennig, is missing (also the *lesson-drawing* and *social-learning model*) are difficult to be applied in this context. In contracted EU development policy the condition setting is generally retrospective in regard to the payments that already take place and direct rule transfer in terms of an *acquis* is not demanded as it is part of the state's internal strategy. The shape of a political system through norms and values that are at best compatible and integrated into those of International Organisations is rather the central focus.[75] These systems have then to define their own way of complying.

It is therefore interesting to observe, to which extent conditionality is of an assent's nature, therefore *'a mutual arrangement by which a government takes, or promises to take, certain policy actions, in support of which an international financial institution or other agency will provide specified amounts of financial assistance'*[76] In regard to this work, it is chosen at the beginning of this chapter the definition of Schimmelpfennig/Scholz, who emphasize conditionality as a '*use*' and '*have to*'-instrument that is *delivered* (somehow *arranged*) by the European Union. Introducing this definition of Killick, conditionality is a *mutually agreed* asset from the recipient's point of view where the government puts itself in a voluntary subordination. Although explaining the same phenomenon, each definition introduces a

[73] Börzel/Risse: p. 11
[74] Schimmelpfennig/Sedelmeier: p. 671
[75] Compare to Hurt: p. 174; Hurt argues that this is the principal influential aim of the Cotonou Agreement.; further see: Lavenex, Sandra/Schimmelpfennig, Frank: EU rules beyond EU borders: theorizing external governance in European politics; Journal of European Public Policy, Vol. 16, No. 6, p. 800 ; The various models discussed and applied by Schimmelpfennig et al do explain how the EU could take influence on the accession process. Some, like the discussion about how the EU externalizes governance (Lavenex/Schimmelpfennig) are not mentioned. However, this is not an integral part of the research where it is the aim to emphasize structural differences between the model of enlargement and the one of development cooperation.
[76] For a definition of conditionality that focuses merely on this mutual agreement, see Zimelis' quotation of Killick (1998); Zimelis: p. 395

proper characteristic that confront themselves at a dividing line: conditionality can be seen as a tool being used and as a clear agreement, too. Börzel and Risse offer a synthetic definition at this point as describing conditionality as an opportunity of manipulating the cost-benefit analysis of the targeted country,[77] what stresses a subliminal coercive character of this notion without naming it. While the argument about *reciprocal recognition* is well known, the coercive relationship resulting from it should be mentioned more often instead.

These examples are far from covering the whole debate about conditionality but emphasize the difficulty of stating that political conditionality is either one or the other phenomenon but rather a situational and/or individual perception of specific actions. It is a broad concept and so it is highly dependent on the nature of relation that exists between the partners. This discussion has a central character for this work as it is the aim to identify conditionality not only as a new achievement in terms norm compliance but also of as a flexible tool. Secondly, as we find out that this individual/party perception is crucial for the understanding of conditionality, a look across the border is indispensable to cover all aspects of this process.
For the better understanding and for the forthcoming research it is first of all necessary to focus on the promoted aid conditionality by the EU and try to point out, what conditionality approach the EU uses in the Cotonou Agreement.

B) Political conditionality in development aid: the EU's approach

In partnership agreements the framing of political conditionality can be a powerful tool of influence: It is needless to say that development aid conditionality can be considered as a top down approach between the partners[78] because it embraces universal norms that are considered as good on one hand, but are also part of strategic interests of the donors on the other.[79] Political conditionality embraces the development procedure of these norms and shapes the attitude of donors towards their aid allocation.[80] Consequently we could presuppose that it can neither be assigned entirely to a *logic of appropriateness* approach nor

[77] Agné: p. 4 f.
[78] Smith, Karen E.: Engagement and conditionality: incompatible or mutually reinforcing? In: Youngs, Richard [edit.]: New Terms of Engagement; Foreign Policy Centre and British Council Publications; London: 2005, p. 23; The author carries out valuable contributions to the theoretical discussion that goes beyond the treatment of accession conditionality.
[79] Schmitz, Andrea: Conditionality in Development Aid Policy; Stiftung Wissenschaft und Politik Research Paper, RP 7 Berlin, 8/2006: p. 11
[80] Zanger, Sabine C.: Good Governance and European Aid – The Impact of Political Conditionality; European Union Politics, Vol. 1, 3/2000, p. 296

to a *logic of consequentalism* approach in practice, as elements from both approaches drive its construction.

i) Influences and obstacles for the paradigm

In international development aid history *political conditionality* is the result of an unsatisfactory experience with sole economic adjustment in recipient countries. Throughout this experience, the record of policy changes and political reformism has been considered to be less efficient.[81] The influence of a country's political and social circumstances has been identified as a crucial factor for its economic performance, what incited donors to no longer ignore the state of democracy and of human and civil rights. The idea is to get capital mobilized if political reformism is given. This shift introduces new challenges for donors and, above all, recipients: The difficulty of political reform that development aid wants to touch is grounded in the complexity of domestic distribution channel control and the social relations behind it. Following this, recipients have to fulfill more obligations than before to receive aid.[82] Simultaneously the question, what kind of change conditionality should entail needs always to be present: several authors point out that conditionality can either change short term behavior or recipient government's political and economic reforms and human rights records, but fails to *buy* democracy and a culture of political reformism entirely: There is thus an interesting gulf observable between conditionality on one hand and causal impact on domestic policies on the other.[83] To that end no causal relationship between fundamental governance reform and aid payments can be proven empirically.[84] The same phenomenon, as Schimmelpfennig and Sedelmeier stress, is already hard to prove for enlargement conditionality[85] and it becomes visible that a*cquis communautaire conditionality* seems to have a higher impact than *democracy conditionality*.[86]

It is to observe a significant perspective change in European development policy by the agenda setting of political conditionality during the 1990s which took its first obvious

[81] Zimelis: p. 395
[82] Schmitz: p. 15 ff., Telephone Interview with ACP Official, 22nd August 2013, notes of the author; it is stated that the usage of EDF funds has become the most complicated method for fund using what could possibly be a reason for the seldom invocation of the Article 97 procedure.
[83] Smith: p. 24, Schimmelpfennig, Frank/Sedelmeier, Ulrich: Conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe; Journal of European Public Policy, 11/4, p. 670
[84] Santiso: p. 16; Vanheukelom: p. 11; Youngs, Richard: Democracy Promotion as external governance?; Journal of European Public Policy, Vol. 16, 6/2009, p. 896, (cited further as Youngs [2])
[85] Schimmelpfennig/Sedelmeier: p. 670
[86] Youngs [2]: p. 896

influence on the 1995 review of the Lomé convention.[87] After requested by the Council, lots of revisions to aid provision have been done up to 1995 that demanded a strategic operational realization of development objectives to the extent that powerful outcomes can only be achieved if there is functioning democracy and trustworthy governance.[88] Especially for the re-negotiation of Lomé IVbis the Commission published early a consultation process guide with its green paper in 1996 which is pointing out as a major result that before, *"[…] the institutional and economic policy situation in the recipient countries has often been a major constraint."*[89] for development and that the social and economical dimension, the institutional and the public sector as well as trade and investment need to be strengthened.

Still today, the donor approach to development aid of the EU is criticized for having been too technocratic for long time what has been put on the agenda of the *EIDHR* in 2002 or of the *Accra High-Level Forum* 2008, which was contributing to a push forward of ownership in a *outcome effectiveness* paradigm rather than in an *aid effectiveness* paradigm that is more procedure-based.[90] After the introduction of EIDHR the EU's approach to democracy promotion has also visibly shifted from a static democracy measuring perspective such as the holding of elections to a more project-focused point of view that strengthens local NGOs and grassroots movements and links rule-of-law-projects with human rights issues.[91] The European Consensus on development grants developing countries further the *"[…] primary responsibility for creating and enabling a domestic environment for mobilizing their own resources, […]. These principles will allow an adapted assistance, responding to the specific needs of the beneficiary country."*[92]

Notwithstanding, these changes have not prevented the EU from the reproach of predominantly applying a narrow concept of development that is not taking into consideration broader economic, social and cultural conceptions.[93] Farther along, in regard to political conditionality or governance the EU has not developed any proper approach that is fundamentally new, what stays not without criticism. A revolutionary approach to good

[87] Arts: p. 156
[88] Santiso: p. 6
[89] European Commission, Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century; COM(96) 570 final, p. 13
[90] Mackie, James/Klavert, Henrike/Aggad, Faten: Bridging the credibility gap. Challenges for ACP-EU relations in 2011; Policy and Management Insights; European Centre for Development Policy Management; No. 2, 2010, p. 2
[91] Youngs, Richard: European approaches to democracy assistance: learning the right lessons?; Third World Quaterly, Vol. 24, 1/2003: p. 127 ff., p. 130, (cited further as Youngs)
[92] Joint Statement by the Council and the representatives of the governments of the Member States, the European Parliament and the Commission: The European Consensus on Development, 2006/C46/01, (14)
[93] Slocum-Bradley/Bradley: p. 11

governance is not precipitating on the Cotonou Agreement where for example *"[…] only serious cases of corruption, including acts of bribery, […] constitute a violation of that agreement."*[94] The concepts remain shaped by the International Financial Institutions (IFI), such as the World Bank or the IMF,[95] and the broad idea of *good governance* was working as a hinge to link economic provisions managed by the Bretton Woods institutions with political circumstances.[96] But this shouldn't say that their concepts remained static in course of recent history: after having used a very demanding approach in terms of conditionality, the IFI have recognized notably with and after the Stiglitz-era that conditionality does neither buy politics and should evolve.[97] Under the hat of Wolfensohn, the IMF and the World Bank have established a comprehensive paradigm for development aid that replaces the allocative approach of before and covers features which are inspiring largely the comprehensive character of the Cotonou Agreement (strategy ownership, civil society participation, private sector inclusion, regionalization)[98]: What is interesting to see is that *conditionality* has already been a major tool for the World Bank to achieve macroeconomic reforms in lending countries at a time where the EU's relationship with developing countries in the south was just about to enter into Lomé's preferential trade agreements. This approach has been given a disastrous record as closely one of three countries was able to meet requirements that have been set by the IFI.[99] According to Stiglitz lending based on conditionality has even *'contributed to the country's problem'*.[100] *"One of the important results emerging from recent research on aid is not only that conditionality is ineffective, but that aid is highly effective in good policy environments."*[101] By having recognized right political circumstances as decisive criteria then, the game of conditionality has been restarted by the EC on the layer of good functioning institutional environment. To underline the need for this development, the EU argued after the entering into force of Lomé IVbis, that in contrary to the IFI, it represents sole a *political entity* in itself.[102] This is a very interesting point. While the Bretton Woods Institutions lost

[94] The Cotonou Agreement, Article 9 (3)
[95] Santiso: p. 6
[96] Schmitz: p. 9
[97] Abusara: p. 57; Youngs [3]: p. 3
[98] http://www.who.int/trade/glossary/story009/en/index.html ; the link provides a list with the most important key points of this paradigm. It is interesting to see in how far the Cotonou Agreement matches the IFI's paradigm.
[99] Blake, Richard Cameron: The World Bank's Draft Comprehensive Development Framework and the Makro-Paradigm of Law and Development; Yale Human Rights and Development Law Journal, Vol. 3, 159/2000, p. 162
[100] Stiglitz, Joseph E.: Participation and Development: Perspectives from a Comprehensive Development Paradigm; Review of Development Economics, Vol. 6, 2/2002: p. 176
[101] Stiglitz: p. 177
[102] European Commission, Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century; COM(96) 570 final, p. 7

more and more legitimacy in course of the years, the EC/EU could visibly strengthen its democratic reason of being. What is far more striking than the simple fact is the self-legitimating of political conditionality through the argument of being itself a powerful political entity. We will see in subchapter 3) that such a discourse has also problems in terms of application, as political entity does not mean a pure integration of all policy fields.
However, while the Cotonou's and the IFI's paradigms show a common ground in their discourse it is interesting to see that where the adherence to conditionality is moving more and more away in the comprehensive approach – because considered as ineffective – [103], the EU maintains and enlarges its conditionality strategy toward development aid. In other words: ownership and self-determination are allowed in terms of *possession*, but *property* remains in the hand of the donor.

As a change in political culture is not to influence by donors it is therefore a logic outcome that strategies for development need to be built up increasingly by partner governments and that the concept of ownership must be re-defined as well.[104] *"Conditionality cannot substitute or circumvent domestic ownership of and commitment to reform. Furthermore, it can have perverse effects, as it tends to undermine democratic processes […]"*[105] which are already in place and do not correlate with the donor's ideas. This happens for example when basic societal structures do establish (spontaneously) a powerful or working concept that is not matching to the ideas of country strategy papers or programming benchmarks, because not suddenly recognized or simply invisible for Western eyes.
Under domestic ownership it has to be distinguished afterwards between sole *government ownership* or *country ownership*. In other words, whether only the recipient country's political and economic elite, or whether micro-entities and citizen movements can also participate in development aid strategy planning. *"The basic idea is that if a country is not seriously interested in reform, it will find ways around conditionality, so that conditionality will fail."*[106] Is ownership though a necessary component for conditionality to work? It is also interesting to see, as Crawford argues, that the EU limits its approach to democracy and state reform one way on liberal streamlining.[107] So even if we would consider conditionality to

[103] Stiglitz: p. 169, p. 176; of course, EU and IFI conditionality rely on different logics. While IFIs have applied conditions on *lending*, the EU is occupied with a *no-return policy* or at best an aid for trade logic. Probably, the inter-generational burdens, as Stiglitz mentions it, are far more to feel through long-term depth-making.
[104] Schmitz: p. 13
[105] Santiso: p. 16
[106] Drazen, Allan: Conditionality and Ownership in IMF Lending: A Political Economy Approach; Tel-Aviv/University of Maryland Working Paper, November 2001, p. 5
[107] Crawford: p. 168

have influence on long term political change, these state reforms evade largely the participatory possibilities given through ownership. Steady adjustments that need to be undertaken can slow down the overall democratic process.

This means that complexity is even higher and that it is therefore difficult to apply a narrow concept that is focused on either/or conditionality, excluding also layers where development aid succeeds less explicitly. Good examples are areas like the transfer of knowledge, the development of unrecorded democratic organization and/or inter-generational education that are not tangible for evaluations. To this end, if not perceived the same way, *ownership* and *conditionality* could enter into conflict and create sources of misunderstanding between both sides:[108]

Also, the used forms do not present any sensitive approaches to culturally diversified regions. Such sensitivity is only measurable during project implementation phases but fails to be part of previously concluded partnership agreements.[109] Secondly, and maybe more importantly, the conflict between ownership and conditionality is the logical outcome of mistrust of the donor country toward the recipient. Reasonably this mistrust is difficult to be switched off and could carry the promoted concepts into a final dilemma where it is difficult to grow out (as concept of *conditionality*).

As it will become visible later in 3), a satisfying application of new ideas lacks not only on a common perception of the country's situation but also of sufficient coordination among donors.

Literature argues about the positive or negative character of EU human rights clauses and about the opposite approaches of *incentive* and *punitive conditionality*. Considering the EU to take more and more *positive conditionality* in its external action, following a definition of K.E. Smith, conditionality applied in the Cotonou Agreement can be qualified as at least *partly negative.*[110] This is the logic consequence, as *"[…] 'negative conditionality involves the reduction or suspension of [already existing] benefits should the recipient not comply with stated conditions.'"*[111], it could be applicable to the consultation procedures of the Cotonou Agreement. This stands in contrast to entire *positive, incentive-based conditionality* where aid flows are increased if a country presents remarkable efforts, as we can observe it in the EU

[108] Schmitz: p. 6, Vanheukelom: p. 11
[109] Börzel/Risse: p. 30
[110] Smith. p. 23;
[111] Abusara: p. 54

enlargement process[112] that we presented briefly before. At least, for the 2008-2013 EDF tranches 3 of 22 billion Euros have been labeled as such incentive-oriented aid flows that are mobilized after democratic and rule of law changes have taken place. Unfortunately these tranches are to share among 70 states and when all bilateral aid flows of other European or extra-European countries are counted on top, the final tranche that presents EU *incentive conditionality* for this country becomes marginal.[113] In cases of the violation of *essential* or *fundamental elements* to the Cotonou Agreement instead, recipient governments are sanctioned by the interruption of aid flows that are gradually restored after the target government has found its way back to political normality. Conditionality has therefore an additional *ex post* character. It is part of the agreement additionally to the prior agreement's conclusion, what would define *ex ante* conditionality[114] and distinguishes development aid conditionality clearly from accession conditionality. Secondly, the EU is introducing a sanction mix that is trying to tone down the character of negative sanctions by putting measures for the re-allocation of funding later on and thus giving the consultation procedures a more positive character. The idea behind is, despite the sanctioning of a country through the cutting of aid, to refinance measures that contribute to remedy the reasons that led to the sanction imposition.[115] It is evident in the same time that these positive measures are not thinkable without a prelude of sanctions, equally it is questionable the sustainable character of these measures in regard to the not given correlation between conditionality and the change of a political culture.

ii) Denying or misusing political conditionality.

What happens if this is the case? Several reasons are put on the agenda to argument for a non-acceptance of EU's conditionality. The example of Cuba as the only ACP non-signatory to the Cotonou Agreement is the most important example to analyze at this point, where its perception is of significant interest.

But first it should be acknowledged that a punitive way of maintaining conditionality can have problematic outcomes for the whole process: aid strategies, if not sufficiently owned, are probably not intrinsically accepted by the partner governments and result finally in friendly gestures that conceal serious problems in order to fulfill the donors' commitments.[116] In this

[112] Smith: p. 23
[113] Youngs, Richard: The end of democratic conditionality: good riddance? FRIDE working papers, No. 102, 2010], p. 9, (further cited asYoungs [3])
[114] Abusara: p. 55
[115] Bartels: p. 39
[116] Vanheukelom: p. 11

situation, political reform would have been bought, but it wouldn't match with the real policies applied what could make donor-recipient relations more difficult because becoming more in-transparent. When the game is not honestly played, and partner governments understand conditionality merely as an intervention in their interior public sphere,[117] it is to fear that too much focus on aid conditionality drifts probably away from the original meaning of development cooperation, namely the sustainable improvement of tools that contribute to further political changes.[118] Simultaneously, important power relations in the countries are neglected through this approach and less democratic partner governments could consider conditionality as a non-legal intervention into their proper sovereignty.[119] Self speaking, this could also happen when civil society organizations that are surrounded by authoritarian governments are naively and unconditionally financed, but the aim to reform towards democracy is not a button that can be pushed. Rather more this (possible) development shows that a differentiated approach needs to be applied and that a *"one size fits all"* is awkward. Since a couple of time now, the (at least academic) confession to punitive conditionality is decreasing and incentive conditionality is considered to be the much more productive alternative.

The argument about meeting at eye level is a major reason for denying partnerships with the EU: As long as auto-determination and state-sovereignty are not respected during the negotiations for partnership agreements, the Cuban government does not see any way to enter into a comprehensive partnership framework.[120] At this point the worrying about not being treated as an *equal partner* in the proper sense of its meaning is considered as decisive. Of course, this argument is hardly be tenable if the economical regional influence of the EU as an entity was so huge that countries wouldn't have much of a choice. But growing (inter-)regional relations with emerging economies (as Venezuela, Brazil or China), as well as bilateral investments from EU-countries seem to be more and more able at the time to compensate potential gains from a restricted framework. The principal reproach is therefore the neglecting of the potential that is drawn from these new emerging economies that do not base their proper partnership agreements on this non-execution clause-conditionality. Political conditionality would accordingly enter into conflict with an *'analysis of the international agenda'* that would be unrealistically underestimated by the EU. The perception of the EU's

[117] Ethier: p. 499
[118] Vanheukelom: p. 11
[119] Schmitz: p. 10 ff.
[120] E-Mail correspondence with Cuban State Official, 2nd July 2013

acting is therefore less norm-based than hegemonic and consequently seen as an outdated *"[…] colonial anachronism"*; also because it is difficult for the ACP countries to tear down the historical linkages that tie them to the European continent.[121] The EU has therefore a card in its hands that allows a privileged approach but during the forthcoming analysis it should be borne in mind whether the agreement's post-colonial "*relic of history"* can be an effective partnership model for the future[122]

C) Assessing Human Rights Clauses in EU Foreign Policy: History and Legal base

Before approaching to the concrete implications of Cotonou's consultation procedures a closer look should still be taken on how the EU integrates Human Rights and suspension clauses and how they are historically and legally based. Concretely, there are only a few cases to observe, where the EU has made use of Human Rights and Democracy clauses in its agreements[123] but the theoretical implementation is rich and surprisingly diverse.

i) The Historical development of EU external Human Rights Clauses as a global divergence.

As human rights, democratic principles and the rule of law are essential elements to the present agreement, they have been grown throughout its historical development. This is finally not surprising since the EU was pursuing *human rights* as an externalization on the international level with its first moral-driven measures which are known as the *Uganda Principles*: The human rights violations under the Idi Amin regime in 1977, but also in the Central African Republic, Equatorial Guinea and Liberia in the 1970s have inspired the EU to pay further attention on these issues in a structural way as the Export stabilization mechanisms (later on referred to as STABEX and SYSMIN for mining) for 46 benefiting countries had an automatic character and were thus difficult to be stopped.[124] The further established EU Human Rights policy was then firstly developed additionally to national policies.

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[121] Ibid. and E-Mail Correspondence of 15th July 2013

[122] The same question is posed by Nickel. See: Nickel, Dietmar: What after Cotonou? The Future Cooperation between the EU and the African, Caribbean and Pacific (ACP) States; Stiftung Wissenschaft und Politik Research Papers, 6/2012; Berlin: 2012, p. 6 ff.

[123] Youngs [2]: p. 897; Youngs is thereby referring to a study of Emerson et al.(2005) by stating that *"[…] it is well established that the EU is not drawn to the systematic use of punitive conditionality outside the accession process. All its third country agreements include, and in several cases have strengthened, provisions for punitive measures to be adopted in response to democratic shortfalls. In practice such provisions have rarely been used."*

[124] See: Nwobike, Justice: The Application of Human Rights in African Caribbean and Pacific-European Union Development and Trade Partnership; German Law Journal, Vol. 6, 10/2005: p. 1383; Zimelis: p. 391; Bartels: p. 25

The developed principles can be understood as a reaction on the reproach that was made until the late 1990s, namely that the EU engagement against human rights violations and democratic principles breaches was not following clear and transparent logics.[125] One reason for that is the long time monopolistic belief in developmentalist theories that equalize development with economic prosperity. A trickling down effect is produced automatically after overall economic progress has been achieved[126] and human rights violations should not occur since everyone should theoretically benefit from it. The argumentative logic as it is used today has been therefore inversed at the time. Development was a pre-condition for the respect of Human Rights. The following idea to include direct UN Declaration on Human Rights references was failing in the negotiation procedure for Lomé II with strong disagreement on the EU's side and opposition by the ACP, so that the internally agreed Uganda principles were implemented as a Council decision with general character.[127]

Later on democratic transitions in Latin America, Africa and in Central and Eastern Europe were reference points that needed to be supported. Often covered up with the rather revolutionary focus on Central and Eastern Europe, the African continent has known a wave of democratic reconstruction through the holding of national conferences and what could be translated as *constitutional roadworks* inspired by a strong generalization of the paradigm of individual-focused liberal democracy in the beginning of the 1990s.[128] At the same time a proverbial explosion of conclusions of new international trade agreements can be observed. It has become of high importance to connect development, human rights and democracy and so did the Commission take the initiative to adopt a Communication where it stressed the need for a more coordinated approach of all Member States to human rights action. After that the Member States formulated their first initiative in June 1991 on the European Council on Human Rights in referring to the previously adopted principles of the Commission communication.[129] To ensure the causality between agreements' objectives the term good governance has been introduced: It was detected that these principles can only be ensured when reasonable management and transparent political and social decisions are given. So did

[125] Hazelzet: p. 14
[126] Zimelis: p. 391
[127] Bartels: p. 26; the Uganda principles state that the Council of the EU should ensure that aid flows that are going to Uganda are not any longer contributing to the maltreatment of Human Rights.
[128] Guèye, Bubacar: La Démocratie en Afrique : Succès et Résistances ; Pouvoirs, 129/2009, pp. 5-29 ; p. 6 ; the author gives a good overview of positive and negative outcomes of this development. What is very interesting to see is that major negative outcomes stated by him cover with democracy-related reasons for invoking consultations: the stay of coups d'états, intransparent elections or sudden constitutional modifications.
[129] Horng: p. 682

the communication also foresee possible negative measures on a public or confidential level to grave abusers.[130]

The most important Commission's Communication from 1995 anchored *human rights clauses* finally for every external partnership (neighborhood, trade and association) agreement by attributing them a standard wording and making general references to relevant human rights instruments,[131] whereby quality and scale differ according to the agreements' nature: At first Mediterranean agreements did not contain development aid provisions, but since the conclusion of the MEDA agreement technical assistance tools have been implemented and with them a suspension clause. Nevertheless the Barcelona Process beginning in 1995 has offered Mediterranean states an association perspective regardless of their commitments to democracy and also Balkan states have received membership outlooks while serious conflicts were still in ongoing.[132] Despite the introduction of essential elements clauses into bilateral agreements with all MEDA states, the EU has, with the exception of Libya, never made use of them.[133]

After 2000 the EU has begun to apply its conditionality approach on its neighborhood policy that it has developed with the direct enlargement process in the 1990s.[134] In contrary, for Neighborhood agreements preferential trade relations are in the foreground. No membership options are given, a suspension clause is left out (especially for bilateral agreements with the NIS states) and breaches of the agreement can be solely handled by applying *appropriate measures*: "*The Community reserves the right at all times to take all appropriate measures including, where the Parties are unable to reach a mutually satisfactory solution in the consultations foreseen in previous Articles or where this Agreement is denounced by either Party, the reintroduction of a system of autonomous quotas […]"*[135] A possible spill over of the achieved ENP approach is overshadowed by remaining strong security and military interests of the EU in the south Mediterranean. Also at that point, the use of negative conditionality in the agreements was practically limited to criticism.[136] The initial agreement of the EU and ASEAN did not contain any human rights provisions and even after their

[130] Horng: p. 682; Bartels: p. 27 f.
[131] For the history of human rights clauses in European Action: Cuyckens: p. 20 ff. ; see also contributions of Arts: p. 158 f.; Zimelis: p. 395; Miller: p. 15
[132] Schimmelpfennig/Scholz: p. 10
[133] Balfour: p. 16
[134] Balfour: p. 16
[135] Agreement between the European Community and the Government of Ukraine on trade in certain steel products; L 232/46, Article 10 (5); this is one example. Further see Börzel/Risse: p. 15; the authors give a general statement on the sole existence of appropriate measures provisions.
[136] Balfour: p. 17

introduction into the new Asian Strategy in 1994 democracy and human rights issues where often not subject on the partners' meeting agenda. While comprehensive bilateral agreements with Asian countries now have human rights clauses introduced, several sectoral agreements with China, South Korea or Laos do not contain any human rights clauses at all.[137] The most important human rights clause-neglected economic sectors are textiles, fisheries and steel production[138] and are thus very important economic branches. By end of 2005, six of ten agreements with ASEAN countries are still in the partnership framework of 1980 where questions about clauses were still far from being discussed.[139] This is also the case for partnerships with countries that are considered to be among the developed (or economic on-eye level) community: For Australia and New Zealand the willing of an introduction of a human rights clause into the concluded agreements of 1996-97 was such an intolerable reason that they rejected this requirement.[140] Equally, agreements with the emerging economies of the BRICS states (Brazil, Russia, India, China, South Africa) do not contain explicit human rights clauses. Human rights issues are dealt only in the framework of broader political dialogue.[141] At this point the reproach made to the EU of not taking into account the pace of emerging economies in terms of third country investment[142] is simply re-translated into its own and direct relations with these countries. The BRICS role as aid donors that are renouncing conditionality for proper investment strategies is neglected by the EU instead.

In general it should be recorded that in comparison to the large amount of remaining agreements with clauses existing, the real invocation of these clauses is relatively low: only a few states were targeted by the entire application of conditionality.[143] This global overview leads then automatically to the raising of an important discussion point, namely the claim that

[137] Börzel/Risse: p. 15 ff; p. 28

[138] Zwagemakers, Fabienne: The EU's Conditionality Policy: A new Strategy to Achieve Compliance; Instituto Affari Internazionali, IAI Working Papers; Vol. 12, 03/2012, p. 5

[139] see Bartels: p. vi, p. 32; Among the six countries are the ASEAN founding members of 1967: Thailand, Indonesia, Malaysia, Philippines, Singapore and then Brunei. While bilateral agreements with the later joining Vietnam and Cambodia contain human rights clauses, the EP has called to re-align the 1980 framework standards to the bilateral agreements. Having begun in 2007, the negotiations for a new free trade agreement (FTA) with a new human rights framework are still ongoing.

[140] Bartels: p. 32

[141] Zwagemakers: p. 4; in the case of Russia, a very interesting discussion about constitutional changes could be introduced where in the case of Niger this has led to immediate consultations and the taking of appropriate measures; Telephone Interview with ACP Official, 16th August 2013, notes of the author

[142] E-Mail correspondence with Cuban State Official, 2nd July 2013

[143]Ethier, Diane: Is Democracy Promotion Effective? Comparing Conditionality and Incentives; Democratization, Vol. 10, 01/2003, p. 107 (further cited as Ethier [2]) the author argues that political conditionality for democracy promotion has almost never been used entirely in regard to significant aid reduction. Kenya and Malawi are named as best examples. Between 1995 and 2010 the EU has used negative measures in 22 occasions, what covers practically with invocations counted under the EU Policy Consilium Archive; see: United Kingdom Foreign and Commonwealth Office: Human Rights and Democracy: The 2010 Foreign & Commonwealth Office Report; Cm 8017, March 2011, p. 72

the more interesting a sectoral or bilateral agreement is for the EU, the less it tends to foster the rigorous implementation of human rights clauses and the more it becomes lenient with conditionality application. Otherwise it would be difficult to explain the given examples as a mere accidental incoherency. Deducted from the example above, the reasoning for the EU not to integrate human rights clauses into sectoral agreements would be similar to the denial of Cuba to enter into the EU-ACP partnership agreement at the farther end.

This cease of application could, in case of multilateral treaties, dangerously lead to a splitting of the party commitments and to the forming of bilateral and sectoral shadow agreements through re-orientation where, as we have seen in this chapter, suspension clauses could easily fall down in the back. A temporal, partial or meantime approach could also be the logic consequence for Cotonou. It has to be mentioned that next to the Cotonou Agreement other strategic tools become eminent that are governing EU development policy relations. The Joint Africa Strategy (covering all African countries except Morocco), different bilateral and regional agreements or the CARIFORUM overlap and superpose dispositions from the Cotonou Agreement probably in a more functional way. Dangers of ongoing sub-regional EPA-negotiations can uncomfortably affect a contemporaneous development of the continent.[144] The Commission's will to embrace the countries by their regional order or as whole continents is becoming more and more evident, also to establish consistency with for example the European Neighborhood policy.[145] It is therefore in the EU's interest (and would fit into its plans) to foster a common understanding of partnership and clauses in its agreements in order to prevent an ongoing segmentalization into further agreements. How can the EU for example cover its relations to sub-Saharan countries in a same framework as with the emerging economy of South Africa in terms of conditionality and clauses? The EU needs to be confronted with this question in regard to its claim on a continent-covering scaffold.
In the very recent past within the framework of the Arab spring, the EU had equally to re-define its relations to the MEDA countries. While showing in the next sub-chapter that the EU has made an incremental progress in terms of legal security in general - above all through its proper legislation and the enabling to act as a democratic values and human rights defender on the international scene - we recognize here that even partnerships that have been concluded throughout the last two years remain template-driven that do hardly take account of democratic and transitional particularities and do rather aim to continue with the business as

[144] Slocum-Bradley/Bradley: p. 17
[145] Mackie/Klavert/Aggad: p. 8

usual model of trade and investment without offering in-depth developmental aspects. This remains in an ambiguous light as the EU was constantly continuing of verbally encouraging the new and even higher emergency of pursuing human rights after the Arab Spring.[146] However, most important developments remain to be seen in the near future.

ii) The legal foundation and concern of clauses in external agreements.

The concluded principles on democracy, pluralism and the protection of human dignity serve henceforth as a base for further EU treaties and will form also CFSP's general objectives. In regard to human rights clauses, observations need to be made (a) in regard to the EU's internal legal structure and (b) the conformity of its externalization with other legal spheres.

a) The Maastricht and the Amsterdam treaties affirm this development by autonomizing first development policy and then making the principles of democracy and human rights a general principle of EC law in Articles 11 and 177 (2) EC, the latter providing a first legal base for EU-development cooperation.[147] In this process, human rights become part of CFSP and development cooperation in the same time and through Article 179 (1) EC the community shall implement measures under the principles that are stated in Article 177 EC[148] The EU had to wait until the entry into force of the Treaty of Nice in 2003 to present a sufficiently elaborated human rights base in its treaty law.[149] Article 181 A TEC about economic, financial and technical cooperation states the EU's action in this domain is managed by the objective to further consolidate, democracy, the rule of law, the respect for human rights and fundamental liberties.[150] At this point the EU was concluding external agreements with human rights clauses since almost a decade (the Cotonou Agreement's clause was also already established and just entering into force) but still a conflict between the attributed powers to

[146] See: Mohamadieh, Kinda: Democratic Transitions and the EU 'Deep and Comprehensive FTA's with MENA Countries: a Possible Backlash?; GREAT Insights Vol. 1, 02/2012: p. 5 / Bossuyt, Jean: New Ambitions with Regard to Human Rights: Can the EU deliver? GREAT Insights, Vol. 1, 02/2012: p. 13

[147] Santiso: p. 11 f.; Jacquemin: p. 5 ; Crawford : p. 171

[148] Horng: p. 687; Bossuyt, Jean: New Ambitions with Regard to Human Rights: Can the EU deliver? GREAT Insights, Vol. 1, 02/2010, p. 12; Article 11 (1), Treaty of Maastricht states that *"The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:[…] - to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms."* Article 177 (2) TEC provides exactly the same wording, so that both overlap.

[149] Nwobike: p. 1386 ; henceforth, the EU has proper and preventive sanction mechanism for its own Member States that risk of breaching the fundamental aspects of the fundamental values now referred to in Article 2 TEU. See: Treaty of the European Union, C 83/13, Article 7

[150] Jacquemin: p. 8

their utilization was present that remedied at last with the entry into force of the Lisbon Treaty.[151]

How does a human rights clause ideally look like? Since 1995, human rights clauses appear at least in four key parts of external agreements that finally grow into a whole: (1) At first the commitments to human rights are mentioned in the agreement's preamble. (2) Secondly, they are defined as essential elements in one article which is then (3) automatically linked to another article stipulating a potential non-execution in case of violation. (4) Finally, a last article (or Annex) clarifies how the latter should be interpreted to reinforce judicial security.[152] The annex to the 1995 Communication equips the EU with standard wordings for newly concluded external agreements[153] and at this point non-execution clause and human rights clause become interlinked and merged with the *general references* of the Universal Declaration on Human Rights. At this point it is interesting to mark the difference of a so-called *Baltic* clause and the following *Bulgarian* clause: while the first is a pure suspension clause from the agreement, *"[…] in whole or in part with immediate effect if a serious breach of its essential provisions occurs."*, the Bulgarian clause contains the taking of *appropriate measures*, except in cases of *special urgency*, in order to "*[…] at least disturb the agreement."*[154] What is interesting to see from a power-relational point of view is that the Baltic clause is followed by a reciprocal suspension, while the Bulgarian clause develops a "*punishment*" character in forms of stitches, by introducing appropriate measures and maintaining the beneficial parts of the agreement. Following this argument, the Bulgarian clause makes power relations more visible in the context of an agreement's application. Considered as being the most developed conditionality taking agreement, Cotonou is equipped with a Bulgarian as well as a *denunciation clause* (Article 99), which allows its disruption with a 6-month preliminary notice.

It is therefore not without reason to argue that the modern form of non-execution clauses become a major tool for the executing side where their inclusion can unfold additional power on the rule-setting force in trade agreements.[155] It is also visible from these four points that

[151] For a more precise explanation see: Broberg, Morten: Furthering Democracy through the European Union's Development Policy: Legal Limitations and Possibilities; Danish Institute for International Studies Working Paper 09/2010; Copenhagen: 2010, p. 14 (further cited as : Broberg [2])

[152] Commission of the European Communities; COM (95) 216 final; p. 12 f., Horng: p. 679

[153] Miller: p. 15

[154] Commission of the European Communities; COM (95) 216 final; p. 15; the Communication establishes a full text template for the different clauses. The Baltic clause was not used often, only for agreements the Baltic states, Albania and Slovenia. The Bulgarian clause was established for i.e. for Russia and Ukraine then.

[155] The same conclusion is drawn by Zwagemakers, see therefore: Zwagemakers: p. 4 f.; even though it shall be seen positively that from that point, agreements are less probable to break down, theoretically, appropriate

especially the non-execution clause of the Cotonou Agreement presents two important sides: a *political* and an *institutional*: on one hand the rule setter presents the principles that are laid down to the agreement like human rights and democratic principles, on the other hand the operationalisation of these principles is assured through the application of good governance principles.[156] In all concluded agreements differences between what has to be understood as essential elements and to what this makes reference are interesting to see. While in the early 1990s external agreements are referring to human rights and democracy from an abstract perspective they relate later (mainly)[157] to the most relevant recognized human rights standards such as the Universal Declaration of Human Rights and, on the OSCE side for example to proper proximate instruments (as the Helsinki Final Act or the Paris Declaration). As broad as the early reference to human rights is the notion of *essential elements* that could cover not only social and economical rights, but political, women's rights or rights of the child as well.[158] Further on, EU human rights clauses in general do neither tell us *how* sanctions and measures shall be applied, nor which type of measures is to be taken[159] (with the exception of broad compliance criteria). This wording generality is also a difficult challenge for the Cotonou Agreement, especially its Article 9, and will be analyzed further within the framework the consultation procedures.

The nexus between being a *general objective* of EU's external action and being an *essential element* to agreements is also an interesting debate that occupies EU lawmakers and analysts. It would be wrong to suppose that *essential elements* of an external agreement are to equate to the agreement's *objective*: The respect of human rights and democratic principles is neither the central aim of the Cotonou Agreement nor of most of the other partnership agreements that the EU concluded so far. They are political or trade agreements[160] and more precisely, their essential elements serve as a common base for the understanding and application of the

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measures can be misused without causing a proper damage on the execution side, as the reciprocal mechanisms continue. In the Baltic clause's wording the damages of ceasing the application are to feel on both sides. Under a Bulgarian clause its framework makes it more difficult for states with weak bargaining power to introduce appropriate measures. This power-relation argumentation "in the long run" (p. 8 of the Communication) works somehow against the reasoning of the EC, claiming the Baltic clause of being the less appeasing solution.

[156] See also the conclusions of Horng; Horng: p. 681

[157] Exceptions can be found for agreements concluded with Algeria and Morocco, where no direct connection to the Universal Declaration on Human Rights has been established. These agreements rely then according to Bartels on provisions of customary international law; see further: Bartels, Lorand: A Legal Analysis of the Human Rights Dimension of the Euro-Mediterranean Agreements; GREAT Insights; Vol. 1, 2/2012, p. 8

[158] For this argumentation see : Bartels: p. 33 f.

[159] Jacquemin: p. 9 f.

[160] Bartels: p. 41

different objectives which are laid down in these agreements. Essential elements clauses are therefore *essential* for the accomplishment of the purpose of such an act.[161]

Finalizing this, the Court has given green light: EC law jurisprudence confirms and supports this development since the European Union Court of Justice has re-checked and allowed the setting of suspension clauses into external agreements. This has been done with the EU-India cooperation agreement in 1996 where the court confirms that *"[…] the consecration of the general objective to promote democracy, the rule of law and human rights can imply, besides positive measures, […] also the adoption of restrictive measures […]."* [162] Referring to an opinion 2/94 and with a court decision of 1994 *Council v Portugal* the Court decided, relating to the cooperation agreement with India, that the Article 177(2) TEC relating to policy objectives in European development policy was sufficient to include human rights clauses in terms of *essential elements* into external agreements, despite having human rights only as a *general objective* in its own treaty law.[163] The principal and practical argument the Court uses is therefore that the introduction of a conditionality clause does not change the overall objective that is set out in the agreement. On the other end opinion 2/94 stated that the Commission itself possesses insufficient competencies to *"[…] enact human rights rules or to conclude international human rights conventions."*[164]

Therefore it was mentioned that a justification for the conclusion was not given that human rights provisions in EU external agreements would go beyond the promotion of Human Rights as EU *general objectives* even though they are stated as *essential elements* under Article 1(1) in this EU-Indian trade agreement. Further, human rights clauses to third countries imply that the Commission makes positive use of human rights by protecting them internationally. The legal bases Article 177 (2) and Article 181 TEC have been sufficient in this regard and the possibility to rely on a free legal basis for the conclusion of human rights clauses in external agreements (ex-Article 308 TEC) was rejected.[165] Nevertheless it needs to be argued that the Human Rights clause being subject to this legally discussed agreement is not a non-execution clause[166] like it is foreseen by the Cotonou Agreement in its complexity.

The Treaty of Lisbon has added a new structure to the EU's external human rights action. The newly applied Article 21 TEU, read together with Article 208 TFEU reinforces the link

[161] Horng: p. 678
[162] Mbadinga: [3]
[163] Miller: p. 31; Horng: p. 689
[164] Zwagemakers: p. 4 f.
[165] Horng: p. 688 ff. ; Zwagemakers: p. 5; EC jurisprudence was always cautious about ex-Article 308 to be used when no other legal base is available.
[166] Bartels: p. 43

between *objective* and *obligation* for the EU's external action in regard to every policy field affecting the relations to developing countries that should be guided by its founding commitments to democracy, human rights and the rule of law. The EU shall respect these given objectives and commits itself to ensure coherent positions and actions to that.[167] With its entering into force, these issues have been finally mainstreamed and provide the EU with a higher profile on the international agenda. Likewise, the above-mentioned opinion 2/94's premises regarding the Commission's competencies loses strike power, also in regard to the equating of the Charter of Fundamental Rights of the European Union with treaty law.[168]

The Vienna Convention of the Law of Treaties is another major sample for the EU's integration of Human Rights clauses. The clauses that have been established during the 1990s, presently applicable within the Cotonou framework, can be traced back to the importance of the Vienna Convention on the Law of Treaties of 1969 that entered into force in 1980. It is Article 60 of the Convention that stipulates a Treaty suspension if one of the parties violates *"[…] any provision essential for the realization of the object and the goal of the treaty."*[169] The Council refers to this possibility in the *Council v. Portugal* case.[170] Following this, *Article 72 (1)* further argues the drop off of all mutual treaty obligations once the suspension has become active.[171] The term *essential* is therefore chosen wisely for the Cotonou Agreement: *"a breach of this provision of a party to the Agreement will constitute a 'material breach' empowering the other party to introduce sanctions through its full or partial termination and suspension"*[172] Further, the convention borrows the term *"special urgency"* to modern EU external agreements (first through an association agreement with the Czech Republic in October 1993) and to the Cotonou Agreement alike.[173] But also at this point the agreement's breach on the operational level, namely the non-execution of the agreement, is not covered by the Vienna Convention's provisions: Article 60 (4) limits a crossing of the beforehand assigned essential elements clauses to provisions that do not contain operative measures in cases of material breach.[174]

[167] Broberg [2]: p. 9, p. 17 f.
[168] Treaty of the European Union; C 83/13, Article 7
[169] Mbadinga: [3]
[170] Miller: p. 31
[171] Mbadinga: [17]
[172] Broberg: p. 6
[173] Mbadinga: [12]; Bartels: p. 29
[174] Bartels: p. 43

b) Wrong suppositions have created confusion about either the *obligation* or the *right* of the EU to enact human rights in their external agreements. Without any proper involvement in human rights violations in third countries, the EU has no *obligation* before customary international law or their properly established human rights clauses to contribute to the remedy of such violations. It has only the right in regard to Article 60 (3) of the Vienna Convention.[175]

With regard to the Lisbon Treaty, the challenge of not confusing *obligation* and *right* marks the difference of provisions set out by the treaties and their externalization.

Opinions differ here: Human rights policy needs to be regarded as part of the internal structure of a state what creates a legal discussion about interventionist character of clauses. The act of promoting human rights in another state's internal structure becomes questionable in regard to customary international law. Even though these points have been argued several times in negotiations to new agreements, Broberg argues that it is today rather unproblematic to view that human rights clauses are in conflict with the principle of non-intervention in public international law.[176] On the other side it is argued that human rights clauses can neither be a re-affirmation of already existing binding instruments, as long as references to non-binding instruments before customary international law, such as the Universal Declaration on Human Rights, are given.[177] The active furthering of democracy and human rights through clauses gets also problematic with agreements that have been concluded before the entering into force of the Lisbon Treaty in regard to their probably insufficient legal bases and their attributed powers.[178] And a third, and maybe more worrying peg, is the conformity of human rights clauses the legal sphere of the WTO rules that are (compared to the clause itself) of highest significance for the objectives of EU agreements (especially the character of the Cotonou Agreement): human rights or democracy provisions shall not have the quality of *reinforcing* these standards in third countries and only be used when material agreement breaches occur. The accordance of an interventionist character to clauses could lead to protectionist activities and put in jeopardy the WTO regulations[179] and conclusively its Most Favored Nation (MFN) clause, whereby any advantage granted to a partner country should be

[175] Ibid.: p. 45

[176] Broberg [2]: p. 12; this shall be an important point to mention: for EU member states too, human rights are part of the inner legal sphere.

[177] Bartels: p. 40; the author makes reference to Brandtner/Rosas argumentation of a mere "*re-affirmation of internationally legal binding instruments"* at this point. For their argumentation see 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, Vol. 9, 1998, p. 475

[178] Broberg [2]: p. 14

[179] Von Bogdandy, Armin: The European Union as a Human Rights Organization; Common Market Law Review, Vol. 37, 2000; p. 1319

re-accorded to other countries as well. This critique is of importance since the very particularity of the Cotonou Agreement is the emplacement of the partnership into the WTO regulatory framework that liberalizes its economic relations to the southern countries. While this takes place, an "*interventionist character*" of the extensive EU's human rights acting gets automatically limited on the other end of the floor. We observe throughout this diverse argumentation that the legal character of EU's external human rights acting may have been strengthened throughout its proper instruments, making human rights a *transverse*[180] objective in European law, but is contestable in regard to other legal systems, where this sophisticated objective collides.

Two observations can be drawn from the discussion of this sub-chapter: First it shows that the implementation of clauses into EU external agreements is a process that is incrementally marked, that is based on lessons learned and that no point can be defined that marks a clear rupture in EU's acting.[181] Step by step, the EU has established a way of reinforcing human rights and democracy on the international scene. But secondly, established Human Rights clauses are far from being uniform in terms of wording, structure and overall inclusiveness and differ instead widely in their intensity.[182] As it is also shown, legal problems do not really occur with the outsourcing of essential elements or general objectives into EU's external action, but with the forthcoming execution or non-execution of the mutually developed agreement that has been considered as being breached. The EU's comprehensiveness on human rights clauses is thus still containing gaps that are not entirely filled that give us the impression of a remaining double standard implementation. This is very problematic in regard to these universal normative values that are transferred throughout non-execution clauses. An uneven application renders the claim, namely to base partnerships on other values than these, a right to exist.[183] To the same end the EU looses credibility for future negotiations. As we will see next, such an ambiguity is not only the product of the setting or wording of human rights and democracy clauses, but underlies also other political processes on community and member states level that contribute to this confusion.

[180] Brandtner/Rosas: p. 472; this notion corresponds to what we describe later as cross-pillar bargaining.
[181] The same conclusion is drawn by Börzel and Risse; Börzel/Risse: p. 2
[182] Bartels: p. 30
[183] Compare here to previous citation of the non-using of investment conditionality: E-Mail correspondence with Cuban State Official, 15th July 2013

3) Multi-level Inconsistency feeding EU development aid conditionality.

The debate for consistency and coherence in EU's CFSP action is a very lively one; however development policy is rather left aside in the debate.[184] Although consistency and coherence in external action is usually measured in terms of *horizontal, vertical, institutional* or *multilateral* coherence, the aim of this work is rather to focus on *donor-recipient* coherence in EU development policy. Including development aid sanctions into this framework, the idea is to catch a regard of how policy mechanisms are not only implemented on the EU's side, but in how far recipient countries are capable of taking part in this process and how they can shape it.[185] However, this sub-chapter shall help, before proceeding to the recipient's point of view, to gather an idea of where difficulties of implementing development aid are already present on the donor's side. This question needs to be treated more seriously in future since the Treaty of Lisbon drives and demands to enact coherent positions on the international agenda throughout all policy fields. While having analyzed mostly the structure of clauses in European external agreements, it is now important to take into account factors that contribute (often indirectly) to the implementation of development aid conditionality. By concentrating essentially on relatively problematic aspects in the development policy field it is however not meant to malign and neglect any positive aspects of conditionality and well-functioning coherent actions.

While democracy, the rule of law and human rights become indispensable factors for EU's external action they turn more and more into a bureaucratic and institutional volume[186] where difficulties become visible. Even after the implementation of consultation procedures into the Lomé agreement additional three years (until 1998) needed to be given to the Joint Councils of Ministers to practice clear consultation features in regards to flagrant human rights violations. This shortfall can be classified into a remaining divergence of interests among the European actors.[187] Especially the European Parliament reiterated this concern for example with the adoption of resolutions in 2001 and 2003: While the Cotonou Agreement is already equipped with an *"exemplary"* regulation of how to handle suspension mechanisms, others, as a logical outcome of the above-mentioned examples, are not. In order to achieve certainty and transparency, it was recommended to include procedure regulations for every external agreement. To the same end, the flexible manner of interpreting human rights clauses should

[184] Carbone, Maurizio: Mission Impossible: the European Union and Policy Coherence for Development; Journal of European Integration, Vol. 30/3, 2008, p. 324
[185] To donor -recipient coherence, see: Carbone: p. 326
[186] Santiso: p. 5
[187] Arts: p. 158 f.

never be misused by the EU to be inactive when it comes to very harsh violations. In 2003 it is stressed that clear implementation mechanisms are missing and that the final use of human rights and democracy clauses depends largely on the will of the EU *"[…] to exert adequate pressure on the country concerned, […]."*[188] What exactly results from this remains unclear: Results and strategies of the recent *Common Approach on the Use of Political Clauses* of 2009 are diplomatically not made available to the public as *"[…] once it is established that the requested document falls within the protected sphere of public interest as regards international relations, […] the institution is obliged […] to refuse public access."*[189]

First speculative studies about the impact of aid conditionality have been conducted during the 1990s, explaining that conditionality in terms of good governance and democracy could not lead to satisfying results due to various factors on donors and recipient sides.[190] This lack of compliance was explained above. It is now transferred on the EU level and we count various problematic factors.

In European development aid policy political conditionality suffers at first from its legal status in the treaties: The EU is a multi-level governance system that needs to take account of numerous actors that have different institutional preferences. These actors are member states and as donors the most important pillar for the realization of EU development policy. Promoting human rights, good governance and democracy is thus a task for cross-pillar bargaining (i.e. the policy-making and interplay of differently tasked Commission DGs) on one hand and multi-level bargaining (i.e. Commission work vs Member State preferences) on the other.[191]

There has already been disagreement of the EU and its member states about which type of conditionality needs to be applied in bilateral agreements.[192] Nevertheless is it argued that the consensus about conditionality is more elaborated on EU level than on the level of its Member States.[193] This is due to the complementary character of development to the EU's tasks but different concepts of aid conditionality make it difficult for the EU as an international actor to explain human rights standards consequently to its partners[194] and even more when applied in a multilateral partnership agreement like the Cotonou Agreement. EU Member States have different perceptions about the necessity and gravity of development policy and therefore

[188] Miller: p. 33 ff.
[189] Council of the European Union, I/A Item Note to COREPER, 12450/11, Brussels, 15th July 2011, (8)
[190] Ethier: p. 499
[191] Börzel/Risse: p. 20
[192] Vanheukelom: p. 11
[193] Ethier: p. 501
[194] Vanheukelom: p.11

different scores in their foreign aid index. Some countries are traditionally more generous donors (Sweden, Denmark, Netherlands) while other countries are reluctant to mobilize funding for the southern hemisphere (i.e. Austria, Italy, Spain).[195]

Furthermore, European states have, due to different cultural ties, different interests to where their aid promises fit best and especially after the enlargement process new EU members did concentrate rather on their direct neighborhood relations than on development aid spending to the southern hemisphere.[196] Even then, strong development aid performers are, in this regard, not united of how and where to invest: while the Swedish government focuses on the reinforcement of civil society institutions in its partner countries the United Kingdom has preferences on the consolidation of democratic institutions.[197] In a very interesting case study Crawford shows that commitments to which type of democracy-support feature should be implemented varies among donors, even though the recipient country presents a democracy favorable environment.[198] This is also important on a level of political orientation or cyclical preferences, where the donor and recipient governments' political colors play a role too.[199]

The Commission has recognized the importance of presenting with one position that it featured in a Communication of 2003 *"[…] the coherence of EU position and co-ordination between donors"* as one of three major elements for the effective application of its clauses.[200]

But this demand is not as easy to achieve because next to it the countries' ideas of aid conditionality evaluation differs respectively. Some European countries subsume similar evaluation standards (United Kingdom, Germany), others do not foresee or communicate any standardized evaluation system at all.[201] Furthermore, important extra-European donors and their criteria weigh heavily: So far, the US Aid agency is considered to be the most diligent partner in terms of development aid evaluation for democracy, human rights and good governance conditionality. Generally, measuring the improvement of a democracy, human rights and good governance situation as such is difficult. Another principal reluctance to evaluation can be explained by the fact that for donors the expected results are comparably low (in comparison to enlargement policy) so that evaluation becomes rather descriptive and a

[195] Carbone: p. 328
[196] Wanlin, Aurore: What future for EU development policy?; Centre for European Reform, Working Paper, May 2007; London: 2007, p. 8
[197] Ethier: p. 503
[198] Crawford: p. 189; the authour argues with the case of Ghana which presents an ideal type of democracy development. Even in very democratic societies, programming that finances features to strengthen basic democracy cannot succeed.
[199] Ethier [2]: p. 114
[200] Miller: p. 36
[201] Ethier: p. 516

retrospective enumeration of accomplished purchasing.[202] This would explain a cost-benefit analysis of donors and the lack of compliance in evaluation leads to the deduction that EU development aid performance as a whole can hardly be measured and though is unlikely to be further build up on lessons learned models.

The legal position of EU development policy in community law, and especially the sticking-out role of the EDF pose other problems: on one hand the ACP states have little bargaining power in regard to development strategies that are planned under the hat of the non-federalized EDF, where each ACP state is negotiating with the Commission about its country strategy papers.[203] On the other donor governments are tented to put up conditionality also to be in-line with credibility to their tax payers: The demand for integrating political conditionality was mainly risen by the public opinion of European countries in order to know whether their funding is directing in a proper sense.[204] As it is though imaginable that some governments put ethical reasons first or that tax payers have different expectations in different countries, the reasons for establishing aid conditionality varies also among donors. This variety of perception and public opinion among states leads to a situation where external interests and democratic principles enter into conflict.[205] The EU does not have tailor made approaches and studies show that some democracy-relevant features are neglected by donors and become irrelevant for EU development aid action.[206] In doubtful situations donors' strategic interests could overshadow their commitments on development aid. The EU tends to continue rather than stopping because of democratic violations and is (at least on a member state level) therefore still having a '*minimalist approach'* to democracy.[207] In the same logic the EU is using *double standards* when it comes to the treatment of different partners and the imposing of Human Rights clauses: As Zwagemakers argues and as seen above, in contrary to developing countries, new emerging economies profit from a more diplomatic approach of the

[202] See: Ethier [2]: p. 108 ff. ; the author argues in this very recent article (2010) that the US evaluation objectives are especially tailored programmes aiming to ensure governance, human rights and democracy promotion. These were established early and under pressure of the US congress. On the other side, among OECD member states (simultaneous EU states) this approach is not given but rather diverse (example that Denmark does not offer publicly accessible evaluation samples). However this does not mean that programmes are not evaluated. But the difficulty to access public information proves either that countries do have less expectations on conditionality influence or that they do not invest in the costly knowledge to do so (according to Carothers, Brown and Kapoor)
[203] Slocum-Bradley/Bradley: p. 20; Crawford: p. 175 f.
[204] Telephone Interview with ACP official; 15th August 2013; Balfour: p. 15; it is argumented in this connection that for the EU public opinion in fund using has become a major factor for its creditibilty.
[205] Del Biondo: p. 381 f.
[206] Santiso: p. 17
[207] Del Biondo: p. 381 f.

EU.[208] En plus, by having a closer look on development aid funding by several European countries, Zanger finds out that the criterion of good governance has no significant impact on the donor's willing to allocate development aid and that even governments that present poor Human Rights records are sometimes rewarded.[209] To get a clearer and comprehensive impression in the end, these remarks will be analyzed more deeply in the second part when we focus on the non-evocation of Cotonou's consultation procedure by listing briefly several case examples.

In the same time of proving inner coherence the EU's approach needs to be compatible with other external policies that are exclusive competencies to the EU, like trade policy, or legally low-integrated competencies, like measures that are taken under CFSP. The result is that its proper concepts are generally broadly defined and contain less detail[210] in order to prevent involuntary interferences between different policy fields that grow inevitably together in the same time. This is already visible on the member state's level, where development policy is handled by different ministries as not every country has a proper ministry for development policy and priority lines become blurred in cases where the ministry for external relations of the country is also in charge of the coordination of development aid provision.[211] A sort of ministerial coordination is also important on the supranational layer. While it is usually the task of diplomatic missions to monitor the good implementation of i.e. human rights policy, it is difficult to achieve that these missions always have the same priorities.[212] Further, the inconsistent application of a certain policy area is often criticized between the EU development policy and the Common Agricultural Policy (CAP)[213] to the extent that trade agreements under the Cotonou Agreement are subsumed under the hat of the WTO while the CAP puts these prerequisites in jeopardy through agricultural subventions. For NGOs and Civil Society Organizations this development results in an insolvable situation for the ACP. It is therefore argued that only a well established combination with other non-aid policy areas can be the key for an effectively implemented development policy.[214]

But as Carbone points it out, incoherency in policy action is to a certain extent inevitable and even acceptable, as the systems that work together are highly differentiated and need

[208] Zwagemakers: p. 4 ff.
[209] Zanger: p. 311
[210] Schmitz: p. 25
[211] Ethier: p. 503
[212] Zwagemakers; p. 5
[213] Carbone: p. 331
[214] Ibid: p, 340

coordination. This is difficult as long as they are rather horizontally organized than being part of a clear integrated hierarchy[215] and in the EU the thematic overlapping of development policy, Human Rights policy and foreign and humanitarian policy are leaving room for improvement. This mixture can be a 'source of frustration' for institutional actors when the individual policy field objectives are not well defined.[216] The more comprehensive the paradigm of development policy is, the more difficult it is to achieve clear coherent action and as long as the right priorities profit, a certain degree of incoherence is acceptable.[217] This seems reasonable but confronts us slowly with reality in the application of conditionality: as we will discuss it below, in regard to the Cotonou Agreement breaches that are easier to recognize and to define, become easier prioritized and handled while they could be less important on the theoretical agenda of the EU. Consequently, *priority* could evolve from a normative, universal tool to a functionalistic mechanism.

Finally, by getting back to the chapter's title, some kind of paradox can be observed that is part of our research ambition. Political conditionality has evolved to a mutually recognized fact by both agreement sides, may it be the Cotonou Agreement or other agreements. It has though become an indispensable, universal norm for EU's external contractual acting. In the same time the procedures that lead to this action are far from perfected, in regard to its legal bases, its norm construction approach and above all the coherent implementation into these agreements. This does not mean that the EU has a wrong approach to democracy, human rights or the rule of law but the de facto, non-reciprocal application of conditionality seems to have a less comfortable impact on weaker countries that do not have exactly the same feeling in regard to the EU's principles and do neither fall under the EU's major interest scope. This way reciprocity turns back into power relations, the terms *ownership* and *partnership* lose weight. Being a very contemporary example, the perception of the Cotonou Agreement's human rights clause's detailed application should deliver worthy information about on which scale one can categorize EU-developing countries relations in regard to the nexus between conditionality and partnership. For some authors it becomes therefore evident that *"[…] the EU has abused its power advantage to impose its political will and economic agenda."*[218]
It is interesting to see whether this abusive character could also be confirmed for situations, where pre-established conditionality is made use of in practice.

[215] Ibid: p. 326 f.
[216] Laakso/Kivimäni/Seppänen: p. 34
[217] Carbone: p. 327
[218] Slocum-Bradley/Bradley: p. 22

The first part of this study aimed to analyze European conditionality in its external action paired with the tool of clause-setting into partnership agreements that equips this conditionality with an ex-post character. We have developed a regard on different characteristics of conditionality and tried to show that it goes beyond the matter of simply defending normative or universally recognized features. It is found that due to historically grown, legal and practical concerns – and despite every effort to increase coherence and creditability – the EU's approach has still bitter overtones. The heaviest repercussions of this approach are to bear by its partners where economic and political bargaining power seems to be the counterweight to this acting. It is often forgotten that conditionality has been mutually recognized and must therefore, to be undertaken, also rely on the willing of both sides. For the ACP this theoretical fact has been useless so far; as we'll see further the invocation of a clause is highly dependent on the political will of the EU institutions.[219]

In the second part of this study we observe the operationalisation of these clauses and, above all, the problems that come along with them to identify major shortcomings that create struggle for the targeted countries.

[219] Miller: p. 42; the author refers at this point on the resolutions taken at the 4th Human Rights Discussion Forum in Copenhagen from December 2002.

II) Applying clauses: the consultation procedures as difficult burden for ACP states

We could acknowledge so far that the shape of non-execution clauses has a complex and multi-facetted side, presenting various problems in its theoretical discussion. Having been executed above all in the EU-ACP framework, its best and most credible operational analysis should be taken through Cotonou's consultation procedures. Gaining a regard on the practical level helps completing these problematic developments comprehensively and lets formulate possible opportunities and constraints for the future.

1) Flexibility or Security? Shape and modifications of the consultation procedure

A) The general shape of Articles 96 and 97. Can they be exploited at each point?

The consultation procedures, Articles 96 and 97, of the Agreement are the core part of the political conditionality manifested in Cotonou because they are meant to guarantee actively the application of the agreement's new and significant political dimension. The fact that the Cotonou Agreement dedicates two separate articles to the consultations procedures distinguishes it from prior consultation mechanisms of other agreements' Human Rights clauses where such consultations are the logical consequence maintained in a sub-paragraph.[220]

As mentioned above, political conditionality is not newly introduced with the agreement, and a suspension measure has already been subject to the Lomé IV convention and its Article 366a. Before, the Lomé I-III convention was built on non-formal development aid suspensions without any legal base what led to intransparency[221] and the causing of perceptible arbitration. Judicial exclusions due to non-following of the provisions are since then - historically grown - of higher detail and quality.[222] The Cotonou Agreement introduces better legal security in regard to the consultation procedures and its key terms.[223] This part of the study is meant to analyze the consultations' key mechanisms: the relationship between significant articles, the Articles' textual shape, its changes over time and the relevant actors intervening into this process. Precious information about the course of negotiations and the real appearance of political dialogue is missing yet.

[220] Cuyckens: p. 40
[221] Laakso/Kivimäki/Seppänen: p. 25
[222] Laakso: p. 121; Cuyckens: p. 30 f.; p. 34
[223] Arts: p. 162

In this continuity, the Cotonou Agreement distinguishes in two Articles between different types of violations to the agreement: Article 96 covers consultation procedures due to contractual violations of human rights elements, democratic principles and the rule of law that constitute, according to Article 9, *essential elements* to the agreement. Article 97 instead focuses on corruption[224] as a synonymous term for the breaching of good governance principles that are considered as *fundamental elements* and fall consequently outside the application scope of Article 96.[225] Being an *essential element* of the agreement can be identical for the denomination *human rights clause* that has, as seen above, gained of crucial importance in EU's behavior on the international scene over time. It is obvious to follow from this observation that the agreement is distinguishing now of what is to a certain extent still acceptable and what is not acceptable at all.

In order to start with the consultation procedure one party should consider the essential or fundamental elements of the agreements to be breached. Article 96 introduces this formal invitation of one state by another to hold consultations if the observed breaches of the essential elements are not '*cases of special urgency*',[226] implicating a space of time left for both actors to remedy the contested situation when the condition is not fulfilled that *"[…] exceptional cases of particularly serious and flagrant violation of the essential elements [...]"*[227] occur. Therefore Article 96 has to be evoked when all political dialogue under Article 8 has been fallen short.[228] Except in cases of *special urgency*, Annex VII previews the possibility to skip political dialogue and to pass directly on to the consultation procedure. This happens when a partner fails his dialogue promises or does not engage in dialogue *'in good faith'*.[229]

The consultation procedure should last no longer than 120 days and within this timeframe and if the parties come to no solution, *appropriate measures* should be taken. These need to be compatible with international law, to be proportional to the violation and they should not lead to the interruption of the agreement.[230] While this description of *appropriate measures* is

[224] Cotonou Agreement: Article 96 and 97; Official Journal of the European Union, L 317/41; 15th December 2000
[225] http://www.consilium.europa.eu/policies/eu-development-policy-(ec-wbesite)/main-themes/cotonou-partnership-agreement/consultations-under-articles-96-and-97-of-cotonou-agreement?lang=de
Arts: p. 163
[226] Cuyckens: p. 39, Arts: p. 161
[227] Cotonou Agreement, Article 96, (2) b)
[228] Cotonou Agreement, Article 96 (1)a a)
[229] Cuyckens: p. 39
[230] Cotonou Agreement, Article 96 (2) c)

comparably detailed in regard to other EU-third country human rights clauses,[231] it remains unclear which parts of the relationship can be touched exactly. However, a given timeframe for conducting dialogue and consultations marks the developed character of the Cotonou Agreement as being the first which is occupied by such regulation.[232]

In fact, the Articles have always been invoked unilaterally by the EU and never by an ACP state which is holding the EU at least possibly responsible for a breach. This arguing would have been plausible for at least some situations: In migration cases the rights of ACP countries' citizens have been violated several times, the questionable legality of waste shipments (i.e. electronic waste) and interlinked fraud and bribery would have been a reason to gain attention on the potential invocation of the consultation procedures.[233] Also, ACP countries could invoke the clause due to violations in their own territory that are immediate results from EU trade policy (as these trade provisions are included in the Cotonou Agreement) which has a crucial impact on local living standards such as a price movement of products that immediately affect living conditions (i.e. basic medical product price shocks).[234] The last argument is often considered as the Cotonou key problematic by critical activists or NGO representatives. For example, these trade conditions could equally lead to insufficient or negative acting by the state in regard to its citizens due to bad trade incomes. Although the chain reaction is observable, direct violations are identified on the recipient government's side. Also, a very extensive reading of human rights violations must be taken in a non-execution clause context to argue that practically the agreement's purpose presents initially a violation of its own essential elements or is working contrary to the purpose of programme-based development aid. A linkage to the invocation of Cotonou's consultation articles due to economic effects is therefore not probable. This is even more difficult when the EU presents as a collective actor in terms of trade policy, what makes it hard to identify a guilty individual player among 28 European countries with different national legislation in some other policy areas[235], not even taking into account WTO rulings at this point. The European Commission is a task-given negotiator and such a role is missing for the ACP yet.

On the other hand, direct concrete incidents, such as migration mal-treatment is a thinkable reasoning. But since the 2005 contested inclusion of migration (Article 13) into the Political

[231] See: Cuyckens: p. 41
[232] Bartels: p. 50
[233] Slocum-Bradley/Bradley: p. 10
[234] Bartels: p. 45
[235] Additionally, the possibility of exceptions regarding general interests of public safety, healthcare or the respect for constitutional identity (Article 4 (2) TEU) count as factors that increase the complicatedness of judging responsible, despite uniform trade measures given.

framework of the agreement, a linkage to Article 8, and therefore a connection with the consultation procedures, is taken away. Human rights issues and especially non-discrimination are now also subject to Article 13 and might be henceforth discussed in this proper framework that has not the possibility of being subject to possible consultations.[236] For the ACP this consequents in a bargaining loose towards Articles 8, 9 and 96 in a rather latent way. Going into the same direction, racist attacks and unequal treatment of ACP citizens on European territory could be a (very frequent) motive too.[237]

Latest, the achieved introduction of bribery as part of Article 97 needs to be discussed. From what is known today about the practical application of Article 97 (see below), the real value of bribery is unrealistically in favor for the ACP. Lastly, and contrary to any hope, an ACP invocation could get broken in the end through a compensatory argumentation from the EU's side about the degree of violations done, what makes this undertaking unrealistic.

Despite every unrealism and unilateral practice it is argued by the ACP secretariat that the ACP states are *"too timid"* in trying to evoke the consultation procedures and that enough thematic material would be available to make it possible. Hindering reasons are above all organizational costs that accompany such evocation. Financial capacities are not of the same nature as within the EU.[238] We can therefore observe that it is not missing of good reasons but of menacing power to the ACP group which could pass to consultations but not to the establishment of *appropriate measures* that could have a significant influence on the EU's acting. *"[...] les ACP comme a-t-on les moyens de prendre des mesures appropriées contre ce pays européens?"* [239] Nevertheless it could be feasible, although not with the same intensity as vice versa, to at least gather the parties around one table and discuss eminent problems.

Putting into question the aspect of equality of both partners[240], the facts of some enumerated points have been subject to criticism during the revision procedures. In its initial form of 2000, the consultation procedures have been slimmer. A regard on the revision process brings more light into the dark, showing tendencies of intended change but also untouched parts.

[236] The Cotonou Agreement, revised version of 2005; Article 13 (1)
[237] Telephone Interview with ACP Official, 15th August 2013, notes of the author
[238] Telephone Interview with ACP Official, 15th August 2013, notes of the author
[239] Email correspondence with Malagasy state official, 2nd September 2013
[240] Mackie/Zinke: p. 5

B) The consultation procedure within the mid-term reviews of the Cotonou Agreement:

The consultation mechanisms are part of different party preferences in the five year-term reviews, called mid-term reviews. Two revisions have been conducted in 2005 and 2010 which have different emphasis and implications for the application of the consultations. Closely after the signature of the basic Agreement already the European Commission saw the necessity for explanation and clarification of several dispositions laid down to the agreement because it feared unintended retards at community level when the consultation procedure should be invoked. It was therefore foreseen to adopt a regulation that defines further the methodological application of the consultation procedures.[241]

Being a controversial core of the Agreement, the articles (especially Article 96) have been initially meant to be seized after a complete shortfall of every discursive effort.[242] This means only to be seized after all political dialogue did not perform any tangible result. During the first revision procedure it was important for the ACP countries to negotiate the evocation of Articles 96 and 97 on to a decision that needs to be taken by ACP and EU countries conjointly. This step has been rejected by the EU in order to prevent a detachment of purpose of the Articles[243] what automatically puts into question the notion of equality in the agreement and raises another important point in the same time: rejecting this proposal means also denying, so to speak, the development of maybe the purest form of consultation that would be based on mutual recognition. This point is heavily disputed but will be revived again and more precisely for discussion in a later chapter.

A deepening has been anchored by the first review of the agreement in 2005, where Articles 96 and 97 have been submitted to the addition of further details. From now on, Article 96 foresees a prior consultation of all possible dialogue mechanisms, referring now explicitly to the propositions in Article 8 to the extent that the application of the consultation procedure is even more ensured to be a matter of last resort.[244] To reinsure the generally open formulation in the text, Article 96 (2) makes reference to Annex VII, simultaneously to Article 8, which has been added with the revision in order to have a better idea of how to behave during the

[241] Rapport the synthèse des activités de la Communauté dans le Champ des Droits de l'Homme, de la Bonne Gouvernance et de la Démocratie ; sur http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/reports/sector/951613_ref_fr.pdf ; p.8

[242] Mackie/Zinke: p. 1

[243] Laakso, Kivimäki, Seppänen: p. 30

[244] Partnership Agreement ACP-EC, European Commission; DE-132, September 2006; Article 96 (1a)

phases of political dialogue and consultations.[245] It is therefore important to bear in mind the special circumstances of each country, that benchmarks targets have to be agreed, that any political dialogue prior to consultations should be systematic and formal and thus should not lead to abnormal relations through punishment.[246] As the perception of punishment was the principal preoccupation of the ACP states before the 2005 revision took place, *"[…] the new framework allows the process to be more about dealing with the root causes of conflicts and the establishment of confidence-building measures, […]".*[247] Consultations should therefore be rather a way to *"[…] foster the strengthening of ACP-EC relations […]"*[248] and their timeframe has been lifted twice, to a maximum of 60 days after the passage from Lomé to Cotonou and to 120 days after the first revision in 2005, in order to establish a more realistic negotiating scenario.[249]

During the Joint Parliamentary Assembly (JPA) in 2009 in Luanda, the parties adopted a statement referring to a common position for the forthcoming Cotonou revision, where it was stressed that the stopgap solutions Article 96 and 97 should be maintained in their reference to highest exploitation of Article 8.[250] The European Parliament, in contrary, did not consider this re-accentuation as indispensable and was henceforth not mentioning it in their resolution to the revision in 2010.[251] Even though a clear reference to the consultation articles is missing on the first hand, the revision is adding more aspects to Article 8's wording, especially concerning the dialogue role of the ACP regional organizations and the AU (paragraph 3) as well as precisions on different forms of discrimination (paragraph 4).[252] This leads to the first remark that the more precisely Article 8 is formulated, the more dialogue is established, the more exhaustively the Article combination is read[253] and the less often, theoretically, recourse to consultation procedures should be taken. Already in the run-up to the 2010 revision it was argued by the ACP secretariat that a better formulation of Article 8 would be necessary as before a recourse to this Article was only practiced in special cases and not – as intended by

[245] Partnership Agreement ACP-EC, European Commission; DE-132, September 2006; Article 96 (2), Annex VII
[246] Ibid; Annex VII, Article 2 (2) – (5)
[247] Partnership Agreement ACP-EC, European Commission; DE-132, September 2006, p. 7 f.; the statement was published from a Head of Mission of Jamaica to the EC during the revision procedure.
[248] Ibid; Annex VII, Article 1 (3)
[249] Ibid; Article 96 (2a); Arts: p. 164
[250] Luanda Declaration on the second revision of the ACP-EU Partnership Agreement, 30th November 2009
[251] European Parliament Resolution of 20th January 2010 on the Second Revision of the ACP-EU Partnership Agreement, 2009/2165/(INI)
[252] Second Revision of the Cotonou Agreement, Brussels: 19th March 2010; p. 4 f.
[253] Mackie/Zinke: p. 5

the agreement – regularly and in normal situations.[254] Consequently, a deeper formulation of the Articles' linkage makes a unilateral application more difficult[255] and maintains political dialogue as long as possible which presents theoretically a positive development.

Finally, the 2005 added Annex VII on political dialogue is establishing a more transparent furnishing of information between the ACP secretariat and the European Commission during each phase of the consultation (Annex VII, Article 3 [4]),[256] strengthens and values therefore the multilateral approach at least theoretically. A higher quantity of information at the right time prevents misunderstandings about the accomplishment of the EU's demands. But unfortunately the increasing of information furnishing remains only a development in theory: since these paragraphs have been introduced into the Cotonou Agreement, the passing of information remains limited to the moment where the EU wishes to invoke the consultation Articles. Issues that are discussed within political dialogue are bilaterally shaped and not subject of such information flows and have thus a sudden character. The ACP secretariat needs to ask for relevant information, to treat this information in a short period of time, sometimes even without the knowledge about a prior political dialogue and cannot prepare for negotiations as it would be wishful. Possibly, the EU relies on the ACP state to pass the information while the ACP might consider the subject either as not noteworthy or as a sole internal problem which creates finally a misunderstanding that extends the procedure unnecessarily.[257] Accordingly, and if intended or not, we should argue that a clarification of this information backlog is needed, that it becomes systemized and extended to all phases where discussion takes place. Of course, ACP countries need to practice this behavior too regarding the secretariat, especially on the ambassadorial level, but as long as the EU unilaterally invokes the Articles, more about this strategy could be delivered.

Before proceeding further, we should take a comprehensive look on the textual state of these articles and their relation between each other.

[254] European Center for Development Policy Management: The 2010 Revision and the Future of the Cotonou Partnership Agreement; Dicussion Paper N° 85, Report of an Informal Seminar, 4th July 2008; 8/2008, p. 5; Bradley, Andrew: An ACP Perspective and Overview of Article 96 cases; European Center for Development Policy Management Discussion Paper 64D; 8/2005, p. 2
[255] Mackie/Zinke: p. 5
[256] ibid. p. 53
[257] Telephone Interview with ACP Official, 15th August 2013, notes of the author

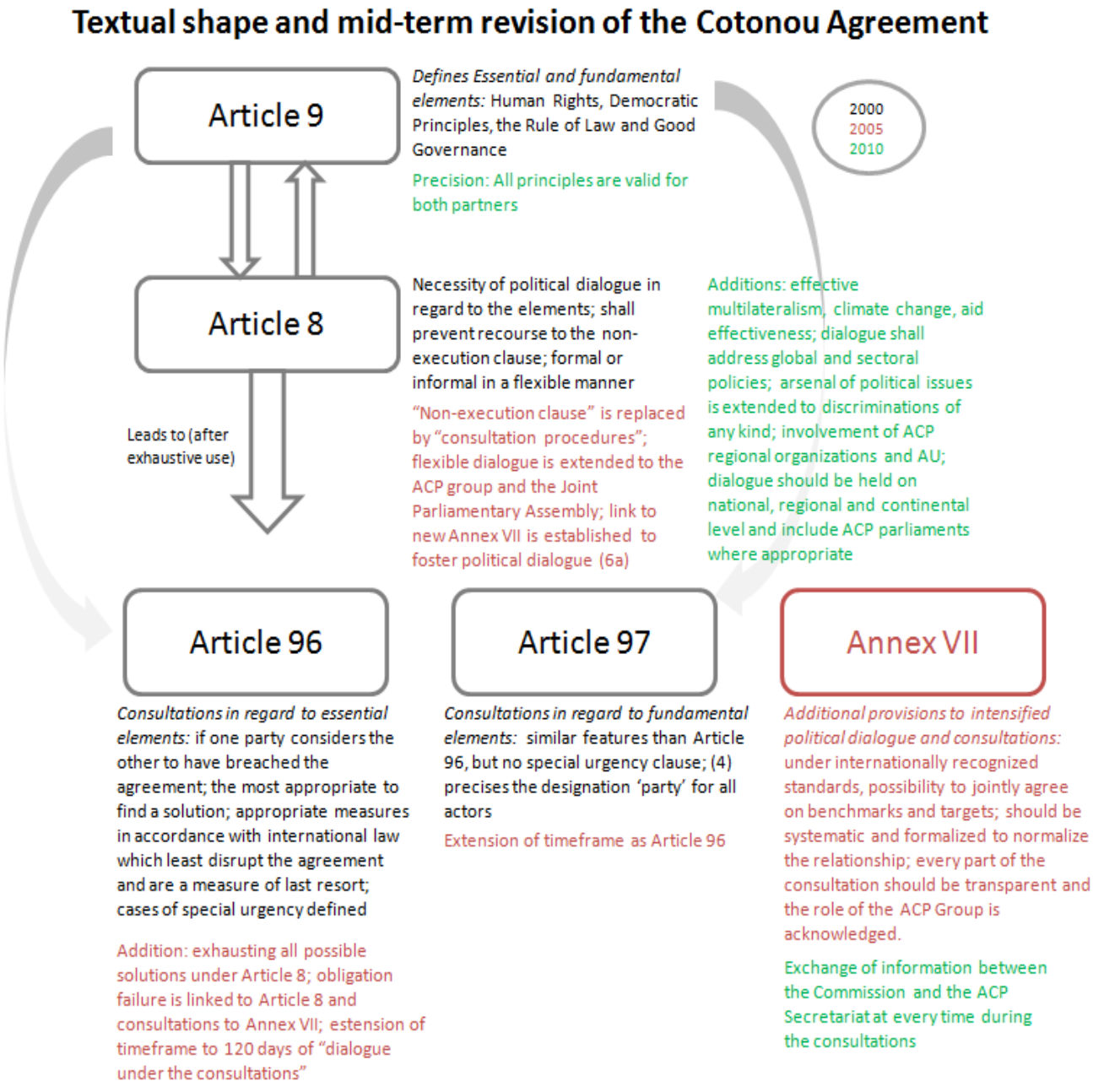

Table 1: Own flipchart of the textual additions to the non-execution clauses of the Cotonou Agreement during the mid-term reviews, detailed changes are to find in the Annex of this work.[258]

The chart shows an important feature: During the mid-term revisions of the Agreement Article 8 that is steering political dialogue has been revised several times at several points to broaden it up to more sectoral fields and to render it more effective.[259] For Article 9, defining essentially reasons and elements for the usefulness of the whole package, no significant change has taken place during the revision procedures. We are lead automatically to the

[258] The Cotonou Agreement (2000), L 317/8; The Cotonou Agreement (2005), L 209/27; The Cotonou Agreement (2010), L 287/3

[259] For that see also: Crawford: p. 174

fundamental question of the relationship between these articles where it is to argument that the nexus between political dialogue has been strengthened while the major cause for passing from political dialogue to consultations, namely the violation of elements of Article 9, has not been modified significantly. While a multilateral dialogue between the EU and the ACP has been established after ten years, the essential elements laid down to Article 9 remain to be interpreted as lively as before and it is to question, whether the mid-term revisions have presented a net improvement of the ACP's root problematic with the agreement's political sphere. The surplus value that is delivered by the changing of Article 8 and sophisticated political dialogue is therefore questionable,[260] as long as unchanged Article 9 criteria function as a slowing down mechanism. The ACP group has delivered several propositions for a modification of Article 9 in the course of time. Ideally it was proposed to set up documents, précising clear modalities for violations of its given elements. The EU has denied this initiative in its earliest state in order to maintain the highest degree of flexibility when consultations are applied,[261] which seems reasonable but bears also interpretational dangers (i.e. when do we observe a breach of rule of law or rather good governance? In which frame can the party violate Article 9 dispositions?) where some countries might feel wide-open to.

The point of re-formulation is explicitly argued for good governance as fundamental element too. We have stressed above that the EU is not using a properly developed idea of what is to understand under *good governance* and that developed approaches are non-adapted to local circumstances. Based on the experience made in almost ten years in the new partnership framework it is claimed a re-adaption of the Article's wording.[262]

A last aspect here to mention is the disregard of Article 97 during the revisions. Annex VII modalities find only validity in regard to consultations under Article 96 and explicitly do not regulate any provisions under Article 97. The non-inclusive treatment of the fundamental elements Article and the simultaneous consolidation of Article 96 enlarge the distance between essential and fundamental elements and make us doubting about Article 97's final purpose of existence. A falling apart, overshadowing or forgetting of this article could be the possible consequence so that Article 97 becomes a contractual relic in form of a potential pressure mechanism.

As a consequence it is to retain that the 2010 revision of the Cotonou Agreement did not bring along any fundamental novelties to the direct utilization of the consultation procedures while

[260] Zwagemakers: p. 4
[261] Telephone Interview with ACP Official, 15th August 2013, notes of the author.
[262] ECDPM Paper: p. 6

the 2005 revision and the addition of Annex VII has significantly amplified the linkage between the agreement's political dimension and the consultation measures. In contrary, Political dialogue has been reinforced throughout the 2010 revision. Before everything, it was Article 96 where a revision necessity was crucial, not the scarcely used sister Article 97 that remains rigidly in its starting position. The second revision can be a more important step towards multilateralism (re-valorization of AU and ACP secretariat) that needs, in its practice, to be analyzed in the forthcoming chapters. But latest, the consequences resulting from the consultation procedure, the taking of appropriate measures, have not been re-evaluated neither. The most recent precision by the Commission does not deliver much more information about what appropriate measures *shall* be as *"These measures can include suspension of meetings and technical co-operation programmes with the country concerned."*[263] Here too, the EU stresses that any additional wording makes the Articles loose their flexibility whereby the ACP group wishes further precisions.[264]

This argumentation needs to be reconsidered when it is argued that, due to the Articles nature, a controversy about their wording cannot be detached completely[265] and when it is discussed about the reasons for invoking or not invoking Articles 96 and 97. They remain, as Zimelis also stresses, ambiguously formulated in favor for the EU.[266] Consequently, the mid-term revisions of Cotonou present an ambivalent character too, where only a few provisions could have been clarified to prevent unintended passages to consultations and sanctions. The hesitating ratification of the latest revision is partly the product of these inadequate efforts.

C) The institutional procedure in the application of Articles 96 and 97

i) How does the EU pass to consultations?

From an institutional perspective we should mention at first that the consultation procedure is following an intergovernmental logic with the Council of the EU being the most powerful institutional actor. As European development policy is a mixed policy, the Cotonou Agreement is logically a mixed agreement and the funding that has to be made available or not remains excluded from the EU budget. Simultaneously the European Commission is meant to be integrated as a "*purely administrative*" body that should propose consultations

[263] European Commission: Communication to the Council and the European Parliament; Human Rights and Democracy at the Heart of EU External Action – Towards a more effective approach; COM (2011) 886 final; p. 11
[264] Telephone Interview with ACP Official, 15th August 2013, notes of the author
[265] Mackie/Zinke: p. 11
[266] Zimelis: p. 396

every time a fundamental element breach can be observed. This rather passive task, as Laakso stresses, is circumvented by the Commission by passing to a proper case-by-case analysis in order to assign a political role to itself.[267] This political role becomes important when EU Member States are divided on the topic. In case of division the Commission does hesitate to open up the procedure so that in general no inter-institutional tensions can be found on the appealing side when it comes to consultations.[268] Despite any case-by-case argumentation the procedure applied during the consultations is mainly standardized.

The last resort measure of evoking Article 96 is pre-determined by the outcome of a discursive bargaining held within the different Council working parties relative to the geographical scope of the country in question that is mostly alternating between Africa and Latin America.[269] These geographical groups fall under the EU's CFSP framework and conduct a political appraisal of the situation in the key country and send it to the Council's ACP working group that is focusing rather on '*technical terms*'[270] such as how to manage political dialogue or the implementation of EPAs etc.[271] For the Commission, the DG Development Cooperation (DEVCO) is collecting the relevant information about the political situation in the concerned countries, but needs to coordinate with DG External Relations (RELEX) if further actions shall be started.[272]

The Commission takes usually the initiative to start with consultation procedures and sends its proposition back to the Council working groups that will have to see whether they consider the propositions to be reasonable. Here, the ACP working group has a more important role than the geographic working groups, in approving the Commission's textual proposals.[273] An approving is usually the case, only once in the history of its existence the Council has rejected the Commission's proposal in regard to violations in Cote d'Ivoire in 2004 due to EU/UN complementary presence and events changing in rapid succession.[274] From this point the Commission and the Council are formulating several declarations in how they consider Cotonou's essential elements to be violated.[275] The close interaction between the Member States, the Council and the two types of working groups are therefore an indispensable

[267] Laakso: p. 124
[268] Laakso/Kivimäni/Seppänen: p. 17
[269] Hazelzet: p. 6
[270] Cuyckens: p. 44 f.
[271] http://www.se2009.eu/en/meetings_news/2009/7/20/acp_working_party_africa_caribbean_and_pacific.html
[272] Laakso/Kivimäni/Seppänen: p. 33; The authors mention election observation missions as a possible action.
[273] One example emphazising this: Opening of consultations with Niger 14257/09 – COM (2009) 529, (3)
[274] Laakso/Kivimäni/Seppänen: p. 53
[275] Mbadinga: [6]

procedure.[276] In contrary to other agreements before, the invocation of the non-execution clause in the Cotonou Agreement is in practice federalized: An internal agreement between the Member States regulates an uniform acting on community level.[277] However it is argued that the interaction between the Council working groups (that absorb close to 70% of decision making within the Council) is difficult whereas members of both groups do rarely attend decisive meetings of the other group.[278] Furthermore the ACP working group is based in Brussels while the geographical working groups are based in the states' capitals.[279] As the Council working groups represent a very important point right at the intersection of political dialogue and consultation procedures, their closed character can be crucial for the right coordination of which way shall be taken to achieve the best outcome of a situation.

The passage to the consultation procedure will be finally voted by the EU's Permanent Representatives Committee (COREPER) and the Council of Ministers mostly by unanimity, although qualified majority voting is possible.[280] Generally, the COREPER is invited to join the Commission's perspective on the draft letter and to support the vote by the Council. Unanimity voting is absolutely necessary when the EU wants to skip political dialogue in cases of *special urgency* with a direct passage to the consultation procedures.[281] At this point the European Parliament gets informed about the starting and the end of the consultations but does not have the possibility to intervene into the voting process. Its role is adapted to the provisions for international agreements in the part of external action of the Treaty of the Functioning of the European Union and can only be changed if the Parliaments role in this sections is lifted.[282] By observing the Parliament generally as a critical body in regard to the Council's (or member states') decisions, and taking into account the working and information quantity developed in the Joint Assembly meetings, such an uplifting could be a wishful

[276] Laakso/Kivimäni/Seppänen: p. 33
[277] Bartels: p. 46
[278] Carbone: p. 335
[279] Cuyckens: p. 45
[280] Mackie/Zinke: p. 6; Hazelzet: p.6; Cuyckens: p. 45
[281] Cotonou Agreement: Annex VII
[282] Hazelzet: p. 7 ; Cuyckens: p. 46; the Joint Parliamentary Assembly, composed of Members of the European Parliament and designated ACP state Members of Parliament, keeps its status as a "consultative body" that fosters "greater understanding" between the EU and ACP states. MEPs discuss the implementation of the Cotonou Agreement based on the Council's annual report. The Agreement does not mention the role of the European Parliament during the consultation procedures but the fact that appropriate measure decision making is concluded by Council's unanimity designates implicitly the role to the European Parliament.; see also: The Cotonou Agreement (2010), L 287/3, Article 17 (1), (2) and Article 300 (10), (11) TFEU; in the conclusion of international agreements the EP gets immediately informed and can demand a report on the legal compatibility of the CJEU.

development for political dialogue in the Agreement. Lastly, it would also help in regard to policy coordination problems of Member States that have been identified above.

Once the voting passage is overcome the violating party receives a formal invitation to hold consultations about the current situation. The formal letters are annexed to the Council notes and are kept short in relation to the complexity of the situation given. They contain the legal base on which the EU is founding its reasoning, by mentioning the breach, and do not give any hints to the public about what will be precisely the discussion points of the consultations.[283] The letter contains a proposed date that should figure as a temporal limit for the consultations, demanding the ACP group to check whether this limit is convening to all parties.

ii) The relational interplay during the procedure

The posting of actors and their position during the consultation has no legal base in the agreement but its empirical observation shall be an important point for the bargaining between the actors and therefore for both side's perception of the consultations' efficiency.After experience, the parties are represented by a mixture of different actors on both sides during the consultations: The EU's negotiating bodies are the Council Presidency, its predecessor and successor, as well as members from the Commission.[284] Generally, the Heads of Mission in the concerned countries are very important negotiating partners[285] as they have logically good knowledge of the countries' political and cultural structures and are in good contact under each other, what is of importance for intergovernmental negotiations on the Council level.

As coups d'état play the major role during the consultations, it is important to identify with which partner the EU wishes to talk (actual government, former government, civil society). The criterion is the possibility for the government to control the state territory.[286] Therefore the EU generally speaks with the party that has the most powerful position in the target country in order to manage the solution as effective as possible.[287] That would mean on the

[283] The Council of the European Union; 14257- COM (2009) 529; the most recent opening document serves us as an example
[284] Mbadinga: [7]; Cuyckens: p. 44
[285] One example give: Laakso/Kivimäni/Seppänen: p. 69
[286] Portela [2]: p. 42
[287] Laakso/Kivimäni/Seppänen: p. 56

other end that the EU also negotiates with authorities it doesn't recognize officially what needs diplomatic delicacy.

On a first negotiation day an internal reunion takes place with representatives from the concerned state. After this reunion, a preparation of the ACP group is conducted to figure out how to document these reproaches and how to prepare the concerned authorities to the formal invitations. At this point, the ACP secretariat enters its functions as a consultative body that is preparing the negotiation points with the government by its experience.[288] For the ACP, next to the concerned country, two chosen friendly countries (*"peers"*) and the two countries that were holding the last and will be holding the next co-presidency are on table. The peers are contacted by the ACP secretariat on an ambassadorial level (Committee of Ambassadors) by regional preference.[289] Their presence strengthens the multilateral commitments of the consultations, the adaptability to regional circumstances and allows the ACP to plan ahead, as consequences of consultations are likely to last longer. After a regional peer finding has taken place, the ACP group is also likely to integrate ACP-parties of another geographical scope (i.e. Caribbean or Pacific countries after the invocation against an African country) in order to complete the group presence. Optionally the targeted country invites the representatives of regional organizations, such as the AU in the larger sense, CARICOM, the Pacific Forum or even the Organisation de la Francophonie (or Lusophonie etc.). After these first nominations have taken place, a huge preparation phase is about to begin which is discussed in the different camps.[290] Subsequently, high level political persons of the infracting country need to be chosen to represent the country during the following procedure. Nominations depend on the function of who is in charge of the mission (foreign affairs, justice, prime ministers or even heads of state, like it was the case in Madagascar). In the following 30 days generally, the EU representatives confront the ACP representatives to the reproaches with an opportunity to make statements on the issues[291]. The European Commission prepares a questionnaire with principal questions to pose to the chosen delegation of the ACP country. Although not imperative, a memorandum set up by the state and based on this questionnaire is demanded. The ACP delegation is then reunified within the Committee of Ambassadors to discuss clearly about the points to accomplish. Often a chronogram or a roadmap that precises in how it would like to respond to the reproaches and how to return to normality, at which

[288] Interview with ACP official, 15th August 2013, notes of the author
[289] Mbadinga: [7]; Cuyckens: p. 44; Telephone interview with ACP official, 15th August 2013, notes of the author
[290] Telephone interview with ACP official, 15th August 2013, notes of the author
[291] Hazelzet: p. 6

point the state wishes to leave the situation throughout any given measure, is the result. During a procedure break the EU observes then the given answers and concludes about the commitments to establish by the state. The EU either welcomes the actions or declines them and concludes finally the appropriate measures, taking into account the proposals by the target country. At this point again the Council votes either by unanimity for an entire suspension or by qualified majority for partial suspension, but even for partial suspension often consensus applies. The EU reviews the realization of the measures in function of the roadmap with high attention on the given dates and hardens or loses its position in the following.[292]

Here a point should be introduced that argues about the procedural one-way character of the consultation procedure. As it is at least theoretically thinkable that also ACP countries would have reasons to invoke the Articles 96 and 97 procedures, by considering a European State or the EU having breached the agreement, a small institutional and procedural fictionist scenario should be thought about. The question is therefore: how does an institutional procedure within Article 96 and 97 framework look like if an ACP state invokes, after all exhaustive use of political dialogue, the consultation procedure? Nothing is known about this and the consultation procedures remain, as logical deduction from its wording, neutral on the question. As consultations are de facto a one way undertaking, for reasons stated above, the concerned state could theoretically ask the EU to pass on table. Reasons are sufficiently given and at this point too,[293] if a state wants to evoke Articles 96 or 97, it can do so unilaterally according to his own preferences without passing through one of the consultative bodies. But just as we have argued before, passing by consultative bodies would be wishful to lift the chances for a possible success.

It is to conclude that while the EU follows a classic institutional logic throughout this realization of its external action, two main impressions are noteworthy that snip into the process. At first, a documental intransparency has been perceived that could be now remedied a little more and secondly, a reciprocal procedure is not foreseen anywhere. Even though the second point is rather of a theoretical nature and might be petty-minded, it should be taken seriously in regard to an "*embellishment*" of the Articles' text, where the term "*party*" refers to "*either signatory*". Also visible from this rather descriptive and lacuna-filling subchapter is

[292] Telephone Interview with ACP Official, 22nd August 2013, notes of the author; Various examples for the possible contact outcomes: The Council of the European Union 10243/10 PRESSE 139; The Council of the European Union 9294/09 PRESSE 110; The Council of the European Union 11800/09 PRESSE 211; for a more general reading about the procedure see: Cuyckens: p. 49

[293] Telephone Interview with ACP Official, 16th August 2013, notes of the author

the important role of the Committee of Ambassadors on the ACP side that has - together with the secretariat and newly to what has been assumed before - an enormous role in terms of influencing and preparing countries throughout the process.[294] Taking into consideration this influence of other ACPs, it is now to question how consultations are evaluated in practice.

2) The practical application of the consultation procedures: a case study review

A) Trends and particularities of Article 96 and 97 cases

Even though this study does not aim to conduct an in-depth case study analysis where positive or negative evaluations should take place, the understanding why, when and how a practical application has occurred is indispensable to understand the reasoning by ACP statesmen, officials and academics behind that criticizes irregularities and incoherency.

The consultation procedures following Articles 96 and 97 have been applied to several, manageable cases of agreement breaches and their outcomes vary in terms of intensity.[295] From 1996 until May 2013, 23 cases have been registered (21 by the Council's Policy Archive until November 2010), whereby 13 different countries have been targeted. Several countries (Niger, Guinea-Conakry, Mauretania, Togo, Fiji and Guinea-Bissau) have been targeted twice or more by consultations and five cases are not closed yet, including the case of Zimbabwe that continues since 2002[296] and the recently re-opened consultations with Guinea-Bissau in spring 2011.[297] With the exception of Cote d'Ivoire, most of the other targeted countries are economically of lower significance.

[294] Telephone Interview with ACP Official, 22nd August 2013, notes of the author; according, the Committee of Ambassadors consults the country's representatives clearly with pragmatic measures to take, insofar which steps should be taken absolutely and what should not be done. A famous and frequently appearing example are ongoing justifications by the countries of which reasons coups d'états have been happening. The bodies try to explain that after the invocation of the consultation procedure it is no more of importance why such a coup has been practiced, but how a return to constitutional order can be as quickly as possible and the most credible way.
[295] For this estimation see: Mackie/Zinke: p. 7; a precise overview is given by Andrew Bradley in the same series.
[296] http://www.consilium.europa.eu/policies/eu-development-policy-(ec-wbesite)/main-themes/cotonou-partnership-agreement/consultations-under-articles-96-and-97-of-cotonou-agreement/policy-archive?lang=en ; Saltnes, Johanne Dohlie: The EU's Human Rights Policy – Unpacking the literature on the EU's implementation of aid conditionality; ARENA working paper, No. 2, March 2013, p. 2
[297] http://www.acp.int/fr/content/consultations-under-article-96-cotonou-agreement-between-government-bissau-and-european-unio

A study through all cases shows that the EU is following generally a clear, systematic pattern[298] and only few exceptions occur in the young history of consultation procedures. In contrary, the reasons for applying Article 96 and 97 consultations differ widely[299] in terms of their broad approach, but do not present, as mentioned above, a much defined record in terms of particular violations. Its missing is part of the very broadly labeled Articles 8 and 9 that offer much space for interpretation and likewise a woolly room for justification by the invoking side.

The human rights, rule of law and democracy record of countries where consultations have been applied is generally worse than in the average of all ACP countries. However, this does not mean analogically that the EU strategically introduces consultations with all those countries which present a bad human rights record. A statistical correlation is missing to that end, but once the consultations invoked, this correlation becomes significant.[300]

For example, only in the case of Liberia from 2001 the EU based its consultations also on Article 97, but without making an argumentative distinction between the breach of good governance and Article 96 conditions.[301] The case of Liberia was also the only case where consultations have been introduced where trans-border human rights violations have been identified. It is interesting to see that the distinction between the breach of the good governance element and other essential elements is not made up clearly: Given the fact that it is the only case where Article 97 has been applied, the worries of the ACP states which have been stated earlier in this work – namely the wastefulness of an addition of a further fundamental element clause into the partnership agreement by 2000 – have a certain justification. Our prior observation about the non-inclusion of Article 97 into the newly constructed framework of Annex VII confirms this trend of a mere symbolization of fundamental elements. The rare Article utilization has another reason that is explainable through the accession to bilateral funding by the ACP, which is of a high complexity.

Secondly, authors argue that in every case of coup d'état the EU has, until now, deployed the use of Article 96 as a breach of democratic principles and the rule of law.[302] This observation has no clear validity anymore: it is only true to the extent when a coup d'état is not considered as the action itself strictly speaking: after a coup d'état in Sao Tomé and Principe in 2003 for

[298] Cuyckens: p. 55; at this point the pattern is observed in regard to the reasons for invoking Articles 96 and 97, not the solution portfolio.
[299] Mackie/Zinke: p. 7
[300] Laakso/Kivimäni/Seppänen: p. 48 f.
[301] Broberg: p. 10
[302] Laakso/Kivimäni/Seppänen: p. 15; Cuyckens: p. 50

example, and quick restoration to political normality, the situation has not lead to consultations under Article 96. Also, actual developments in Central African Republic remain to be observed, as four months passed by without public knowledge about the sole mentioning of using the Cotonou Agreement's provisions.[303] Coup d'état evocations cover approximately half of all consultations procedures applied. The reason for the comprehensive application in coup d'état violations is that they are considered as clear cut violations of democratic principles which are easy to recognize while other situations are highly dependent on long-lasting evaluations of probable deterioration or non-deterioration of a situation.[304] Such violations are less comfortable to notice for the EU and demand therefore higher administrative and procedural costs that do not guarantee a result.[305] According to the ACP, coup d'état violations trigger a direct passage to consultations with automatic budget sanctioning which are falling under the behavioral scope of special urgency cases.[306]

The other appeals have been made due to Human Rights and Rule of Law violations[307] that are related to non-transparent electoral processes or the violations of fundamental freedoms,[308] but a Human Rights violation as such has never been the only reason for the evoking of consultations. It has always needed a simultaneous breach of democratic principles so that one could easily argue that democratic principles prime over Human Rights abuses[309] or that they are even necessary to clearly identify Human Rights abuses under this agreement. When measures are applied this becomes even more visible. The skipping of Article 8 and the direct passage to consultations with automatic tranche cuts is achieved only in coup d'état cases. When human rights violations are identified, the EU remains under the framework of political dialogue.[310] If we subsume coups d'état as a violation of free and fair elections or illegal constitutional changes, the latter has even been the reason for invoking the consultation procedures in each case.[311] Also, it is more difficult to assign human rights violations always

[303] http://www.nytimes.com/2003/07/24/world/sao-tome-agreement-reinstates-president-mutineers-pardoned.html?ref=saotomeandprincipe ; in the time of writing this work, a coup d'état in Central African Republic was active since 4 months approximately. To date, no information about the opening of a possible consultation procedure can be found.; further reading on the case : http://www.globalresearch.ca/central-african-intrigue-another-western-backed-coup-detat/5330013;
Indeed both are the only cases in the framework where no consultations have been applied. The author argues interestingly in favor of a strategic acting of the EU, having less interest in the comeback of General Boizizé.
[304] Laakso/Kivimäni/Seppänen: p. 34; Cuyckens: p. 50
[305] Portela [2]: p. 41 ff.
[306] Telephone Interview with ACP Official, 15th August 2013, notes of the author
[307] Cuyckens: p. 50
[308] Bradley: p. 3
[309] See also: Portela [2]: p. 41 f.
[310] Telephone Interview with ACP Official, 22nd August 2013, notes of the author
[311] Laakso/Kivimäni/Seppänen: p. 19

directly to the government in place, while these can also be committed by private actors or the results of ethnic conflicts. After coups d'états it is normally the case that coup-launching party is on power the other day. In several cases like in Guinea-Bissau or Zimbabwe for example, "only" denied foreign election observation (breach of democratic principles) by the partner countries was the reason that led to the introduction of consultations.[312] Compared to all types of possible human rights abuses that have been discussed within the European Parliament commissions (i.e. gay rights, aboriginal rights, child and sex tourism etc.), the EU's concept of invoking the consultation procedures has been broadly uncreative and limited[313] and stands therefore in a contrast to a toolbox of possible intervention criteria.

Several cases show a quite successful record of consultation resolution. The cases of Cote d'Ivoire, Liberia or Niger present a very rapid commitment list dispatching with intensive discussions on Brussels or country's tables.[314] It has even been the case that a country considered its own situation as worthy to invoke consultations: still under the Lomé IVbis framework in 1998, Togo has also deemed it necessary to bring its own (as critically marked) state to an end, regarding the procedure as the most productive way to solve a situation, where normal aid relations have been cut since 1993.[315]

The most famous and unique example that occupies academics[316] and steps out of line is the case of Zimbabwe of 2002. Unresolved since almost 12 years, applied consultations have been topped by the use of additional sanctions under the European CFSP framework: in addition to suspensions of EDF program envelopes (lying within the framework of the Cotonou Agreement) the EU established travel bans, arms transfers and asset freezes (outside the Agreement).[317] The direct passage from political dialogue under Article 8 to Article 96 was proposed by the Council to the Commission after waiting too long for a response of the Zimbabwean government to prior the agreed dialogue.[318] After series of further misunderstandings by the partners, EU officials and experts agree today that the passage to the consultation articles was not a good solution in the case of Zimbabwe, where political dialogue has not been conducted.[319] At the same time the EU started consultations with the

[312] Laakso: p. 129
[313] Bartels: p. 38
[314] Hazelzet: p. 12 f.
[315] Mbangu, Lydie: Recent cases of Article 96 Consultations; European Center for Development Policy Management, Discussion Paper No. 64 C, 08/2005, p. 10
[316] Laakso: p. 131 ff.; Laakso/Kivimäni/Seppänen: p. 68 ff.
[317] Bradley: p. 12
[318] Laakso/Kivimäni/Seppänen: p. 69
[319] Laakso: p. 130

Zimbabwean government in a moment where the situation in the country itself has been improved, i.e. that freedom of participation and overall participation showed a better record.[320] Here the intervening of the EU was downturned to a campaign of political propaganda and the EU's negotiation presence was perceived as thoughtlessly arrogant. Also, the European countries have conducted different strategies of toughness towards the government in Harare; especially the role of the UK had a difficult standing in being accused of supporting regime change, leading to a diplomatic crisis.

As Laakso et al argue, the case study record of the EU would be much more of a coherent one without the problematic developments of the Zimbabwean case.[321] In other words, reasons for the failure or non-succeeding of Article 96 and 97 procedures are principally to gain from the case of Zimbabwe while on the other side, successful outcomes can be learnt throughout several other cases.

B) How are consultations evaluated? When are consultations necessary?

i) Analysis of success and failure factors

How could one explain success or failure factors for the outcomes of consultation procedures between ACP countries and the EU? Assessing the impact and outcomes of Article 96 sanctions varies from positive to negative evaluation where it depends from which point of view academics argue: *"Coherence with regard to the Article 96 procedure is hard to interpret in an unambiguous way by empirical research. It requires different approaches in different situations and with regard to different issues."* [322]

A general evaluation of effectiveness is therefore difficult and rather a case-by-case analysis should be taken[323] so that there is until now no clear tailor-made concept on how consultations should ideally look like (even though a certain standard procedure has been presented). This can be a result of the above cited evaluation backlog in European development policy as such, but is also the logical outcome of broadly defined Article provisions. However, various recommendations have already been communicated.

It is has become common sense that whether or not consultations with target governments have a good outcome needs to be assessed in the forefront of the call, whereby the willingness of the government should be checked.[324] *"Article 96 should not be invoked in cases where the government of the ACP country in question is uncooperative and where Member States are*

[320] Laakso/Kivimäni/Seppänen: p. 15
[321] Ibid.: p. 51
[322] Ibid.: p. 43
[323] Zimelis: p. 402
[324] Mackie/Zinke: p. 8 ; Laakso/Kivimäni/Seppänen: p. 15

not all committed beforehand to reflecting the appropriate measures in their bilateral relations."[325] This is a lesson learned from the negatively evaluated consultations with Zimbabwe. Logically a direct passage to consultations due to non-cooperative behavior would become unlikely to be worth striving for.

It is often argued that the passage to Article 96 and 97 consultations is applied too quickly where it would be more appropriate to stay longer within the context of political dialogue. If this is not feasible for any reason, political dialogue should be continued to be conducted during the consultations. This would at least have an impact on a coherent legal linkage between Article 8 and the Articles 96 and 97,[326] whereas this conclusion results also from the experiences with the Zimbabwean case, held back throughout the mid-term revisions. It is remarkable that since the opening of consultations with the Zimbabwean government no further consultations have been started for a bigger period of time until the case of Guinea-Bissau two years later. It is obvious that the EU has become more careful in invoking the consultation procedures after the unsolvable situation with Zimbabwe.

Another important issue is the involvement of other, so called *peer countries* into the consultations. For several cases (i.e. Togo) neighboring partners or the ACP group have been having a significant influence on the quick accomplishment of consultations.[327] For the outcome of the Guinea Bissau (2003) consultations the inclusion of the ECOWAS group was crucial, while such a support was missing from the SADC community when the EU was calling for consultations against Zimbabwe.[328] Consequently, a general thumbnail seems to show relevance: the more a country is isolated by its trading and diplomatic neighbors, the more it is willing to apply measures set by an external force. The more it can find allies or indifferent partners in its regional sphere, the more it is likely that the country in question becomes reluctant to apply them.[329]

This point brings us back to the discussion of the proposal of a common consultation procedure invocation: if the inclusion of important partners and neighbors from the same group of states are so important for the successfulness of a consultation procedure, why aren't decisions that lead to these consultations, after all exhaustive use of political dialogue, taken at least by a bigger group of states? At this point the EU leaves us in an explanatory gulf what

[325] Laakso/Kivimäni/Seppänen: p. 20
[326] Mackie/Zinke: p. 8 f.
[327] Mbangu: p. 17
[328] Cuyckens: p. 58
[329] Telephone Interview with ACP Official, 16th August 2013, notes of the author; this thumbnail it is a based on an experience-related explanation.

seems to be contradictory with its own strategy, especially in regard to recent quicker developed reactions by the AU or regional organizations such as ECOWAS. For example, the influence of ECOWAS during the Mali coup d'état in 2012 is a convincing partnership example where no necessity of passing to consultations was given after ECOWAS was able to manage quickly the return to constitutional normality.[330] Partner country opinion and inclusion can take pressure from the confronted governments and provides casualty during the negotiations. The presence of peers can also emphasize the importance of being embedded and finding a more complex, dialogue-based solution that functions in the state's environment, that is – in regard to appropriate measures – acceptable to close trading partners. Even though the (partial) loosing of the Articles' *effet utile*[331] is to fear through this step at first sight, it must be acknowledged on the other hand that the EU could waste time, administrative costs and energy if partners are not included, not convinced or do not have positive feelings about the invocations, as well as if the concerned country has no willing to move. Thus, the utility of the consultation procedures can also be interpreted to go beyond the interest of punishing states that do not respect essential or fundamental elements in upholding the agreements usable framework as much as possible during conflicting situations. Although this idea seems naive at first sight, a clearer approach to a multi-partner consent from the beginning is essential. Therefore it mustn't be necessarily the concerned country itself that has to give its asset, but at least close partners should welcome and vote for this step. The invocation of consultations against Zimbabwe was against the advice of its neighboring countries[332] where different regional priorities have been pursued and SADC was not convinced unanimously. But for achieving this evaluation, the concerned regional organization needs to study the situation properly. In the case of Madagascar i.e. it is argued that the situation has been analyzed unevenly by SADC what lead the EU to position in its favor since it is using a strategy of *subsidiary* regarding the necessities of the countries. The

[330] Ibid. in this case, consultations have been held informally throughout delegations later on. This had the advantage of not falling into an automatic cutting procedure and to maintain important development aid tranches.
[331] This is a very interesting and multi-dimensional point that should be discussed. Since appropriate measures have the possibility to be seen as measures that "least disrupt the agreement", that should be taken in a positive environment and a possibility to disrupt the agreement entirely exists anyway (Art. 99), a modification of the consultation invocation process seems a plausible step. As appropriate measures are not defined clearly and if we read the aim of the consultations as the way of getting back to political normality as quick as possible, we could also consider a multilateral/ more pragmatic approach to consultations as a productive contribution to the Articles' *effet utile*. Especially when an *effet utile* is not defined throughout the single Articles' limits, but in the context of the purpose of fulfilling of the agreement they are embedded in.
[332] See: Portela: p. 45

EU explains that this strategy relies on the good relations to the AU that have been established meanwhile.[333]

What becomes visible from the Guinea-Bissau case is the factor of a clear identification of the breach's nature in order to adapt concrete measures.[334] Ideally, this should save time, work space and helps presenting precise solutions to targeted partners without affecting the civil population. When outcome success is correlated to a breach's identification, it is also of no wonder that coups d'état are more frequently addressed in order to have a clear problem-solution portfolio. Logically it will be a bigger challenge for the EU to be able to identify other violations with the same precision as it recognizes politically motivated subversions. As solution proposals for coups d'état the EU demands and accepts the preparation of new elections or the re-establishment of a democratic constitution. Even though these demands are probably logical (and as milestones easy to recognize empirically) it does say less about the guarantee of a real democratic value behind the whole process.[335] It could be easily argued that solutions with symbolic characters are chosen.

Probably the most important point that is on balance for the evaluation of the consultations is the reproach that the procedure as such is not transparent enough.[336] We have identified and acknowledged this problem by looking closely at the EU-institutional procedure of the application of these Articles and its information furnishing during the procedure. To the same end, as identified through case study documents, the public has very limited access to the course that lies exactly between the identified violations, the subsequently published remedy list, and finally the applied solutions that lead or led to the satisfaction of the EU. Copies of official letters addressed to the targeted confronting them with the reproaches instead do not help us to gain interesting information about the consultation record. Several times, the EU recognizes efforts being made by the partner government and maintains the appropriate measures established which needs further explanatory value. Above all, the officially

[333] Email correspondence with Malagasy State Official, 2nd September 2013; Telephone Interview with ACP Official, 16th August 2013, notes of the author; it has been stressed here that the EU was following the adaption of statements by the African Union, adapting itself the opinion of SADC which was based on a *"false analysis"* of the situation.
[334] Mackie/Zinke: p. 8
[335] Zimelis argues from a similar point of view, stating the EU's remedying approach as *static*. See: Zimelis: p. 403 f.
[336] This point is also argued by Mackie/Zinke; see: Mackie/Zinke: p. 8

published material does neither tell how the perception of consultations on the local level is advanced,[337] but only how/if the EU sees the advancement of the process.

Additionally it needs to be held back that while the legal security of Article 8 might have been shaped during the revisions, this does not automatically lead to a more transparent application and does not tell us whether all the Article's provisions are fully exploited.[338] Results for a higher exploitation are not yet to observe. Probably a 2015 revision or the passage to a new agreement framework needs to be waited for to gather retrospective impressions about revisionist gains.

ii) A double standard? The non-evocation of Articles 96 and 97

After having presented an overview about the conducted case studies and the argumentative approach behind, it is also important to stress when and, if possible, why the EU did not pass to the call for Article 96 and 97 consultations in some cases. This element is heavily discussable[339] as the choice of case studies where consultations have not been invoked is much more subjective and arbitrary than the case studies for the effective evocation of consultations in countries with slow decreasing human rights situations, as it was shown above. Not invoking consultations means analyzing hundreds of situations worldwide. To that end, argumentative positions from the previous chapter of development aid inconsistency are re-brought into life and linked directly to sanctions under the Cotonou agreement. They are far more doctrinal than quantifiable.

We count two different argumentative sides that are important to mention and that can also be combined in the discussion: on one hand the argument of what we call *intended incoherence* and secondly the idea of a simple missing of taking notice of Human Rights degradations. *Intended incoherence* means that the EU does take note of (sometimes) flagrant Article 9 breaches and does not intervene because the targeted policy objectives are in danger. Instead, the Commission condemns these violations publicly. The same is the case for circumstances going beyond Article 9 like war or quasi-war situations.[340] In this situation one could argue the EU is having serious concerns of *"[…] the merits of applying sanctions or negative*

[337] The same perception is recorded by Laakso et al. For the frame of discussion, the available documents only give impressions of general agreement or a non-satisfaction of the EU's side. Laakso/Kivimäni/Seppänen: p. 41

[338] Compare to the pre-revision perspective of the ECDPM: ECDPM Policy Paper: p. 3 f.

[339] Del Biondo and Saltnes discuss in a controversial manner about precise reasons for the non-evocation of the consultation procedures.

[340] Laakso/Kivimäni/Seppänen: p. 37, p. 53

measures."[341] Problems occurring with this first argumentation are automatically leading to the second.

Because secondly, the correct evaluation of a democracy, rule of law or human rights breach should be given by determining clearly at which point the target country has broken the premises.[342] In regard to our first part about the different perceptions of conditionality modalities it becomes quite clear that different perceptions about these notions introduce uncertainties about at which point they are broken. Definition, explanation and condition setting become therefore interrelated in regard to the (unintended) non-application of consultation procedures.

The most interesting point that amplifies especially the dilemma of democracy clauses is the situation where countries which do not present satisfying democratic records are able to ensure development and economic growth in the same time.[343] Taking into account the double or triple punishment of countries under the invocation of Articles 96 and 97 and countries that, despite problematic human rights situations, have not been targeted at all the previously posed question needs to be asked again, whether the EU builds its action on a normative or on a strategic approach. Although it is argued at this point that colonial-historical and direct economic ties are not of significance when it comes to the establishment of consultations, even that a colonial past with a EU member state results sometimes even in a more severe treatment;[344] but that whether the subjected country is a key player for its region or not seems to have a crucial impact. The reluctance of passing from political dialogue to consultations is observable for boosting economies such as Kenya, Nigeria and Ethiopia, whereby the threshold to sanction these countries seems to be larger.[345] This hesitation is also linked to the effects that shall be intentionally caused throughout development aid cuts: for emerging countries like the listed (especially with high resource deposits), development aid is less important and would be a minor reason for stopping violations.[346] It is therefore immediately to question, whether consultations in development aid are an effective tool towards more

[341] Smith: p. 26
[342] Broberg [2]: p. 16
[343] Del Biondo: p. 383
[344] Hazelzet: p. 1; Hazelzet's explanation works against the reason for which we supposed the introduction of non-execution clauses in part I of this study. After its introduction, the human rights clause seems not be *"[…] an empty shell. […] This finding is surprising since it runs counter to the frequently alleged gap between human rights rhetoric and practice."*
[345] Del Biondo: p. 390
[346] Portela [3]: p. 77; the author bases itself on an interview with an EU official, stating that cutting development aid would have been „peanuts" in regard to the economic size of the country.

powerful countries and secondly, whether their shape is rather tailor-made for controlling relations to countries of less economic weight.

Even though a plausible explanation is offered through these ideas, a definite conclusion about this cannot be drawn too hastily, as long as the empirical quantifiable data about a correlation between pursuing interests and non-invocation of Article 96 is until now hardly relevant. Examples to prove strategic and interest-driven non-application are chosen in the forefront where it is clear that such interests already exist,[347] and these examples are too few to become meaningful for an empirical prove. However, facing the record of so far targeted countries mirrors a seeming correlation between importance of strategic partnership and sparing so that it would be wishful to develop further studies on this. So at this point we should keep in mind what the before-stated difference of correlations in HR records tells us: countries within the consultation procedures present a worse human rights record than the average, but there remain untouched countries that present the same.

Another reflection should be made up at this point. The preference by the EU to establish consultations after various coup d'état breaches might be easy to recognize but has another side that is important: while coups d'état occur after the country in question cannot present sufficient resistance, political subversions can also be prevented where the government in place is ruling on the edge between democracy and authoritarianism, being able to crush any attack on its power. It is to say therefore that as easy as coups d'état are to identify in comparison to other democratic and human rights breaches, the easier they might be to repress through authoritarian ruling as well. Before everything, they are just one puzzle stone and unrepresentative for the democratic and rule of law development in ACP countries *per se* what takes us back to our first part's conclusion about the EU's approach limitation to democracy. Beyond the case of the Sao Tomé and Principe putsch the recent case of Central African Republic makes us question also the praised principle-based acting of the EU in coup d'état actions, making an objective approach finally difficult to apply to those most congruent cases of Article 96 invocations. Besides it accentuates the small distance between *special urgency* and non-invocation.

According to this discussion it is legitimate to argue that a strategic approach gains to the detriment of a norm-based line.

[347] Saltnes: p. 6

c) The relationship between classic sanctions and development aid sanctions

In order to better integrate the gained impressions it is of use to compare punitive measures relating to development policy with sanctions that the EU uses under its CFSP framework: of course, we do not analyze CFSP sanctions more than superficially, but a confrontation should be helpful in order to categorize consultations better.

EU sanctions are based on antecedent Council decisions but become afterwards the only institutionalized community tool that is following an integrated EU decision making procedure: after proposition by the Commission and the High Representative, the Council concludes with qualified majority voting the establishment of restrictive measures.[348] After an increasing of sanctions established in the UN security council since the 1970s, the autonomous use of EU sanctions has begun in the 1980s and multiplied intensively during the 1990s while it increased dramatically in the very recent past, from 22 in 2010 to 69 in 2011 and is today part of a new international self-perception of the European Union. The most frequently used sanctions are arms embargos, followed by asset freezes and travel bans.[349] This gain of importance needs to be picked up for this work to observe if it has consequences for the culture of the consultation procedure in the Cotonou Agreement, as the agreement's consultation articles do also not go beyond the cutoff of development obligations towards i.e. the imposition of economic sanctions.[350]

From an European institutional point of view measures that are implemented within the Cotonou Agreement do not properly refer to the term *sanctions*. Those remain reserved for measures that the EU establishes under its CFSP framework in Article 215 TFEU.[351]

In order to manage the link between classical sanction theory and development aid suspension a widening of the definition is needed, as it should not be forgotten that in the case of the EU this aid suspension is institutionalized as well, not depending that much on unilateral assessments. Therefore Portela offers a wide concept that is covering *"[…] the interruption of normal relations or the withdrawal of a benefit by a state (or a group of states) in response to an objectionable action by another state or entity."*[352] The nuance that is made here clearly focuses on the state and the ruling class as a targeted object and is therefore meant to differ from classic economic sanctions where spreading effects remain difficult to be seized.

[348] Keukeleire/Mac Naughtan: p. 104 ff.
[349] Gebert, Konstanty: Shooting in the dark? EU sanctions policies; European Council of Foreign Relations, Policy Brief, January 2013; p. 1; Vines, Alex: The effectiveness of UN and EU sanctions: lessons for the twenty-first century; International Affairs; Vol. 88, 04/2012, p. 868; Portela: p. 84
[350] Bartels: p. 38
[351] Treaty of the Functioning of the European Union, Article 215; see also: Portela: p. 40
[352] Portela: p. 40

Sanctions should argue governments by re-directing community funds and are not part of bilateral aid flows in application between target country and European Member States. Further spreading effects shall be caught up by the maintaining of immediate humanitarian aid provision to the benefit of the population.[353]. This might be theoretically reasonable, but it should be argued that an easier seizing of what are the outcomes is not automatically given and that even the cut from EDF grants can have problematic results for the population.[354] This is a very important, even central argument for this work. In 2001 already "*The ACP-EU working group on the impact of sanctions and embargoes on the people in countries targeted by these measures, has indicated that it is the wider population and not the government, which often suffers from the imposition of sanctions."*[355] Despite any willingness by the partner government to furnish commitments it remains also – at least to a certain extent – in control of important relations in the country and has thus influence on the local population. Authoritarian elites who feel themselves targeted by sanctions do generally have other sources of income and can therefore manage to unload repercussions on their population. Sanctions could make them reluctant to open up their system and a vicious circle could be the consequence.[356] Logically, even smart sanctions and government programme cuts do influence the local population and in poor countries the sole provision of humanitarian aid can have disastrous outcomes when important infrastructural mechanisms are interrupted. This is of an even higher problem when humanitarian aid content and EDF grants somehow related to the improvement of the population's basic needs are interrelated at some points. When roads are not finished through public funding support cuts, it is for the economical detriment of the poorer population. This interrelatedness is differently shaped among the countries, but also an approach of representatives of the development countries' civil society organizations (that could theoretically also argue in favor for human rights clauses as a positive mechanism of pressure), who fear long-lasting effects for the development targets of their countries.[357] While the above-mentioned and famous 1995 EC Communication clearly demands that *"in the selection and implementation of these measures it is crucial that the population should not be penalized for the behavior of its government."*[358] it needs to be admitted that whether or not the population suffers is finally not in the hands of the EU. So to see, the factor of

[353] Ibid.: p. 41, p. 43, p. 49
[354] Zimelis: p. 402 ff.
[355] Statements of the ACP-EU Joint Parliamentary Assembly; 30/01/2001; http://www.europarl.europa.eu/dg3/sdp/acp/en/2001/aj011030_en1.htm#5
[356] Compare to Youngs [3]: p. 2
[357] Compare to Zimelis: p. 404 ; for the organization of civil society: http://www.trademarksa.org/news/african-ngos-oppose-human-rights-clause-epas
[358] Commission of the European Communities; COM (95) 216 final; p. 7

dependency should be counted if we regard that economic relations with a third country are not exactly following the same logic as relations based on aid provision aiming to lift these countries onto the level of normalized economic relations: A characteristic of development aid is that programs should conduct economic wealth to be equally distributed among the population and guarantee basic needs. Cuts put it automatically into danger.

In the course of the revision procedure 2005, as already mentioned, it was argued with the addition of Annex VII that the consultation procedures need to be further connected to a positive fostering of the EU-ACP relations. The idea of detaching a negative character from the consultations seemed to be necessary with regard to the understanding of Article 96 as the *"sanction article"*.[359] However, in reality this remains difficult as we could not observe any consultation procedure that has not ended with the introduction of *appropriate measures*, neither has it been evoked, as mentioned above, by any ACP state unilaterally.[360] Moreover we have mentioned before that the EU did not define in detailed manner what could be understood under *appropriate measures* in order to maintain highest flexibility. The ACP group believes that the term needs to be modified as several ACP countries criticize the term *appropriate* as "*semantic*", presenting a wrong approach to those measures applied in reality. Normally, they should represent positive moves that are applied to cure the given conflict. The fact that in several situations EDF cuts are automatically launched without a look on the individual situation of the state invites the ACP to argument that measures are not *appropriated/adjusted* to the given situation, but simply negative.[361]

The question, whether consultations do have still the character of consultations *strictly speaking*, seems consequently appropriate. In practical, and diverging from the EU's position, it would be interesting to think ahead cautiously that political dialogue under Article 8 is in practice a "*consultation*" word-for-word and that the "*consultations*" under Articles 96 & 97 are finally – even sometimes in a much attenuated form and considered as smart – "*sanctions*". This critique seems to be harsh but tries to point out, in how far a process of linguistic appeasement has taken place, mostly throughout the revisions, that incites consultations to get lost as a prolonged form of political dialogue.[362] On one hand this development complicates a clear distinction, on the other the achievements made in Article 8

[359] Laakso: p. 123; it is reminded at this point that the wording has moved from "non-execution clause" to the "dialogue under the consultations" in Article 96. See: *Table 1*

[360] Ibid.: p. 123; this does not mean that every country has been sanctioned through the consultation procedure in terms of transfer cuts, but (lists of) conditionality actions to fulfill have been applied.

[361] Telephone Interview with ACP Official, 16th August 2013

[362] A major example is the wording change in Article 96 after the 2005 mid-term revision, where hence "*dialogue*" is also conducted under the consultation procedure.

through the revision procedures become rather worthless. A blurring line in this development should be therefore avoided and rather should Article 8 mechanisms be continued at each point between the consultations.

Compared to CFSP sanctions the consultation procedure is, as Portela outlines, a quite successful tool from a European perspective, as long as the EU is an important trading partner or significant donor for this country.[363] In Vines' eyes, the record of Article 96 appropriate measures stands in contrast to the to date evaluation of CFSP sanctions and the use of the latter can be then a useful mechanism if a UN Security Council sanction does not have successful outcomes.[364] The successfulness of consultations becomes visible with a closer look on the measures applied through these channels, being generally limited to EDF tranche cut-offs or government program cuts with the maintaining of humanitarian aid. The EU toolbox for CFSP sanctions is a number larger and is opened at a point where consultations lose their range and where the stopping of development aid flows becomes a politicized issue of internal propaganda. The case of Zimbabwe illustrates these limits, where Article 96 measures went into the wrong direction. The probability of not succeeding or even worsening the situation is therefore logically higher for CFSP sanctions what lowers the surprise. Being focused on development aid, consultations suggest themselves as a mechanism and from a European perspective this can be effectively interesting. It should therefore be recognized that consultations have a sanctioning character which might be less obvious but can be powerful and hitting when development cooperation is an important building stone in the state's structure (apart from who is under control).

3) Which perspective to draw on conditionality and clause-execution by the ACP?

"La conditionalité n'est pas appropriée comme instrument politique."[365]

"Le principe général sur la conditionnalité est accepté"[366]

Part I of this work has described the fact that the partnership agreement has been signed by both sides and relies therefore of a common perception about its modalities in the end. On the other side, several points that criticize this conditionality have been mentioned. The question,

[363] Portela: p. 49 f.
[364] Vines: p. 877, p. 874; this shouldn't say anything about the effectiveness of CFSP or UNSC sanctions as such but shows at which point consultations or CFSP sanctions can be effective.
[365] E-Mail correspondence with Cuban State Official, 2nd July 2013
[366] Telephone Interview with ACP official; 15th August 2013

why countries enter into such kind of arrangement, is also interesting to discuss. Several countries have seen major economic opportunities in the re-negotiation of the prior conventions[367] in order to escape their unfortunate economic situation. The EU could maintain and stabilize its regard on conditionality throughout the weak position of the ACP states but in fact the Cotonou Agreement and its company of conditionality has been signed and set up.
Which regard can we catch from the ACP side? One very jutting out aspect of this work is that while there seems to be an overall agreement about the theoretical content of clauses based on political conditionality, there is no covering agreement about the tool of "*conditionality*" and how it should be used. Hard it is to disagree with the normative values transferred by the EU and practically impossible would it be to think a step back off the human centered development approach. Nevertheless the incomplete ratification process among the ACP until mid-2013 reflects the problems that the countries have with conditionality tied to the Accords' dispositions and this leaves us in a dilemma that might be very specific for development aid conditionality and a future comprehensive framework. This shows also that it is not possible to define a clear statement for a general attitude of ACP countries towards political conditionality as it is conducted throughout the Cotonou Agreement, but it is certain to see that several aspects that have been mentioned towards the concerned countries need still to be perfected.[368]

In regard to the application of non-execution clauses one major development is feared: it is not the fact itself to pass from political dialogue to consultations but the perception that the demands during the procedure are not applied in a uniform manner in terms of intensity and duration of the appropriate measures to all countries. This fear is especially spread among small players where high pressure is easier to establish.[369] Even though no exact generalization can be drawn from this (we bear in mind the case-by-case approach due to the small number of invocations) it is interesting in any event to see that the size and the political and economic role of a targeted state seems to play a role in the ACP self-perception in being the weaker player, while to the other end the EU has any freedom. It enters also into the logic of what has been argued before, namely the reasoning for strategic non-application or disregard on important small countries' interests. Also it has been argued by a Fijian official that the timeframe to re-organize in order to comply to the demanded commitments have been

[367] E-Mail correspondence with Cuban State Official, 15th July 2013
[368] Telephone Interview with ACP official; 15th August 2013; This remains a very general evaluation but needs to be set in regard to the practical realization of case-by-case analysis and the institutional procedure; the argument, not to generalize, can therefore be reinforced.
[369] Telephone exchange with Fijian Official, 23rd July 2013; notes of the author

too short and escorted with high pressure.[370] In regard to the non-constitutional passing of the interim-presidency, a Malagasy official argues in the same direction. "*Les décisions de l'UE sont comme unilatérales. Il n'y pas eu d'échange mais des solutions déjà apportées par l'UE qui s'imposent.*"[371] It is then claimed that the EU follows principally the statements and positions of the international community and its influential countries in regard to political happenings. In the Malagasy case France is the most influential partner where the EU approaches its position,[372] meaning from an ACP-state perspective that individual interests do indeed play a major role in decision orientations of the Council, moving away from an honest common position. While the invocation of consultations is not related to being a former EU member state colony, the passage during the procedure might be a relevant feature in the Council.

Throughout it becomes visible that while the ACP in form of a multilaterally organized group interprets the EU's approach still as moderate and open, directly concerned country officials do less. Countries that have been involved in consultations are having problems to understand the Cotonou framework as a true partnership agreement. This observation is logical as the ACP group's mission is the maintaining of good political relations to the EU whereby each country within the group has an own diversity of problems to solve. So to say, the divergence of national interests among the ACP countries, their high signatory quantity and comparably low-integrated supranational character (including other interest-driven opinion construction in regional organizations as UEMOA, SADC or ECOWAS) prevents the countries also to position them actively within a univocal statement towards clear political topics in order to function as a comprehensible counterweight. As the EU is more confident towards integrated groups and their positioning (i.e. the AU) consultations could be more understanding for the ACP. Not having the same level of integration makes the consultation process very difficult and keeps the opportunity window closed.

[370] Ibid.
[371] Email correspondence with Malagasy State Official, 2nd September 2013
[372] Ibid.

Conclusion, discussion and outlooks

Human rights, democracy, rule of law and good governance clauses continue to bear visible problems for the EU's partner countries. This has become already evident from the first part of this study, where our scope has been enlarged to numerous examples and theoretical discussions about conditionality embedded in a partnership and simultaneous donor-recipient logic. The neglecting of external influences and the use of double standards leads to protest and also to the denial to enter into these agreements. The legitimacy of human rights and democracy clauses, applied in a strategic and uneven logic which does not correspond to the universal character originally transferred by them decreases slowly while other actors do still not play the same game of conditionality in their investment policies. It needs therefore to be concluded that either human rights, democratic principles and the rule of law need to be enacted every in the same manner worldwide – towards a consequent clause-setting for every partner – or the EU's approach to conditionality needs to be changed in regard to development aid in the long term. Several reasons and potential problems for this have been pointed out in both parts of this thesis.

Although various quickly remedied cases have been recorded throughout the consultation procedures Articles 96 and 97 that present a firsthand success, important second-rate shortcomings are visible that could be improved in a mid-term revision. Although we know now more about the process of consultations as such, informational lacks about procedures and decision making on the institutional side are relevant and prevent the public still from drawing clear conclusions about which direct procedure lies between invocation and solution, what would finally constitute the real success for all participants; most importantly, the public opinion of the concerned states. At least, improvements could be made on three different layers.

a) Institutional: Success of consultations has so far only been measured through a quick and satisfying remedy. But what is taught by evidence, and becoming most visible through the Zimbabwe case, is that consultations need before everything willingness, multilateral cooperation and reciprocal dialogue instead of unilateral assessment to function properly. Even if a multilateral invocation shall be too controversial, at least multilateral fixed points such as the ACP secretariat or the Commitee of Ambassadors need to be used more seriously and fed with more information to guarantee a net improvement throughout the whole process. The ACP group has stressed this necessity early enough.

b) Legal/Textual: Secondly, and in regard to the forthcoming re-evaluation of the agreement, the EU could make a step towards the ACP without putting the flexibility of the articles at its disposal. The hierarchical divergence between human rights and democratic principles during the consultation should be taken seriously into account and re-worked in the future (i.e. precisions on the term '*special urgency*' and what could be understood as *appropriate*). Further annex/protocol precisions that are based on case experience can help to gain trust into the framework, its consultations and appropriate measures and can reduce – as it is stressed by the ACP – the invocation of the consultation procedure on to a maximum. Finally it can foster the equilibration of a legal security/high flexibility approach in this partnership.

c) EU-Internal: Lastly, the EU-budget inclusion of the EDF and – generally – a higher integration of development policy into the EU's shared policy spheres can resolve these accusations from the EU's side. A public and transparent strategy guideline regarding the EU's general approach to the execution of human rights clauses (and their future setting) would be a helping hand to come over the major reproach of using the famous double standard. A reinforced role of the European Parliament (that stresses in favor of this conformity) could surely accentuate this demand so that problematic points discussed in Pt. I, 3) improve in the long run.

In that logic, a previously discussed incentive-based approach is likely to guarantee better overall outcomes by rather re-organizing programming instead of cutting and can save the EU a strategic place towards other new raising powers that do not attach value to conditionality. The principal constraint is that this process needs more attention, is costly and is more complex to be achieved.

Nevertheless it shall be noted that the additions throughout this work about the perception of political conditionality by ACP states need always to be seen from a distinct position, must be taken into account on one hand, but should never stand in behalf of the exact falseness or accuracy of the Cotonou Agreement as such. Given the fact that there are two sides of the medal, and other controversial aspects in this huge partnership, it reiterates merely as an explanatory variable the difficulties that accompany the multilateral and complex state of relations, its future negotiations and shows that conditionality goes beyond the fact of being just a *'mutually agreed principle'*. In this multidimensional pattern there seems to be a never ending conflict and dilemma between legal security throughout a precise textual formulation

on one side and the maintaining of highest flexibility in favor for a case-to-case approach on the other that might not to be resolved entirely.

Although consultations are identified as effective mechanisms to resolve conflicts by some, they cannot be drawn to the same end from the ACP side as from the European. The only possibility to resolve this bargaining deficit and to foster the proposals in the actual framework seems an ongoing multilateralisation of the ACP group that permits to better canalize positions and opinions. ACP states can then pass on problems to the group where other states might realize that they have the same issues to treat, but due to the regionally far-reaching integration of this organization, this might be only achievable onto a certain limit. Therefore, sub-regional economic organizations will have to play a crucial role in the future and also would it be interesting to search for the same dialogue with ACP NGO representatives to gain another completing perspective on this conflict. Hence, the EU needs to acknowledge this "*other side*" of human rights and democracy promotion by accepting that numerous developmental aspects lie outside of its control. It should use conditionality more and more trust-based in order to be faithful in regard to its commitments to ownership and self-determination as to minimize unforeseeable and difficult outcomes for the effective implementation of development aid. The better this is realized, the more the EU can maintain and re-develop its relations to ACP countries to stay an influencing international partner throughout the 2015 revision and the negotiation of a post-2020 partnership framework.

ANNEXES

Annex 1: Article 5 and Article 366a of the Lomé IVbis Convention

Article 5

1. Cooperation shall be directed towards development centred 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 this 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.

In this context development policy and cooperation shall be closely linked to respect for and enjoyment of fundamental human rights and to the recognition and application of democratic principles, the consolidation of the rule of law and good governance. The role and potential of initiatives taken by individuals and groups shall be recognized in order to achieve in practice real participation of the population in the development process in accordance with Article 13. In this context good governance shall be a particular aim of cooperation operations.

Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of this Convention.

2. The Contracting Parties therefore reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.

Every individual shall have the right, in his own country or in a host country, to respect for his dignity and to protection by the law.

ACP-EC cooperation shall help abolish the obstacles preventing individuals and peoples from actually enjoying to the full their economic, social, political and cultural rights and this must be achieved through development which is essential to their dignity, their well-being and their self-fulfilment.

The Contracting Parties hereby reaffirm their existing obligations and commitment in international law to strive to eliminate all forms of discrimination based on ethnic group, origin, race, nationality, colour, sex, language, religion or any other situation. This commitment applies more particularly to any situation in the ACP States or in the Community that may adversely affect the pursuit of the objectives of the Convention. The Member States (and/or, where appropriate, the Community itself) and the ACP States will continue to ensure, through the legal or administrative measures which they have or will have adopted, that

migrant workers, students and other foreign nationals legally within their territory are not subjected to discrimination on the basis of racial, religious, cultural or social differences, notably in respect of housing, education, health care, other social services and employment.

3. At the request of the ACP States, financial resources may be allocated, in accordance with the rules governing development finance cooperation, to the promotion of human rights in the ACP States and to measures aimed at democratization, a strengthening of the rule of law and good governance. Practical steps, whether public or private, to promote human rights and democracy, especially in the legal domain, may be carried out with organizations having internationally recognized expertise in this sphere.

In addition, with a view to supporting institutional and administrative reform, the resources provided for in the Financial Protocol for this purpose can be used to complement the measures taken by the ACP States concerned, within the framework of its indicative programme, in particular at the preparatory and start-up stage of the relevant projects and programmes.

Article 366a

1. Within the meaning of this Article, the term 'Party' refers to the Community and the Member States of the European Union on the one side, and each ACP State, on the other.

2. If one Party considers that another Party has failed to fulfil an obligation in respect of one of the essential elements referred to in Article 5, it shall invite the Party concerned, unless there is special urgency, to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it.

For the purposes of such consultations, and with a view to finding a solution:

--the Community side shall be represented by its Presidency, assisted by the previous and next Member States to hold the Presidency, together with the Commission;
--the ACP side shall be represented by the ACP State holding the Co-Presidency, assisted by the previous and next ACP States to hold the Co-Presidency. Two additional members of the ACP Council of Ministers chosen by the party concerned shall also take part in the consultations.

The consultations shall begin no later than 15 days after the invitation and as a rule last no longer than 30 days.

3. At the end of the period referred to in the third subparagraph of paragraph 2 if in spite of all efforts no solution has been found, or immediately in the case of urgency or refusal of consultations, 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.

The Party concerned shall receive prior notification of any such measure which shall be revoked as soon as the reasons for taking it have disappeared.

Annex 2: Articles 8, 9, 96 and 97 of the Cotonou Agreement (2000, 2005, 2010)[373]

Article 8 – Political Dialogue

1. The Parties shall regularly engage in a comprehensive, balanced and deep political dialogue leading to commitments on both sides.

2. The objective of this dialogue shall be to exchange information, to foster mutual understanding, and to facilitate the establishment of agreed priorities and shared agendas, in particular by recognising existing links between the different aspects of the relations between the Parties and the various areas of cooperation as laid down in this Agreement.

The dialogue shall facilitate consultations and strengthen cooperation between the Parties within international fora as well as promote and sustain a system of effective multilateralism. The objectives of the dialogue shall also include preventing situations arising in which one Party might deem it necessary to have recourse to the consultation procedures envisaged in Articles 96 and 97.

3. The dialogue shall cover all the aims and objectives laid down in this Agreement as well as all questions of common, general or regional interest, including issues pertaining to regional and continental integration. Through dialogue, the Parties shall contribute to peace, security and stability and promote a stable and democratic political environment. It shall encompass cooperation strategies, including the aid effectiveness agenda, as well as global and sectoral policies, including environment, climate change, gender, migration and questions related to the cultural heritage. It shall also address global and sectoral policies of both Parties that might affect the achievement of the objectives of development cooperation.

4. The dialogue shall focus, inter alia, on specific political issues of mutual concern or of general significance for the attainment of the objectives of this Agreement, such as the arms trade, excessive military expenditure, drugs, organised crime or child labour, or discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The dialogue shall also

[373] The colored text shows additions that have been established throughout the mid-term revisions. Red color points out modifications established in 2005, Blue colored text describes the most recent modifications of the 2010-revision.

encompass a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance.

5. Broadly based policies to promote peace and to prevent, manage and resolve violent conflicts shall play a prominent role in this dialogue, as shall the need to take full account of the objective of peace and democratic stability in the definition of priority areas of cooperation. The dialogue in this context shall fully involve the relevant ACP regional organisations and the African Union, where appropriate.

6. The dialogue shall be conducted in a flexible manner. Dialogueshall be formal or informal according to the need, and conducted within and outside the institutional framework, including the ACP Group, the Joint parliamentary Assembly, in the appropriate format, and at the appropriate level including national, regional, continental or all-ACP level.

7. Regional organisations as well as representatives of civil society organisations shall be associated with this dialogue, as well as ACP national parliaments, where appropriate.

8. Where appropriate, and in order to prevent situations arising in which one Party might deem it necessary to have recourse to the consultation procedure foreseen in Article 96, dialogue covering the essential elements shall be systematic and formalised in accordance with the modalities set out in Annex VII.

Article 9 – Essential elements regarding human rights, democratic principles and the rule of law, and fundamental element regarding good governance

1. Cooperation shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.

Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.

2. The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. Human rights are universal, indivisible and inter related. The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural. In this context, the Parties reaffirm the equality of men and women.

The Parties reaffirm that democratisation, development and the protection of fundamental freedoms and human rights are interrelated and mutually reinforcing. Democratic principles are universally recognised principles underpinning the organisation of the State to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative

and regulatory system, and the existence of participatory mechanisms. On the basis of universally recognised principles, each country develops its democratic culture.

The structure of 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.

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.

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 serious cases of corruption, including acts of bribery leading to such corruption, as referred to in Article 97 constitute a violation of that element.

4. The Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance.

These areas will be an important subject for the political dialogue. In the context of this dialogue, the Parties shall attach particular importance to the changes underway and to the continuity of the progress achieved. This regular assessment shall take into account each country's economic, social, cultural and historical context.

These areas will also be a focus of support for development strategies. The Community shall provide support for political, institutional and legal reforms and for building the capacity of public and private actors and civil society in the framework of strategies agreed jointly between the State concerned and the Community.

The principles underlying the essential and fundamental elements as defined in this Article shall apply equally to the ACP States on the one hand, and to the European Union and its Member States, on the other hand.

Article 96 – Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law

1. 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.

1a. Both Parties agree to exhaust all possible options for dialogue under Article 8, except in cases of special urgency, prior to commencement of the consultations referred to in paragraph 2(a) of this Article.

a) If, despite the political dialogue on the essential elements as provided for under Article 8 and paragraph 1a of this Article, a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in Article 9(2), it shall, exceptin cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the Party concerned to remedy the situation in accordance with Annexe VII.

The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution.

The consultations shall begin no later than 30 days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In no case shall the dialogue under the consultations procedure last longer than 120 days.

If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused or in cases of special urgency, appropriate measures may be taken. These measures shall be revoked as soon as the reasons for taking them no longer prevail.

b) The term "cases of special urgency" shall refer to exceptional cases of particularly serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9, that require an immediate reaction.

The Party resorting to the special urgency procedure shall inform the other Party and the Council of Ministers separately of the fact unless it does not have time to do so.

c) The "appropriate measures" referred to in this Article are measures taken in accordance with international law, and proportional to the violation. 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.

If measures are taken in cases of special urgency, they shall be immediately notified to the other Party and the Council of Ministers. At the request of the Party concerned, consultations may then be called in order to examine the situation thoroughly and, if possible, find solutions. These consultations shall be conducted according to the arrangements set out in the second and third subparagraphs of paragraph (a).

Article 97 – 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.

Annex 3: Annex VII – Political Dialogue as regards Human Rights, Democratic Principles and the Rule of Law (2005)

Article 1 – Objectives

1. The consultations envisaged in Article 96(2)(a) will take place, except in cases of special urgency, after exhaustive political dialogue as envisaged in Article 8 and Article 9(4) of the Agreement.

2. Both Parties should conduct such political dialogue in the spirit of the Agreement and bearing in mind the Guidelines for ACP-EC Political Dialogue established by the Council of Ministers.

3. Political Dialogue is a process which should foster the strengthening of ACP-EC relations and contribute towards achieving the objectives of the Partnership.

Article 2 – Intensified Political Dialogue preceding consultations under Article 96 of the Agreement

1. Political dialogue concerning respect for human rights, democratic principles and the rule of law shall be conducted pursuant to Article 8 and Article 9(4) of the Agreement and within the parameters of internationally recognised standards and norms. In the framework of this dialogue the Parties may agree on joint agendas and priorities.

2. The Parties may jointly develop and agree specific benchmarks or targets with regard to human rights, democratic principles and the rule of law within the parameters of internationally agreed standards and norms, taking into account special circumstances of the ACP State concerned. Benchmarks are mechanisms for reaching targets through the setting of intermediate objectives and timeframes for compliance.

3. The political dialogue set out in paragraphs1 and 2 shall be systematic and formal and shall exhaust all possible options prior to consultations under Article 96 of the Agreement.

4. Except for cases of special urgency as defined in Article 96(2)(b) of the Agreement, consultations under Article 96 may also go ahead without preceding intensified political dialogue, when there is persistent lack of compliance with commitments taken by one of the Parties during an earlier dialogue, or by a failure to engage in dialogue in good faith.

5. Political dialogue under Article 8 of the Agreement shall also be utilised between the Parties to assist countries subject to appropriate measures under Article 96 of the Agreement, to normalise the relationship.

Article 3 – Additional rules on consultation under Article 96 of the Agreement

1. The Parties shall strive to promote equality in the level of representation during consultations under Article 96 of the Agreement.

2. The Parties are committed to transparent interaction before, during and after the formal consultations, bearing in mind the specific benchmarks and targets referred to in Article 2(2) of this Annex.

3. The Parties shall use the 30-day notification period as provided for in Article 96(2) of the Agreement for effective preparation by the Parties, as well as for deeper consultations within the ACP Group and among the Community and its Member States. During the consultation process, the Parties should agree flexible timeframes, whilst acknowledging that cases of special urgency, as defined in Article 96(2)(b) of the Agreement and Article 2(4) of this Annex, may require an immediate reaction.

4. The Parties acknowledge the role of the ACP Group in political dialogue based on modalities to be determined by the ACP Group and communicated to the European Community and its Member States. The ACP Secretariat and the European Commission shall exchange all required information on the process of political dialogue carried out before, during and after consultations undertaken under Articles 96 and 97 of this Agreement.

5. The Parties acknowledge the need for structured and continuous consultations under Article 96 of the Agreement. The Council of Ministers may develop further modalities to this end.

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[374] During the writing of this work, the Policy Archive has been made non-accessible to the public. Being links of general guidance to the policy archive of all Article 96 and 97 cases, they are posted anyway. The links are now re-directing to the main content of the European Commission Development Aid Homepage.
[375] The page of the Swedish Council presidency (www.se2009.eu) has been deactivated throughout the conducting of research.

Declaration of authorship

I hereby declare that the work submitted is my own and that all passages and ideas that are not mine have been fully and properly acknowledged.

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